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THE LAW AND PRACTICE

OF THE

PROBATE DIVISION

OF THE

HIGH COURT OF JUSTICE

WITH APPENDICES OF STATUTES, STAMP DUTIES, RULES, INSTRUCTIONS
AND MEMORANDA, FEES, COSTS, FORMS,

AND

PRECEDENTS OF PLEADING

BY

H. CLIFFORD MORTIMER
OF TRINITY COLLEGE, CAMBRIDGE, B.A., LL.B., OF THE INNER TEMPLE, BARRISTER-AT-LAW,
PROBATE AND DIVORCE COURT.

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TO MY FATHER

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PREFACE.

My aim has been, within the limits of its subject, to make each section of this book complete in itself and as exhaustive as possible. With that end in view, whenever I have been in doubt under which of two or more headings to deal with an important point of law or practice, I have dealt with it under both or all.

In every case, I have consulted the original authorities, in the form both of decided cases and of the old text books on Ecclesiastical Law, and have stated the propositions of law as far as possible in the words of the judges. All modern works on the subject have also been consulted, and I wish especially to acknowledge my indebtedness to Sir Edward Vaughan Williams' work on Executors, and to Tristram and Coote's Probate Practice.

In the foot-notes I have not contented myself with a bare enumeration of the cases upon which the propositions in the text are based, but have given the brief point, and, where necessary, the salient words of the judgment; thus affording a ready means of testing the authority of the general proposition, and an indication of the particular facts to which it has been applied. The space at my disposal has rendered possible a statement of the law, fuller and more exhaustive, I venture to think, than has hitherto been attempted.

In citing authorities, I have given the name and title of the judge at the time of the decision referred to. A special feature has been made of the Appendix of Precedents of Pleading, which is, so far as I am aware, a new departure in books on probate practice.

I owe a deep debt of gratitude to Mr. Hugh Fraser, for the advice and encouragement which he has given.

Mr. H. A. de C. Pereira, Barrister-at-Law, of the Principal Probate Registry, has prepared the Appendix of Specimen Forms (Appendix VII.). Mr. Pereira has also read through the proof-sheets of that part of the book which deals with the practice, and has assisted me with suggestions. I have to thank him for clearing up many doubtful points of practice. It must, however, be understood that the responsibility for any errors which may have crept in, rests with myself alone.

Mr. E. W. D. Colt-Williams, Barrister-at-Law, has prepared the Table of Cases, Statutes, and Rules, and has assisted me with Appendices I., II. and III.

Mr. Hugh K. Ryan, Barrister-at-Law, has kindly read through some of the earlier sheets, and helped me with their revision.

H. C. M.

1 Dr. Johnson's Buildings,
Temple,
April, 1911.

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Note.—Reports, other than Ecclesiastical and Probate, are cited by their recognised abbreviations.

Add.	Addams' Ecclesiastical Reports.
Curt.	Curteis' Ecclesiastical Reports.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports.
Eccl. & Adm.	Spinks' Ecclesiastical and Admiralty Reports.
Hagg.	Haggard's Ecclesiastical Reports.
Hagg. App.	Haggard's Ecclesiastical Reports, Appendix.
Hagg. Consist.	Haggard's Consistory Court Cases.
L. J. P.	Law Journal Reports, Probate and Matrimonial.
Lee	Lee's Ecclesiastical Cases.
Moo. P. C.	Moore's Privy Council Reports.
N. C.	Notes of Cases.
[1891] P.	Law Reports, Probate, Divorce and Admiralty Division (since 1891).
P. D.	Law Reports, Probate, Divorce and Admiralty Division (before 1891).
P. & D.	Law Reports, Probate and Matrimonial.
Phill. *or* Phil.	Phillimore's Ecclesiastical Reports.
Rob.	Robertson's Ecclesiastical Reports.
S. & T.	Swabey and Tristram's Reports.
Spinks, Eccl. & Adm.	Spinks' Ecclesiastical and Admiralty Reports.

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PART THE FIRST.

THE LAW.

CHAPTER I.

OF THE PROBATE DIVISION OF THE HIGH COURT OF JUSTICE AND OF THE JURISDICTION AND AUTHORITY OF THAT DIVISION.

Section 1.

OF THE ORIGIN, CONSTITUTION, AND FUNCTIONS OF THE COURT.

SUB-SECTION 1.—*Origin of the Court.*

The Spiritual Court formerly had jurisdiction of the probate of wills

THE origin of the ecclesiastical jurisdiction in relation to probate and administration has been the subject of much controversy (*a*), but it seems clear that, as early as the reign of Henry II., the Spiritual Court had acquired an exclusive jurisdiction with regard to the probate of wills and the determination of all matters requisite to their authentication (*b*).

and granting of administration to intestates' estates.

As to the granting of letters of administration, by the common law the Ordinary had the disposal of intestates' estates (*c*), and when administrators were originated by the statute 31 Edw. III., stat. 1, c. 11, their title and authority were derived exclusively from the Ordinary, whose officers they were (*d*).

(*a*) Bac. Abr. tit. Exors. E. 1.

(*b*) *Ibid.*; Wms. on Exors., p. 208; Pollock and Maitland, Hist. Eng. Law, ii. 312 *et seq.*, 330, 339.

(*c*) Bac. Abr. tit. Exors. E. 1. See *Dyke* v. *Walford*, (1846) 5 Moo. P. C. 434.

(*d*) 2 Black. Comm. 496.

Jurisdiction of the Ordinary:

and of the Metropolitan.

The Ordinary (generally speaking, the bishop of the diocese) had regularly the probate of wills and granting of administration of every person dying within his diocese (*e*), but if a person died having goods in several dioceses, the probate of his will, as also the granting of administration to his estate, belonged to the archbishop of the province in which the goods were situate (*f*).

Testamentary and other jurisdiction of the Ecclesiastical Courts abolished by the Court of Probate Act, 1857,

The jurisdiction and authority to grant and revoke probate of wills or letters of administration of the effects of deceased persons continued to be exercised on behalf of the Ordinaries by the Ecclesiastical Courts until the year 1857, in which year the Court of Probate Act (20 & 21 Vict. c. 77) was passed. This Act, which came into operation on the 11th day of January, 1858, provided (*g*) that the voluntary and contentious jurisdiction in respect of such matters of all ecclesiastical, royal peculiar, peculiar, manorial, and other Courts and persons in England should absolutely cease; and that (*h*) "the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons now vested in or which can be exercised by any Court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in her Majesty, and shall, except as hereinafter is mentioned, be exercised in the name of her Majesty in a Court to be called the Court of Probate." The Act further provides: "The Court of Probate shall be a Court of record; and such Court shall have the same powers, and its grants and orders shall have the same effect, throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in

and transferred to the Court of Probate.

The Court of Probate to have throughout all England the same powers as the Prerogative Court within the province of Canterbury.

(*e*) Bac. Abr. Exors. E. 4.

(*f*) *Ibid.*, E. 3.

(*g*) Court of Probate Act, 1857, s. 3.

(*h*) *Ibid.*, s. 4.

relation to those matters and causes testamentary and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court; and all duties which, by statute or otherwise, are imposed on or should be performed by ordinaries generally, or on or by the said Prerogative Court, in respect of probates, administrations, or matters or causes testamentary within their respective jurisdictions, shall be performed by the Court of Probate: Provided that no suits for legacies, or suits for the distribution of residues, shall be entertained by the Court, or by any Court or person whose jurisdiction as to matters and causes testamentary is hereby abolished" (*i*).

Suits for legacies or distribution not to be entertained.

The Supreme Court of Judicature Act, 1873 (*j*), s. 3, enacted that the several Courts therein mentioned (of which the Court of Probate was one) should be united and consolidated together, and should constitute one Supreme Court of Judicature in England. The Supreme Court, so constituted, consists of two divisions: the first, under the name of "His Majesty's High Court of Justice," exercising original jurisdiction; the second, under the name of "His Majesty's Court of Appeal," exercising appellate jurisdiction (*k*). The jurisdiction which was vested in, or capable of being exercised by, the Court of Probate, was transferred to and vested in the High Court by sect. 16 of the Act.

The jurisdiction of the Court of Probate transferred to the High Court of Justice by the Judicature Act, 1873.

The High Court of Justice consists of three divisions (*l*), of which the Probate, Divorce, and Admiralty Division is one (*m*). There are two judges of the Probate, Divorce, and Admiralty Division, one of whom is President (*n*); but causes

The Court of Probate constituted a division of the High Court of Justice.

Judges of the Probate Division.

(*i*) Court of Probate Act, 1857, s. 23.

(*j*) The Act came into operation on the 1st November, 1875.

(*k*) Judicature Act, 1873, s. 4.

(*l*) Originally five (Judicature Act, 1873, s. 31), reduced to three by an Order in Council of the 16th December, 1880. As to the power of a judge of another division to sit in the Probate, Divorce, and Admiralty Division, see Judicature Act, 1884, ss. 5 and 6; and to dispose of interlocutory matters of urgency, Judicature Act, 1881, s. 12. *Sed quære* whether this applies when a judge of the Probate, Divorce, and Admiralty Division is sitting, but refuses to dispose of the matter.

(*m*) Judicature Act, 1873, s. 31.

(*n*) *Ibid.*, sub-s. 5.

or matters assigned to this division are disposed of, in the first instance, by one judge only (*o*).

SUB-SECTION 2.—*Exclusive Jurisdiction of the Court.*

Matters formerly within the exclusive cognizance of the Court of Probate assigned to the Probate Division.

To the Probate Division are assigned all causes and matters which would have been within the exclusive cognizance of the Court of Probate if the Judicature Act had not passed (*p*).

This division, therefore, now exercises in England "the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration (*q*) of the effects of deceased persons . . . together with full authority to hear and determine all questions relating to matters and causes testamentary" (*r*) (except suits for legacies and suits for the distribution of residues), conferred upon the Court of Probate by sects. 4 and 23 of the Court of Probate Act, 1857.

No matter not within the cognizance of the Court of Probate to be commenced in the Probate Division.

This jurisdiction in relation to the granting and revocation of probate and administration is exercised exclusively by the Probate Division (*s*), and not by any other division of the High Court. Sect. 11 of the Judicature Act of 1875 enacts that a person commencing any cause or matter shall not assign the same to the Probate Division unless he would have been entitled to commence the same in the Court of Probate; but as to the converse proposition, viz., the commencing, in a

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(*o*) Judicature Act, 1873, s. 42.

(*p*) *Ibid.*, s. 34.

(*q*) By the interpretation clause (s. 2 of the Court of Probate Act, 1857) "will" shall comprehend "testament" and all other testamentary instruments of which probate may now be granted; "administration" shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed and whether granted for general, special, or limited purposes.

(*r*) By the interpretation clause (s. 2 of the Act of 1857) "matters and causes testamentary" shall comprehend all matters and causes relating to the grant and revocation of probate of wills or of administration.

(*s*) County Courts have in certain cases concurrent jurisdiction with the Probate Division in contentious matters, by virtue of the Court of Probate Act, 1857, ss. 55, 56, and 57; Court of Probate Act, 1858, s. 10 (*vide post*, p. 627), and also a certain limited jurisdiction in non-contentious matters under 36 & 37 Vict. c. 52 and 38 & 39 Vict. c. 27 (*vide post*, p. 10).

Matters assigned to the Probate Division will not be determined by any other division.

division other than the Probate Division, of an action or matter assigned to the Probate Division, the Act is silent. It seems that judges in other divisions have jurisdiction, if they think fit to exercise it, in matters assignable to the Probate Division (*t*), but that the judge in the Chancery or King's Bench Division, if requested to exercise such jurisdiction, would use a sound discretion in refusing to do so, and in directing the parties to seek their remedy in the division to which such matters are assigned (*u*).

The Probate Division will not construe the will except in so far as is necessary for the carrying out of its proper functions.

The function of the Probate Division in relation to wills is merely to determine whether or not the testamentary paper in question is entitled to probate, whether an executor has been appointed and who he is, or, if no executor has been appointed, to determine who is to administer the deceased's estate. Except in so far as it is necessary for the proper determination of these questions, it is no part of the function of the Court to construe the will (*w*). The Ecclesiastical Courts, indeed, were accustomed to perform this office, for suits for legacies might have been brought therein. But sect. 23 of the Court of Probate Act, 1857, expressly excepts suits for legacies and suits for the distribution of residue from the jurisdiction of the Court of Probate; and by the same section (*x*) of the Judicature Act, 1873, as assigned to the Probate Division "all causes or matters which would have been within the exclusive cognizance of the Court of Probate," all causes and matters for "the administration of the estates of deceased persons" and for "the execution of trusts charitable or private" are assigned to the Chancery Division (*y*).

(*t*) *Pinney* v. *Hunt*, (1877) 6 Ch. D. 98; *Bradford* v. *Young*, (1884) 26 Ch. D. 656; but see *Priestman* v. *Thomas*, (1884) 9 P. D. at p. 76, and at p. 214 (C. A.).

(*u*) Wms. on Exors., p. 212; and see the cases cited in the preceding note.

(*w*) The Court of Probate does not habitually act as a Court of construction; that is not its proper function, save in cases where it is absolutely necessary in order to determine the rights of litigant parties. And where the Court of Probate is bound so to act and give its opinion, then, if resort is had to the Court of Chancery, it is according to the decision of the latter Court that the estate of the testator must ultimately be administered: *Warren* v. *Kelson*, (1859) 1 S. & T. 290; *Walkeley*, (1893) 69 L. T. 419, but see *post*, pp. 6 *et seq.*

(*x*) S. 34.

(*y*) See also Judicature Act, 1875, s. 11, *ante*, p. 4.

It is the duty of the Court of Chancery to construe the will and enforce its provisions.

The Chancery Division, whose function it is to enforce a proper performance of the provisions of the instrument, is for this reason sometimes called "The Court of Construction," in contradistinction to the Probate Division, which merely decides the *factum* of the will (*z*).

SUB-SECTION 3.—*Concurrent Jurisdiction of the Court.*

The Probate Division has concurrent jurisdiction to determine all questions in controversy between the parties.

Under sub-sect. 7 of sect. 24 of the Judicature Act, 1873, the Probate Division, as a division of the High Court of Justice, in the exercise of the jurisdiction vested in it by the Act, in every cause or matter pending before it "shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as . . . shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The jurisdiction of the Court, therefore, is not confined to the determination of those questions which must of necessity be decided before the Court can exercise its proper function, and determine what testamentary papers of the deceased are entitled to probate and who is entitled to be constituted his personal representative. It extends further; and whenever in an action a subject of controversy arises which can conveniently be determined between the parties, the Court may, and if possible the Court should, determine it, so as to prevent further and needless litigation (*a*).

Under what circumstances the Court will exercise its concurrent jurisdiction.

But in all these cases it is not sufficient that the Court should have jurisdiction; there is always the further question whether it should exercise the jurisdiction conferred upon it.

(*z*) Wms. on Exors., p. 215.

(*a*) *Tharp*, (1878) 3 P. D. 76, at p. 81.

And the Court will not, it seems, exercise its jurisdiction under the section unless the question in controversy between the parties fairly arises out of the suit, unless every person is before the Court whose interests can be affected by its decision (*b*), and unless the question is properly put in issue by the pleadings in the suit (*c*).

Instances in which such concurrent jurisdiction has been exercised:

in determining of what the separate property of a married woman consists;

Thus when the will of a married woman made before the commencement of the Married Women's Property Act, 1882, was tendered for probate, and was contested on the ground that she had no separate estate, the Court, being satisfied that there was separate property, granted probate of all such property as the testatrix had power to dispose of (*d*) without deciding what that property was. It was held, on appeal, to be the duty of the Court, so far as the evidence and pleadings enabled it to do so, judicially to decide of what such property consisted (*e*).

in determining whether a power of appointment has been validly exercised;

Again, in the Ecclesiastical Court, when there existed a power which enabled a married woman to dispose of property, and there was a question as to whether the power was well executed or not, the practice was to grant probate of the instrument in order to enable the Court of Equity to determine that question. But since the Judicature Act, 1873, it has been held that when all the necessary parties are before the Court, the same reason which now enables the Court to decide all questions in controversy between the parties fairly arising out of the suit applies to enable, and more than enable, to justify the Court in determining the question of the valid execution of the power (*f*).

in making a declaration of trust.

And in a suit in which it appeared that the deceased had been prevented by force and threats from executing a will which would have deprived the plaintiffs of all interest in her estate, the defendants were allowed to amend their pleadings, and to

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(*b*) *Tharp*, (1878) 3 P. D. 76, at p. 82, judgment of Jessel, M.R.

(*c*) *Ibid.* at p. 88, judgment of Bramwell, L.J.

(*d*) Since the commencement of the Married Women's Property Act, 1882, probate of the will of a married woman is no longer limited, and the Court makes a general grant; *vide post*, p. 93.

(*e*) *Tharp*, (1878) 3 P. D. 76.

(*f*) *Ibid.*; and see *post*, p. 282.

claim a declaration that the plaintiffs were trustees of the shares devolving on them by the will of the deceased for the defendants and interveners (*g*). But in an action for probate the writ cannot claim a declaration of legitimacy, for a legitimacy declaration suit must be by petition, and the statutory procedure must be followed (*h*).

SUB-SECTION 4.—*The Registries.*

Principal probate registry.

1. *Principal Probate Registry.*—Sect. 4 of the Court of Probate Act, 1857, provides for the institution of a principal probate registry "at such place or places in London or Middlesex as her Majesty in Council shall from time to time appoint." Registrars and officers of the principal registry were appointed (*i*) and reappointed to the Supreme Court by sect. 77 of the Judicature Act, 1873.

Jurisdiction.

The principal probate registry has jurisdiction of three kinds:—

(1) Ordinary jurisdiction in common form business (*k*) in cases of persons who at the time of their death had a fixed place of abode within the district of the principal registry (*l*), including cases arising in connection with deaths abroad;

(2) Concurrent jurisdiction in common form business in all cases in which application may be made to a district registry (*m*);

(*g*) *Betts* v. *Doughty*, (1879) 5 P. D. 26; and see *Stone* v. *Hoskins*, (1905) P. 194.

(*h*) *Warter* v. *Warter*, (1890) 15 P. D. 35.

(*i*) Court of Probate Act, 1857, s. 14; Court of Probate Act, 1858, ss. 6, 7, 24, and 35. As to the powers of a registrar, *vide post*, p. 545.

(*k*) *I.e.*, the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration: Court of Probate Act, 1857, s. 2; *vide post*, p. 439.

(*l*) This jurisdiction arises by implication from s. 46 of the Court of Probate Act, 1857. The district of the principal registry, as ascertained by a process of exhaustion of the districts of the district registries contained in Schedule A to the Act, includes the City of London, the counties of Middlesex, Surrey, and Hertford, the western electoral division of the county of Kent, and the southern electoral division of the county of Essex: Tristram and Coote, p. 4.

(*m*) S. 59 of the Court of Probate Act, 1857, provides that it shall not be obligatory on any person to apply for probate or administration to any district registry, but in every case such application may be made through the principal registry of the Court of Probate wherever the testator or intestate may at the time of his death have had his fixed place of abode.

(3) Exclusive jurisdiction in contentious business (*n*).

District registries.

2. *District Registries.*—Sect. 13 of the Court of Probate Act, 1857, provides for the establishment for each of the districts specified in Schedule A to the Act and at the places respectively mentioned in that schedule (*o*) of a public registry attached to and under the control of the Court of Probate, referred to as "the district registry." The district registrar is empowered to grant probate of a will or letters of administration in common form in cases where it appears upon affidavit that the deceased at the time of his death had a fixed place of abode within the district in which the application is made (*p*); but no grant is to be made by a district registrar in any case where there is contention as to the grant until such contention is terminated by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form (*q*).

Jurisdiction.

Not obligatory to apply for a grant to district registry.

And by sect. 59 of the Act it is provided that it shall not be obligatory on any person to apply for probate or administration to any district registry, but that in every case such application may be made through the principal registry wherever the deceased at the time of his death had his fixed place of abode.

(*n*) *I.e.*, all proceedings in the Court of Probate or in the registries thereof in respect of business not included in the Court of Probate Act, 1857, under the expression "common form business," except the warning of caveats: Rule 3, C. B. District registries have no jurisdiction in these matters, and caveats must be warned from the principal registry: Rule 9, C. B.

(*o*) For Schedule A see Appendix, p. 771.

The affidavit conclusive.

(*p*) Court of Probate Act, 1857, s. 46. By s. 47 the affidavit above mentioned is to be conclusive for the purpose of authorising the grant by the district registrar of probate or administration; s. 49 provides for transmission of notice of applications for grants by the district registrar to the registrars of the principal registry; s. 50 provides that the district registrar shall, in cases of doubt, take the directions of the judge; and by s. 20 of the Court of Probate Act, 1858, all second and subsequent grants shall be made in the principal registry, or in the district registry where the original will is registered, or the original grant of administration has been made, and for such second or subsequent grants to be made in a district registry no affidavit that the deceased had a fixed place of abode within the district where the application is made is required.

Second and subsequent grants.

(*q*) Court of Probate Act, 1857, s. 48.

These provisions apply to district registries of the Probate Division.

SUB-SECTION 5.—*Probate Jurisdiction of County Courts.*

County Courts.

Jurisdiction in contentious business;

County Courts have, under the provisions of the Court of Probate Act, 1857 (*r*), ss. 55—59, and of the Court of Probate Act, 1858 (*s*), ss. 10—12, jurisdiction in contentious business in certain cases. The nature and extent of this jurisdiction is considered in a later chapter (*t*).

in non-contentious business.

36 & 37 Vict. c. 52.

Where an intestate's estate does not exceed £100.

County Courts have also certain probate jurisdiction in non-contentious business. By the Intestates' Widows and Children Act, 1873 (*u*), s. 1, it is enacted: "Where the whole estate and effects of an intestate shall not exceed in value the sum of one hundred pounds, his widow or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said registrar shall fill up the usual papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate, and transmit them by post to the said registrar of the County Court, to be by him delivered to the party so applying for the same, without the payment of any fee for the same save as is provided by this Act."

38 & 39 Vict. c. 27.

By an Act of 1875 (38 & 39 Vict. c. 27) the provisions of

(*r*) 20 & 21 Vict. c. 77.

(*s*) 21 & 22 Vict. c. 95.

(*t*) *Post*, pp. 627 *et seq.*

(*u*) 36 & 37 Vict. c. 52.

this Act are made applicable to the surviving children of poor *widows* who die intestate. It is considered that the provisions of these Acts apply only to the children of an intestate who are of full age and competent to take letters of administration, and that they do not apply to grandchildren (*v*).

Duties of registrar of County Court.

The Act of 1873 (*w*) further provides that the registrar of the County Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant (*x*); that, if he has reason to believe that the whole estate and effects of which the intestate died possessed exceed in value £100, he shall refuse to proceed with the application until he is satisfied as to the real value thereof (*y*); and that registrars of County Courts may exercise the powers of Commissioners of the Court of Probate (*z*).

Fees.

Under the provisions of this Act a table of fees to be taken in cases to which the Act applies has been framed. This table, dated the 8th August, 1873, will be found in the Appendix (p. 958).

Sub-section 6.—*Assizes.*

Power of the Court of Probate to direct an issue to be tried at assizes:

By sect. 35 (*a*) of the Court of Probate Act, 1857, "it shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceeding under this Act to be tried . . . by means of an issue to be directed to any of the superior Courts of common law."

And by sect. 38 (*a*): "where the Court of Probate directs an issue, it shall be lawful for such Court to direct such issue to be tried either before a judge of assize in any county, or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery."

retained by Probate Division.

It is still the practice, in a proper case, to direct issues of fact to be tried at assizes (*b*).

(*v*) Circular, August, 1873.

(*w*) 36 & 37 Vict. c. 52.

(*x*) S. 2.

(*y*) S. 3.

(*z*) S. 4.

(*a*) Repealed by 55 & 56 Vict. c. 19 (S. L. R.).

(*b*) *Vide post*, p. 625.

Section 2.

THE JURISDICTION OF THE COURT IN RELATION TO PROPERTY.

Order of discussion

The jurisdiction of the Probate Division may be considered either in relation to the property which is the subject-matter of its grant, or in relation to the persons in respect of whose estates its grants are made. In this section it is proposed to discuss the jurisdiction of the Court in relation to property and to inquire in respect of what property the Court has power and authority to make a grant, whether of probate or of letters of administration; how far that grant, when made, extends to property abroad; and to consider the effect upon the decision of the English Court of a grant made by the Court of the deceased's domicil.

and summary.

As a result of this inquiry it will be found that the Probate Division has jurisdiction to grant probate or letters of administration in respect of the personal property of a deceased person (1) if any personal property of the deceased is locally situate in England at the time of his death, or (2) has become locally situate in England at the time when the grant is applied for (*c*); that the Probate Division has, in cases of deaths occurring since the 1st day of January, 1898, jurisdiction to grant probate or letters of administration in respect of the real estate (*d*) of a deceased person which is situate in England; but that, where there is neither real nor personal estate of the deceased in England, the Court has no jurisdiction to make a grant. It will be seen that certain property has been expressly exempted from the jurisdiction of the Court by statute.

Further, it will appear that an English grant has no direct operation out of England, and that, although a grant made by a foreign Court has no direct operation in England, it is the well-established practice of the English Court to follow the decision of the *forum domicilii* both as to the document which is to be treated as the true last will of the deceased,

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(*c*) Dicey, Conflict of Laws, p. 307.

(*d*) See the definition of real estate, *post*, p. 16, note (*d*).

and as to the person who is entitled to be appointed his personal representative.

Sub-section 1.—*Personal Property.*

The Court has jurisdiction in respect of personalty when there is personal property in England,

The Probate Division has jurisdiction to grant probate of a will of personalty, or letters of administration in respect of the personal property of a deceased person, if, and only if, there is personal property of the deceased locally situate in England at the time of his death, or at the time when application for a grant is made (*e*). The foundation of the jurisdiction of the Court is that there is personal property of the deceased to be distributed within its jurisdiction (*f*); the object of its grant is to enable the executor or administrator to administer property in this country (*g*); it is not the function of the Court to determine as an abstract question who is the proper representative of the deceased (*h*). Where the deceased had no property within this country, the Court has no jurisdiction to make a grant (*i*).

but not otherwise.

A will disposing only of property in a foreign country is not entitled to probate in England.

If, therefore, a will disposes only of property in a foreign country, it is not entitled to probate in England (*j*). And if two independent wills are made, one disposing of the testator's property in England and the other disposing of his property abroad, the former only will be admitted to probate in this country (*k*). If, however, the two wills are not independent, the case is different (*l*). The English will, if last, may refer to

Two independent wills, one disposing of property in England, the other of property abroad,

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(*e*) Dicey, Conflict of Laws, p. 307.

(*f*) *Tucker*, (1864) 3 S. & T. 585, at p. 586; *Butson*, (1882) 9 L. R. Ir. 21; see *Roche*, (1861) 7 Jur. N. S. 784.

(*g*) *Coode*, (1867) 1 P. & D. 449.

(*h*) *Tucker*, (1864) 3 S. & T. 585, at p. 586.

(*i*) *Ibid.;* see *Evans* v. *Burrell*, (1859) 4 S. & T. 185; *Fittock*, (1863) 32 L. J. P. 157.

(*j*) *Coode*, (1867) 1 P. & D. 449; see *Jauncy* v. *Sealey*, (1686) 1 Vern. 397; *Att.-Gen.* v. *Dimond*, (1831) 1 Cr. & J. 356.

(*k*) *Murray*, [1896] P. 65, at p. 71; see *Coode*, (1867) 1 P. & D. 449; *De la Rue*, (1890) 15 P. D. 185; *Fraser*, [1891] P. 285; *Seaman*, [1891] P. 253; *Callaway*, (1890) 15 P. D. 147; *Astor*, (1876) 1 P. D. 150; *Tamplin*, [1894] P. 39; *Smart*, (1884) 9 P. D. 64; *Schenley*, (1904) 20 T. L. R. 127; and where a deceased leaves a will expressly limited to her property abroad, the Court will grant administration of her property in England to her next of kin: *Mann*, [1891] P. 293.

(*l*) Even though one of the documents refers to and incorporates the other, the Court may grant an indulgence by allowing only a portion of the testamentary papers to be included in the English probate; see *Tamplin*, [1894] P. at p. 44 and the cases cited in the preceding note, and *vide post*, p. 237.

the latter not entitled to probate in England unless incorporated by reference in the former.

and incorporate the foreign will by reference, and then the probate should include both documents, for they virtually become one document. So also the foreign will, if last, may incorporate the English will, in which case the foreign will would not be limited in its operation to property abroad, and both would be included in the probate (*m*).

Practice in cases of two such independent wills.

A copy of the foreign will to be filed.

When of two independent wills, one disposing of the testator's property in England and the other disposing of his property abroad, the former only is admitted to probate, it is the practice to require a copy of the foreign will to be filed in the registry, together with an affidavit verifying it; and a note is appended to the probate that such affidavit has been filed (*n*).

Where there is no personal property within the jurisdiction, the Court will not grant letters of administration.

If there is no personal property of the deceased in this country, the Court has no jurisdiction to grant letters of administration in respect of his personal estate (*o*).

How the local situation of personal property is to be ascertained.

In most cases there can be no difficulty in determining whether or not the personal property of the deceased is actually situate in England; but where the property consists of debts or other choses in action, questions of difficulty may arise. The whole question is discussed at length by Professor Dicey in his work on the Conflict of Laws (*p*), and from a consideration of the cases he deduces the following rule: that lands and generally, though not invariably, goods must be held to be situate at the place where they at a given moment actually lie; but debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom the claim exists resides (*q*). There are, however, certain exceptions to this rule (*r*); and it is necessary

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(*m*) *Murray*, [1896] P. 65, at p. 71; see *Western*, (1898) 78 L. T. 49; *Green*, (1899) 79 L. T. 738; *Harris*, (1870) 2 P. & D. 83; *Howden*, (1874) 43 L. J. P. 26; *Bolton*, (1887) 12 P. D. 202. In the last case, however, there appear to have been no words of reference, and if the decision in this case conflicts with the cases referred to in the preceding note, it must be regarded as of doubtful authority. See also *post*, p. 238.

(*n*) *Murray*, [1896] P. 65; *De la Rue*, (1890) 15 P. D. 185; *Fraser*, [1891] P. 285; *Seaman*, [1891] P. 253; *Callaway*, (1890) 15 P. D. 147; *Astor*, (1876) 1 P. D. 150; *Gilmer* v. *Overman*, (1907) 23 T. L. R. 716.

(*o*) *Tucker*, (1864) 3 S. & T. 585; *Evans* v. *Burrell*, (1859) 4 S. & T. 185; *Fittock*, (1863) 32 L. J. P. 157.

(*p*) Dicey, Conflict of Laws, pp. 309—314.

(*q*) *Ibid.*, p. 310; see *Ewing*, (1881) 6 P. D. 19.

(*r*) *Ibid.*

to add that the maxim "*mobilia sequuntur personam*," under which the goods of a deceased person are for some purposes regarded as situate in the country where he was domiciled at the time of his death, has no application to the local situation of personal property as regards the jurisdiction of the Court to make a grant (*s*).

The local situation of personal property is unaffected by the maxim "*mobilia sequuntur personam*."

SUB-SECTION 2.—*Real Property.*

Prior to the 1st January, 1898 (on which day the Land Transfer Act, 1897, came into operation), the Court had no jurisdiction to admit to probate a will relating to real property alone (*t*); but if the will were a mixed will, relating both to real and personal estate, the Court had jurisdiction to grant probate (*u*). And by the Court of Probate Act, 1857, it was enacted that where a will affecting real estate was proved in solemn form, or was the subject of a contentious proceeding, the heir-at-law and persons interested in the real estate were to be cited to see proceedings, and if so cited, should be bound by the decree of the Court (*x*).

Prior to 1898 the Court had no jurisdiction to grant probate of a will disposing only of real estate,

but might grant probate of a mixed will, relating to both realty and personalty.

It was further held that the appointment of an executor in a testamentary paper which disposed only of real property was sufficient to entitle the paper to probate, on the ground that the appointment of executors operated to prevent an intestacy as to any personal estate which the deceased might possess (*y*). But the will of a married woman made during coverture under a power, disposing only of real property, was held not to be entitled to probate, though there were an appointment of

A will disposing of real estate only *and* appointing an executor was entitled to probate.

Secus the will of a married woman made under a power and disposing only of real

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(*s*) Dicey, Conflict of Laws, p. 314. The cases of *Spratt* v. *Harris*, (1833) 4 Hagg. 405, and *Winter*, (1861) 30 L. J. P. 56, lend some countenance to the view that the Probate Division has jurisdiction to make a grant whenever the deceased died domiciled in England; but this view is inconsistent with *Att.-Gen.* v. *Hope*, (1834) 1 C. M. & R. 530, *Fittock*, (1863) 32 L. J. P. 157, and *Coode*, (1867) 1 P. & D. 449; and see *Fernandes' Executors' Case*, (1870) L. R. 5 Ch. 314; *Ewing*, (1881) 6 P. D. 19; *Laidlay* v. *The Lord Advocate*, (1890) 15 A. C. 468, 483.

(*t*) *Habergham* v. *Vincent*, (1793) 2 Ves. jun. 230; *Drummond*, (1860) 2 S. & T. 8; *Bootle*, (1874) 3 P. & D. 177; see also *Gunn*, (1884) 9 P. D. 242; *Lloyd* (1884) 9 P. D. 65.

(*u*) *Partridge's Case*, (1702) 2 Salk. 553.

(*x*) Court of Probate Act, 1857, ss. 61–63.

(*y*) *O'Dwyer* v. *Geare*, (1859) 1 S. & T. 465; *Barden*, (1867) 1 P. & D. 325; and that notwithstanding the renunciation of the executor: *Jordan*, (1868) 1 P. & D. 555.

estate, even though it appointed an executor.

executors, for an executor appointed under those circumstances took nothing in his character of personal representative (*z*).

Prior to 1898 a grant of administration extended only to the personal estate.

A grant of probate or administration extended only to the personal estate of the deceased, though chattels real vested in his personal representative, as did trust and mortgage estates by virtue of the Conveyancing Act, 1881, s. 30 (*a*).

Jurisdiction of the Court as to real estate extended by the Land Transfer Act, 1897.

The jurisdiction of the Court in respect of real estate was extended by the Land Transfer Act, 1897 (*b*), which came into operation on the 1st day of January, 1898.

Sect. 1 of that Act, which applies only in cases of death after the commencement of the Act (*c*), provides that "where real estate (*d*) is vested in any person (*e*) without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

Probate and administration can now be granted in respect of real estate alone.

And by sect. 1, sub-sect. 3, "probate and letters of administration may be granted in respect of real estate only, although there is no personal estate."

The Court shall, in granting administration, have regard to the rights and interests of persons interested in real estate.

Sect. 2, sub-sect. 4, of the Act provides: "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin."

(*z*) *O'Dwyer* v. *Geare*, (1859) 1 S. & T. 465; *Barden*, (1867) 1 P. & D. 325; *Tomlinson*, (1881) 6 P. D. 209; and see *Brownrigg* v. *Pike*, (1882) 7 P. D. 61; *Cubbon*, (1886) 11 P. D. 169; *Hornbuckle*, (1890) 15 P. D. 149.

(*a*) 44 & 45 Vict. c. 41.

(*b*) 60 & 61 Vict. c. 65.

(*c*) S. 1, sub-s. 5.

(*d*) The expression "real estate" does not include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant: s. 1, sub-s. 4. But though the *legal* estate in such land does not devolve to the personal representative, an equitable estate or interest does so devolve: *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(*e*) The section applies to real estate over which a person exercises by will a general power of appointment, as if it were real estate vested in him: s. 1, sub-s. 2.

Present form of grant.

The Court, in cases of deaths occurring since the Act came into operation, now grants probate and letters of administration in respect "of all the estate which by law devolves to and vests in the personal representative of the deceased."

The Land Transfer Act, 1897, does not bind the Crown.

The Land Transfer Act, 1897, does not bind the Crown, and a grant to the Solicitor to the Treasury on behalf of the Crown is of administration of the personal estate only (*f*).

The real estate vests in all the executors.

It has been held that where a testator dies subsequently to the Land Transfer Act, 1897, having appointed executors, his real estate vests in all the executors, and not only in those who prove the will; and that the executors who have proved the will cannot convey the legal fee simple without the concurrence of their co-executor who has not proved, unless the latter has renounced or otherwise rendered it impossible for him to obtain a grant of probate (*g*).

A will disposing only of real and immovable property in a foreign country cannot be admitted to probate in England.

Nor can any administration be granted in respect of such property.

A will disposing only of real and immovable property in a foreign country cannot be admitted to probate in England (*h*), even though the testator held the land or houses for a chattel interest (*i*). It seems scarcely necessary to add that foreign land and immovables cannot be dealt with under an English grant of administration, nor can administration in respect of them be granted by the English Court (*k*).

SUB-SECTION 3.—*Property exempted from the Jurisdiction of the Court by Statute.*

Certain property is specially exempted from the jurisdiction of the Court by statutes, so that payment thereof to persons interested in the estates of the deceased may be made without representation obtained.

The effect of these statutes may be briefly summarised as follows (for further information the text of the statutes must be consulted):—

Seamen and Marines.—The Navy and Marines (Property of

(*f*) *Hartley*, [1899] P. 40; *vide post*, p. 339.

(*g*) *Pawley and L. & P. Bank*, [1900] 1 Ch. 58; see *Cohen's Executors and L. C. C.*, [1902] 1 Ch. 187. As to the course to be adopted, *vide post*, pp. 503, 523.

(*h*) *Tamplin*, [1894] P. 39, at p. 46.

(*i*) *Freke* v. *Lord Carberry*, (1873) L. R. 16 Eq. 461, at p. 466.

(*k*) Dicey, Conflict of Laws, 351.

Seamen's assets not exceeding £100.

Deceased) Act, 1865 (28 & 29 Vict. c. 111), provides that where the residue belonging to deceased officers, seamen, or marines does not exceed £100 it shall not be necessary for any purpose that representation to the deceased be taken out; but the Admiralty may in such case dispose of the residue in accordance with the provisions of sect. 8 of the Act. See Order in Council, 28th December, 1865, sections XXIV.—XXVII.

The Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), and sections XIII.—XVII. of the Order in Council of 28th December, 1865, made thereunder, contain provisions as to payment of naval assets under the wills of seamen and marines without probate, in certain cases.

Soldiers' pensions not exceeding £50.

Soldiers.—The statute 11 Geo. IV. & 1 Will. IV. c. 41, s. 5, as amended by 26 & 27 Vict. c. 57, s. 3, provides for the payment without administration or probate of sums not exceeding £50 in respect of pensions of soldiers. The statute 2 & 3 Will. IV. c. 53, s. 19, as amended by 27 & 28 Vict. c. 36, s. 3, authorises the payment of shares of prize money not exceeding £50 belonging to deceased soldiers without representation.

Soldiers' prize money not exceeding £50.

Payment of prize money to next of kin abroad.

The statute 2 & 3 Will. IV. c. 53, s. 26, authorises the payment of prize money to the next of kin of deceased soldiers who reside abroad without administration or probate.

Residue of soldiers' estates not exceeding £100.

The statutes 26 & 27 Vict. c. 57, ss. 15, 16, and 47 & 48 Vict. c. 55, s. 4, provide for the payment of the residue of the estate of officers and soldiers where it does not exceed £100 without any representation being taken out to them.

Merchant seamen's savings.

Merchant Seamen.—The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides for the payment of deposits in a seamen's savings bank (sect. 150), and further provides that wages and property of seamen or apprentices not exceeding £100 in value may be paid over by the Board of Trade to the persons therein mentioned without representation being obtained (sects. 176, 177).

Wages and property not exceeding £100.

Funds in a loan society not exceeding £50.

Members of a Loan Society.—3 & 4 Vict. c. 110, s. 11, provides that in case of the intestacy of a debenture-holder, depositor, or other claimant entitled to receive any sum not exceeding £50 out of the funds of a loan society, the same may be paid as provided without representation obtained.

Members of Building Societies.—By 37 & 38 Vict. c. 42, s. 29, a sum not exceeding £50 due to any member of, or depositor in, a building society under the Act, may, on his death intestate, be paid as provided without representation obtained. And in the case of a depositor in a building society still governed by 6 & 7 Will. IV. c. 32, sums not exceeding £20 may be paid over (see 37 & 38 Vict. c. 42, s. 7).

Funds not exceeding £50 in building society,

or £20 in certain cases.

Depositors in Savings Banks.—Depositors in trustee or post-office savings banks who are not under sixteen years of age may under regulations made in accordance with 50 & 51 Vict. c. 40, s. 3, nominate a person to whom any sum, not exceeding £100, payable to such depositor at his decease, may be paid at such decease, and, in the absence of such nomination, provision is made for the payment, without representation obtained. to the persons and in the manner specified.

Deposits in savings banks not exceeding £100.

Members of Friendly Societies, Trades Unions, and Industrial and Provident Societies.—Similar provisions for nomination or payment without representation obtained of sums not exceeding £100 have been made in the case of members of friendly societies by 59 & 60 Vict. c. 25, ss. 56, 57, and 58; in the case of members of registered trade unions by 39 & 40 Vict. c. 22, s. 10, extended by 46 & 47 Vict. c. 7, s. 3; and in the case of members of industrial and provident societies by 56 & 57 Vict. c. 39.

Deposits in friendly societies, trades unions, and industrial and provident societies not exceeding £100.

Civil Servants.—By 50 & 51 Vict. c. 67, s. 8, sums not exceeding £100 due from a public department in respect of any civil pay, superannuation or other allowance, annuity or gratuity to any deceased person may, subject to any regulations made by the Treasury, be paid to the persons directed without representation obtained.

Civil servant's pay not exceeding £100.

Workmen's Compensation.—Money paid in compensation under Lord Campbell's Act (9 & 10 Vict. c. 93) may be paid to the persons entitled without representation obtained. See 27 & 28 Vict. c. 95; and see Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), Schedule I., s. 5.

Money paid in compensation under Lord Campbell's Act.

SUB-SECTION 4.—*Effect of an English Grant upon Property Abroad.*

An English grant has no direct operation out of England,

An English grant, whether of probate or of letters of administration, has no direct operation out of England (*l*).

As a corollary to the rule that the English Court has no jurisdiction to make a grant in respect of property situate out of England, it follows that where a testator dies leaving assets in England and abroad the grant of probate or administration by the English Court cannot extend to the latter (*m*). Wherefore the person constituted executor or administrator by the English Court, if he wishes to sue in that capacity in the Court of a foreign country to recover assets of the deceased situate there, cannot rely upon the English grant, but must prove the will or obtain a grant of administration in the Court of that country (*n*).

and cannot extend to property abroad.

If the English representative sues in a foreign country, he must obtain a grant in that country.

The rule applies whether or not the deceased was domiciled in England at the time of his death (*o*).

This proposition, which seems now clearly established, may appear at first sight to conflict with the dictum of Sir John Nicholl in *Spratt* v. *Harris* (*p*). "I apprehend," he said, "that all personal property follows the person, and that the rights of a person constituted in England representative of a party deceased, domiciled in England, are not limited to the personal property in England, but extend to such property wherever locally situate" (*q*). This doctrine must be understood in the sense that a person who has obtained an English grant may sue in the *English* Courts in relation to movables of the deceased situate in a foreign country (*r*), and does not therefore conflict with the rule that the representative constituted by the English Court will have to clothe himself with

But an English representative may sue in the *English* Courts in respect of personal property abroad.

(*l*) Dicey, Conflict of Laws, r. 72, p. 343.

(*m*) See *Murray*, [1896] P. 65, at p. 71.

(*n*) Dicey, r. 72; Wms. on Exors., p. 273; see *Blackwood* v. *The Queen*, (1882) 8 A. C. 82, at pp. 92, 93; *New York Breweries Co., Ltd.* v. *Att.-Gen.*, [1899] A. C. 62.

(*o*) *Blackwood* v. *The Queen*, (1882) 8 A. C. 82.

(*p*) (1833) 4 Hagg. at p. 408.

(*q*) See *Whyte* v. *Rose*, (1842) 3 Q. B. at p. 507.

(*r*) *Ibid.*

a title from the Court where the property is locally situate if, in the course of administration, it becomes necessary to take legal proceedings in that country to reduce the estate into possession (*s*).

The Courts of the foreign country will, as a general rule, make a grant to the English representative.

When, however, the deceased dies domiciled in England, and it becomes necessary for his representatives to recover and to deal with assets in a foreign country, the Courts of that country ought, by the comity of nations, to follow the decision of the English Court, and by means of a grant or otherwise to enable the English executor or administrator to recover and deal with such assets (*t*).

Extension of English grant to Scotland, Ireland, and the colonies.

Special provision has been made by statute for the extension of English grants to Scotland (*u*) and Ireland (*x*) by a merely ministerial act of the Scotch or Irish Courts; and adequate provision is made for the recognition of an English grant by the Courts of all British possessions to which the Colonial Probates Act, 1892, has by Order in Council been applied (*y*).

SUB-SECTION 5.—*Effect of a Foreign Grant upon Property in England.*

A foreign grant has no direct operation in England, so as to entitle the foreign representative to sue in the English Courts.

A grant of probate or letters of administration, or other authority to represent a deceased person, made by the Courts of a foreign country, has no direct operation in England (*z*).

No grant of probate or letters of administration by a foreign Court can entitle the person constituted representative of the deceased by such grant to sue in that capacity in any Court in England (*a*). The Courts of this country look only to the judgment of the Probate Court in England, in granting probate or letters of administration, to ascertain who are authorised

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(*s*) Wms. on Exors., p. 273, citing Story, Conflict of Laws, ss. 512, 513 518; Dicey, rr. 73, 74.

(*t*) Wms. on Exors., p. 273; Dicey, r. 74; *Atkins* v. *Smith*, (1740) 2 Atk. 63; *Burn* v. *Cole*, (1762) Ambl. 415; Murray, [1896] P. 65, at p. 71. See also, as to the limits of this rule, *Blackwood* v. *The Queen*, (1882) 8 A. C. 82, at pp. 92, 93.

(*u*) 21 & 22 Vict. c. 56, s. 14; *vide post*, p. 491.

(*x*) 20 & 21 Vict. c. 79, s. 94; *vide post*, p. 489.

(*y*) *Vide post*, p. 492; and see Dicey, r. 78.

(*z*) Dicey, Conflict of Laws, r. 118, p. 443.

(*a*) *Whyte* v. *Rose*, (1842) 3 Q. B. at p. 507.

A foreign representative, to obtain possession of English assets, must obtain a grant in England.

to represent the estate of a person deceased (*b*). It follows that a foreign executor or administrator, who wishes to act in England as personal representative of the deceased, cannot rely upon the foreign grant, but must prove the will (*c*) or obtain a grant of letters of administration (*d*) from the Probate Division of the High Court of Justice (*e*).

SUB-SECTION 6.—*The English Court will follow the Decision of the* Forum Domicilii.

The English Court will, as a general rule, make a grant to the foreign representative,

When a person dies domiciled in a foreign country, and the Court of that country has invested any person, no matter whom, with the power and duty of administering the estate, the Probate Division in England will, as a general rule, follow the decision of the Court of the country of domicil, and constitute the same person representative of the deceased in England.

and grant probate of a will which has been proved in the Court of the domicil, without further evidence of validity,

And where the will of a testator has been proved in a Court of competent jurisdiction in the country of his domicil at the time of his death, a duly authenticated copy will be admitted to probate in this country without further evidence of the validity of the will.

on the principle that the law of the deceased's domicil at death governs the distribution and succession to his personalty, and regulates the decision as to what constitutes his will.

These rules are only one of the consequences of the principle, now generally recognised by the Courts of all civilised countries, that the law of the country in which the deceased was domiciled at the time of his death governs the course of distribution and succession as to his personalty, and, subject to the exceptions mentioned in a later section of this chapter, regulates the decision as to what constitutes his last will (*f*).

The principles upon which the English Probate Court acts in cases where a personal representative to the deceased has already been appointed by the Court of the country in which

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(*b*) *Tyler* v. *Bell*, (1837) 2 My. & Cr. at p. 109 ; and see the cases there cited.

(*c*) *Jauncy* v. *Sealey*, (1686) 1 Vern. 397 ; *Price* v. *Dewhurst*, (1838) 4 My. & Cr. at pp. 80, 81 ; *Bond* v. *Graham*, (1842) 1 Hare, at p. 484.

(*d*) *Att.-Gen.* v. *Bouwens*, (1838) 4 M. & W. at p. 193 ; *Whyte* v. *Rose*, (1842) 3 Q. B. at pp. 507, 508.

(*e*) *Enohin* v. *Wylie*, (1862) 10 H. L. C. at p. 19.

(*f*) *Vide post*, p. 28.

Where a representative has been appointed by the Court of the domicil, the English Court will follow the foreign grant.

he died domiciled were laid down by Sir J. P. Wilde in the case of *In the goods of Earl* (*g*). The learned judge, after reviewing the cases upon this question decided by the judges of the Prerogative Court (*h*), said: "The result of the cases is that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate (*i*) have militated against the rule of following the foreign grant." The learned judge then cited with approval the words of Lord Westbury, L. C., in *Enohin* v. *Wylie* (*k*), as to the confusion which must arise if, when a testator dies domiciled in one country, the Courts of every other country should assume the right of declaring who is the personal representative; expressed his adherence to the practical principle there pointed out; and, after stating that this Court is armed with a special power by sect. 73 of the Court of Probate Act, 1857, continued: "I think the Court ought to act upon that section, and to make a grant in all cases" where the deceased died domiciled in a foreign country "to the person (*l*) who has been clothed by the Court of the country of domicil with the power and duty of administering the estate, no matter who he is, or on what ground he has been clothed with that power."

And grant administration under sect. 73 of the Court of Probate Act to the person who has been constituted representative of the deceased by the foreign Court, no matter who he is, or on what ground appointed.

It is thus the duty of this Court to follow the law of the domicil of the deceased by recognising the persons whom the Court of that country has invested with the powers and duties of administrators (*m*). But it has been held that the

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(*g*) (1867) 1 P. & D. 450, at p. 452; and see *Smith*, (1868) 16 W. R. 1130.

(*h*) *Larpent* v. *Sindry*, (1828) 1 Hagg. 382; *Read*, (1828) 1 Hagg. 474; *Countess da Cunha*, (1828) 1 Hagg. 237; *Viesca* v. *D'Aramburu*, (1839) 2 Curt. 277; *Stewart*, (1838) 1 Curt. 904; *Rogerson*, (1840) 2 Curt. 656.

(*i*) *E.g.*, *H.R.H. the Duchess D'Orléans*, (1859) 1 S. & T. 253.

(*k*) (1862) 10 H. L. C. at p. 15.

(*l*) Conversely this Court will refuse to make a grant to a person, named executor in a will, where the Court of the testator's domicil has decreed that the time for the execution of such executorship has elapsed, and that the executor has no longer any right to intermeddle with the deceased's estate: *Laneuville* v. *Anderson*, (1860) 2 S. & T. 24; and see *Whitelegg*, [1899] P. 267; *Meatyard*, [1903] P. 125.

(*m*) *Meatyard*, [1903] P. at p. 129. It is not necessary that the grant by the foreign Court should be in form an equivalent to an English grant of probate or administration. Thus in *Dost Aly Khan*, (1880) 6 P. D. 6, where the

Secus if the foreign representative is personally disqualified by the English law.

English Court cannot follow the foreign law so far as to grant administration to anyone who is, by the law of England, personally disqualified from taking the grant. For instance, however much the foreign Courts may hold that a minor should have the grant, this Court cannot go so far as to give it to such a person (*n*).

The form of the English grant does not necessarily follow that of the foreign grant.

The form, however, of the English grant will not necessarily follow that of the foreign grant. The English Court has regard to the law of the domicil in order to determine what power or authority has been vested in anyone with regard to dealing with the estate, and will then give such a grant to such person as will enable him to perform in this country the duties imposed upon him (*o*).

Where probate is to be granted to the foreign representative as executor.

Where probate will not be granted.

Thus where in a foreign will a person is in terms named executor, and an executor has, by the law of the testator's domicil, powers as extensive as those conferred upon an executor by the law of England, probate will be granted in this country to that person (*p*). But where the powers conferred on the person by the will, or by the law of the country of domicil, fall short of the powers of executors according to the English law, probate will not be granted to that person,

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deceased was domiciled in Persia, a limited administration was granted to the person declared to be entitled to certain property of the deceased in England by the decree of the Persian Court, although by the law of Persia representation of the estate of a deceased person is not recognised.

In *Black*, (1887) 13 P. D. 5, a grant was made to a person whom the acting executor had substituted as executor in his stead, to act during his absence, on it appearing that such person, by the laws of the country of domicil, became possessed of all the powers necessary for the administration of the estate; and see *Bianchi*, (1859) 1 S. & T. 511; *Abdul Hamid Bey*, (1898) 78 L. T. 202. And the Court will grant administration to the person entitled to administer the estate by the law of the testator's domicil, even to the exclusion of the person named executor in the will: *Whitelegg*, [1899] P. 267; *Meatyard*, [1903] P. 125.

(*n*) *Meatyard*, [1903] P. 129, 130. In *Countess da Cunha*, (1828) 1 Hagg. 237, a limited administration was granted to a minor residuary legatee, the wife of a minor, on the ground that by the law of Portugal, where the deceased died domiciled, she was entitled to a grant; but in *Duchess D'Orléans*, (1859) 1 S. & T. 253, a grant under similar circumstances was refused, on the ground that in England a grant cannot be made to a minor.

(*o*) *Briesemann*, [1894] P. at p. 261.

(*p*) *Von Linden*, [1896] P. at p. 149. So probate will be granted to the person who is, *by English law*, executor according to the tenor of the will: *ibid.*; but not to the executor according to the tenor by foreign law, if he would not be so recognised by the law of England: *Cosnahan*, (1866) 1 P. & D. 183; *Earl*, (1867) 1 P. & D. 450.

but there will be a grant to him, under sect. 73 of the Court of Probate Act, of administration with powers as near as may be to those granted by the will or by the law of the domicil (*q*). The grant will describe him as "the person entitled under the grant of the country of the deceased's domicil to administer the estate"; and thus the difficulty is avoided of declaring that a person is executor who, according to the practice of the English Court, is not executor, and of continuing the chain of executorship by persons who are executors according to the law of a foreign country, but not according to the law of this country (*r*).

How described.

When a will (*s*) has been recognised as valid (*t*) by a Court of competent jurisdiction in the country in which the testator was domiciled at the time of his death, it is the established practice of the English Court to admit to probate in this country a duly authenticated copy of such will, without further evidence of its validity, as it is presumed that the foreign Court has been satisfied on that point (*u*). Nor, in such a case, while the will remains unquestioned in the country of domicil, will the English Court allow its validity to be litigated here (*x*), for where the title of persons claiming the

When a will has been recognised as valid by the Court of the testator's domicil, it will be admitted to probate in England without further question; and its validity cannot be questioned in this country;

(*q*) *Von Linden*, [1896] P. at p. 149; see *Cosnahan*, (1866) 1 P. & D. 183; *Earl*, (1867) 1 P. & D. 450; *Hill*, (1870) 2 P. & D. 89, a case of a grant *de bonis non*; *Dost Aly Khan*, (1880) 6 P. D. 6, where a limited grant was made; *Briesemann*, [1894] P. 260; and see *Moffat*, [1900] P. 152; *Meatyard*, [1903] P. 125.

(*r*) *Earl*, (1867) 1 P. & D. at p. 453.

(*s*) *I.e.*, an instrument which has been recognised as regulating the succession to the estate of the deceased after his death by the tribunal of the domicil, even though it would not be regarded as testamentary by the English Courts. See *Oldenburg*, (1884) 9 P. D. 234, where, on proof that by the law of Russia no will or codicil of a deceased member of the royal family has any effect as such, but the deceased's property is distributed in accordance with an *acte definitif* decreed by the other members of the family and confirmed by the Emperor, this Court granted probate of the *acte definitif*, notwithstanding the execution of a will and codicils. See also *Cosnahan*, (1866) 1 P. & D. 183; *Dost Aly Khan*, (1880) 6 P. D. 6.

(*t*) No regard is had to the form in which the Court of the domicil has signified its adoption of the will. The English Court does not require that the form of approval should be the same as its own grant of probate: *Deshais*, (1865) 4 S. & T. 13, 14.

(*u*) *Miller* v. *James*, (1872) 3 P. & D. 4; *Deshais*, (1865) 4 S. & T. 13; *Vigny*, *ibid.* 15.

(*x*) *Miller* v. *James*, (1872) 3 P. & D. 4; *Doglioni* v. *Crispin*, (1866) L. R. 1 H. L. 301, at p. 314.

even if the judgment of the foreign Court has proceeded on a mistake as to the English law, or the whole of the facts were not before the foreign tribunal.

estate of a deceased person has been adjudicated upon by the Courts of the domicil, such adjudication is binding upon and must be followed by the Courts of this country (*y*), even if the judgment of the foreign Court has, by the default of the party complaining of the judgment, proceeded on a mistake as to the English law (*z*) or the whole of the facts were not before the foreign tribunal (*a*), for the Courts of this country do not sit to hear appeals from foreign tribunals, and if the decision of the foreign tribunal was wrong, recourse must be had to the mode of appeal provided in the foreign country (*b*).

A will need not be proved in the *forum domicilii* before application for probate can be made in this country.

In certain early cases it appears to have been laid down that in all cases where a testator died domiciled abroad his will must in the first instance be proved in the Court of the country of domicil, and accordingly proceedings in the English Court for proof of the will were stayed until the tribunal of the domicil had made a decree (*c*). But the view has since prevailed that the Court of this country has power to admit to probate the will of a domiciled foreigner which disposes of property in England, although the tribunals of the domicil have not in the first instance been resorted to, notwithstanding that the validity of the will in such a case is to be determined by the law of the domicil (*d*).

Where a will has been proved abroad, codicils thereto must be proved in the Court which granted probate of the will.

It is still, however, the practice of the English Court, in cases where a will has been proved abroad, to require that probate of the codicils, if any, should be applied for to the Court which granted probate of the will (*e*).

Provision has been made by statute for the recognition in England of Irish (*f*) and Scotch (*g*) grants by a merely

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(*y*) *Enohin* v. *Wylie*, (1862) 10 H. L. C. 1; *Ewing* v. *Orr-Ewing*, (1884) 10 A. C. 453; *Doglioni* v. *Crispin*, (1866) L. R. 1 H. L. 301.

(*z*) *Castrique* v. *Imrie*, (1869) L. R. 4 H. L. 414; *Godard* v. *Gray*, (1870) L. R. 6 Q. B. 139.

(*a*) *Brissac* v. *Rathbone*, (1861) 6 H. & N. 301.

(*b*) *Bank of Australasia* v. *Nias*, (1851) 16 Q. B. 717; *Re Trufort*, *Trafford* v. *Blanc*, (1887) 36 Ch. D. 600.

(*c*) *De Bonneval* v. *De Bonneval*, (1838) 1 Curt. 856; *Hare* v. *Nasmyth*, (1815) 2 Add. 25, n.; and see *Trimlestown* v. *Trimlestown*, (1830) 3 Hagg. 243.

(*d*) See *post*, p. 27.

(*e*) *Miller*, (1883) 8 P. D. 167; and see *Crawford*, (1890) 15 P. D. 212.

(*f*) 20 & 21 Vict. c. 79, s. 95; *vide post*, p. 488.

(*g*) 21 & 22 Vict. c. 56, s. 12; 39 & 40 Vict, c. 70, s. 41; *vide post*, p. 490.

ministerial act of the English Court; and by the Colonial Probates Act, 1892, the grant made by the Court of any British possession to which the Act is applied by Order in Council may be resealed in England (*h*).

Extension of Irish, Scotch, and colonial grants to England.

Section 3.

THE JURISDICTION OF THE COURT IN RELATION TO PERSONS.

Order of discussion,

It now becomes necessary to consider the jurisdiction of the Court in relation to the persons in respect of whose estates its grants are made, and to inquire to what extent its jurisdiction is affected by the nationality and domicil of such persons.

and summary.

In the course of this discussion it will be seen that the Court has jurisdiction to make a grant in respect of property situate in England whether the deceased is a British subject or a foreigner, and whether domiciled in England or abroad. It will further appear that, as a general rule, the law of the deceased's domicil at death is applied by the Court, and governs all questions as to the validity of his will of personalty and as to the person who is entitled to be appointed his personal representative; that there is a partial exception to this rule in the case of wills of personalty of British subjects, and in the case of wills exercising a power of appointment; and that the validity of a will of lands and all questions of succession to real estate are governed by the *lex situs*.

SUB-SECTION 1.—*Jurisdiction in respect of Persons Domiciled Abroad.*

Where the deceased left property in this country, the Court has jurisdiction whatever his nationality or domicil.

If the deceased has left property in this country, the Probate Division has jurisdiction to grant probate or letters of administration in respect of his estate, whatever may have been his nationality and domicil at the time of his death, and notwithstanding the fact that the tribunal of his domicil has not in the first instance been resorted to by the parties.

It was at one time suggested that the *forum domicilii* had *exclusive* jurisdiction.

In certain early cases, to which reference has been made in the preceding section, the judges of the Probate Courts in England appear to have taken the view that they ought not

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(*h*) 55 Vict. c. 6; *vide post*, p. 492.

to make a grant in respect of the personal estate of a deceased person who died domiciled abroad unless and until recourse had first been had to the Court of the country of the domicil (*i*). But the contrary view has now prevailed; and although the English Court recognises the necessity of applying the *law* of the domicil when granting probate or administration of the personal estate of deceased persons who die domiciled abroad and the propriety of following the decision of the tribunal of the domicil in cases where the question litigated in the English Court has actually been raised and decided in the former Court (*k*), it is now clear that the Courts of the domicil have not exclusive jurisdiction in such cases, so as to prevent the person entitled to represent the deceased by the law of his domicil, from applying in the first instance in the English Court for a grant of probate or letters of administration in respect of the personal estate of the deceased which is situate in England (*l*).

But it is now clear that the English Court has jurisdiction even if the tribunal of the domicil has not been resorted to in the first instance.

General principle: the law of the deceased's domicil at death governs all questions

The general principle which governs both testamentary and intestate succession is that the law of the country in which the deceased was domiciled at the time of his death governs

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(*i*) *Hare* v. *Nasmyth*, (1815) 2 Add. 25, n.; *De Bonneval* v. *De Bonneval*, (1838) 1 Curt. 856; *ante*, p. 26.

(*k*) *Vide ante*, pp. 22 *et seq.*

(*l*) The view that the forum of the domicil has exclusive jurisdiction to determine the succession to movable estate (and thus incidentally to decide what is the will of the deceased, and who is to be his personal representative) appears to have been founded on the judgment of Lord Westbury in *Enohin* v. *Wylie*, (1862) 10 H. L. C. 1, at p. 13. This judgment was more than once criticised by Lord Selborne, who in the case of *Ewing* v. *Orr-Ewing* (10 A. C. 453, 502) said: "For the purpose of determining the succession to movable estate . . . recourse must be had, *not always or necessarily to the Courts*, but always and necessarily to the law, of the domicil." See also the judgments of Lord Cranworth and Lord Chelmsford in *Enohin* v. *Wylie*, where the former said (10 H. L. C. at p. 19): "The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicil." Cf. *Doglioni* v. *Crispin*, (1886) L. R. 1 H. L. 301, at p. 314; and see this case commented upon, *Re Trufort*, (1887) 36 Ch. D. 600, at p. 611.

The statement in the text is not intended to preclude the possibility that the English Court, when proceedings are actually pending in the Court of the domicil, might still well take the view that proceedings in this country should be stayed until the tribunal of the domicil has made a decree. Where administration with a will annexed had been obtained in this country, after a caveat entered had expired, but without notice to the adverse party, and while the will was in suit in the Irish Court—the *forum domicilii*—the administration was revoked, as surreptitiously obtained: *Trimlestown* v. *Trimlestown*, (1830) 3 Hagg. 243.

the distribution of and succession to his personalty, and therefore regulates the decision as to what constitutes his last will, and whether and how far it is valid, and who is entitled to be appointed his personal representative, and that without regard to his nationality, the place of his birth or of his death or the situation of the property at the time of his death (*m*).

as to the validity of his will of personalty, and as to who is entitled to be appointed his personal representative.

In the succeeding sub-sections of this section it is proposed to discuss the application of this principle to grants of probate and of letters of administration by the English Court, and the important exceptions which modify its applicability.

Definition of terms.

At the outset it becomes necessary clearly to define the sense in which certain terms are used in the course of the discussion.

"Foreigner" and "British subject."

The term "foreigner" is used in this chapter as equivalent to "alien"; *i.e.*, any person not a natural-born or naturalized British subject. The term "British subject" includes a naturalized British subject.

The term "valid" as used in this section refers to *formal* validity, and not to material validity.

A will is "valid" in the sense in which that term is used in this section, if made by a person under no testamentary incapacity and duly executed. Such a will may be wholly or in part inoperative because it contains provisions to which the law will not give effect. But if the will is valid in the sense adverted to, the Court of Probate in this country will admit the instrument to probate as testamentary, leaving it for the Court of Chancery to determine how far its provisions can be given effect to. The distinction is clearly drawn by Lord Cranworth in *Whicker* v. *Hume* (*n*):—"Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a

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(*m*) *Price* v. *Dewhurst*, (1838) 4 My. & Cr. 76, at p. 82, and cases there cited; Dicey, Conflict of Laws, Comment to r. 183; Wms. on Exors., p. 275; and see *Craigie* v. *Lewin*, (1843) 3 Curt. 435, at p. 450; *Ferraris* v. *Hertford*, (1843) 3 Curt. 468, at p. 486; *Bremer* v. *Freeman*, (1857) 10 Moo. P. C. 306, at pp. 357 *et seq*.; *Enohin* v. *Wylie*, (1862) 10 H. L. C. 1; *Crispin* v. *Doglioni*, (1863) 3 S. & T. 96, 99; *Miller* v. *James*, (1872) 3 P. & D. 4.

(*n*) (1858) 7 H. L. C. 124, at pp. 156, 157.

matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more, for after that there would then arise the question, how is the Court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by the law of that country the property must be administered" (*o*).

The expression "the law of the domicil" must be understood as referring to the rules applicable in the case of the particular testator or intestate.

It is necessary to give some explanation of the meaning of the expression "the law of the domicil." Foreign law is a matter of fact to be ascertained by the English Court by the evidence of experts skilled in such law (*p*); and when it is said that the law of a particular country must regulate the decision of the English Court, the rules applicable *in the case of the particular intestate or testator by the law of that country are intended.* For example, a testator, born an English subject, dies domiciled in Belgium leaving a will not executed according to the forms required of Belgian subjects by the law of Belgium; but by the law of Belgium the validity of the will in such a case is not to be governed by the law of that country applicable to its natural-born subjects, but by the law of the testator's own country. The will being valid according to the law of England, is admissible to probate here, as conforming to the rules applicable in the case of that particular testator by the law of Belgium, the country of the domicil (*q*).

E.g., if the laws of the domicil permit that particular testator to execute a will in English form, a will so executed is valid in England.

The law of the domicil as it stood at the time of the death of the testator or intestate is to be applied without reference to subsequent changes.

Finally, the expression "the law of the domicil at the time of death" means not only the law of the country in which the deceased was domiciled at the time of his death, but also that law *as it existed at the time of his death; i.e.*, if a change is made in that law after the death of the testator or intestate, the English Court will not have regard to such change, even though in terms retrospective (*r*).

(*o*) See Dicey, Conflict of Laws, pp. 667—673.

(*p*) *Bremer* v. *Freeman*, (1857) 10 Moo. P. C. 361. As to what persons are competent to give evidence on this point, *vide post*, p. 486.

(*q*) *Collier* v. *Rivaz*, (1841) 2 Curt. 855. For further illustration of this principle, see *Maltass* v. *Maltass*, (1844) 1 Rob. 67, 3 Curt. 231; *Abdul Messih* v. *Farra*, (1888) 13 A. C. 431; *Lacroix*, (1877) 2 P. D. 94.

(*r*) *Lynch* v. *Provisional Government of Paraguay*, (1871) 2 P. & D. 268.

SUB-SECTION 2.—*All Questions as to the Validity of a Will of Personalty are governed by the* Lex Domicilii.

The law of the domicil governs the validity of a will of personal estate.

When the English Court is called upon to grant probate of a will of personalty, its decision both as to the validity of the will and as to its title to probate is regulated and governed, subject to the exceptions hereafter to be mentioned (*s*), by the law of the country in which the testator was domiciled at the time of his death (*t*).

Accordingly, where the will of personalty (*u*) of a foreigner (*x*) is brought into the Probate Division in this country for probate, the object of that Court is to deal with the instrument exactly as the Court of the testator's domicil would have dealt with it at the time of his death (*y*); in other words, in deciding whether the instrument is admissible to probate, the English Court will be guided by the law of the country where the testator was domiciled at the time of his death, and will grant or refuse probate of the instrument according as it is or is not a valid will (*z*) by the law of that country (*a*).

A will of personalty made by a foreigner who dies domiciled in England must be executed in accordance with the English law.

Hence, on the one hand, the will of personalty (*b*) of a foreigner (*c*) who died domiciled in England will be admitted to probate in this country if it is a valid will by the law of

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(*s*) Sub-ss. 3 and 5, *post*.

(*t*) *Anstruther* v. *Chalmer*, (1826) 2 Sim. 1; *Stanley* v. *Bernes*, (1830) 3 Hagg. 373; *Price* v. *Dewhurst*, (1838) 4 My. & Cr. 76; *Preston* v. *Melville*, (1841) 8 Cl. & F. 1; *Craigie* v. *Lewin*, (1843) 3 Curt. 435; *Ferraris* v. *Hertford*, (1843) 3 Curt. 468, at p. 486; *Bremer* v. *Freeman*, (1857) 10 Moo. P. C. 306; *Enohin* v. *Wylie*, (1862) 10 H. L. C. 1; *Crispin* v. *Doglioni*, (1863) 3 S. & T. 96, 99; *Miller* v. *James*, (1872) 3 P. & D. 4; *Eames* v. *Hacon*, (1880) 16 Ch. D. 407.

(*u*) As here used, the term "personalty" does *not* include leaseholds and other interests in lands, for these, in common with other immovables, are governed by the *lex loci rei sitæ*: *Freke* v. *Lord Carberry*, (1873) 16 Eq. 461; *De Fogassieras* v. *Duport*, (1881) 11 L. R. Ir. 123; *Gentili* (1876), Ir. R. 9 Eq. 541; *Duncan* v. *Lawson* (1889), 41 Ch. D. 394; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24; *vide post*, p. 39.

(*x*) For the meaning of this term, *vide ante*, p. 29. A natural-born British subject who has become an alien by marriage is a foreigner in this sense: *Von Buseck*, (1881) 6 P. D. 211; *Bloxam* v. *Favre*, (1883) 8 P. D. 101, 9 P. D. 130, C. A.

(*y*) *Vide ante*, p. 30.

(*z*) *Vide ante*, p. 29.

(*a*) *Vide ante*, p. 30.

(*b*) *Vide supra*, note (*u*).

(*c*) *Vide ante*, p. 29.

England (*d*); probate of the instrument will be refused if the will is invalid on account of the testamentary incapacity of the testator or non-compliance with the formalities prescribed for due execution (*e*) by the English law.

The will of personalty of a foreigner who died domiciled abroad will be admitted to probate only if it is a valid will by the law of the country of his domicil.

On the other hand, the will of personalty (*f*) of a foreigner (*g*) who died domiciled abroad (*h*) will be admitted to probate in England if it is a valid will by the law of the country in which the testator was domiciled at the time of his death (*i*); probate of the instrument will be refused if the will is invalid on account of the testamentary incapacity of the testator or non-compliance with the formalities prescribed for due execution (*k*) by the law of the country of domicil (*l*).

SUB-SECTION 3.—*Exception in the Case of Wills of British Subjects.*

Exception as to wills of British subjects by Lord Kingsdown's Act, 1861.

The principle under discussion was rendered to a great extent inapplicable to the wills of British subjects dying after the 6th of August, 1861, by the Wills Act, 1861 (*m*), commonly known as Lord Kingsdown's Act.

(*d*) *Hare* v. *Nasmyth*, (1815) 2 Add. 25, n. The property was in England, and the party died there, but the domicil was in Scotland, and the validity of the will was held to depend on Scotch law. The decision is no longer applicable to the will of a British subject (see 24 & 25 Vict. c. 114, *post*, p. 33). See *Price* v. *Dewhurst*, (1838) 4 My. & Cr. 76; *Yates* v. *Thomson*, (1835) 3 Cl. & Fin. 544; *Bloxam* v. *Favre*, (1883) 8 P. D. 101, 9 P. D. 130, C. A.; *Von Buseck*, (1881) 6 P. D. 211.

(*e*) *Vide ante*, p. 29.

(*f*) *Vide ante*, p. 31, note (*u*).

(*g*) *Vide ante*, p. 29.

(*h*) *I.e.*, in a foreign country or any British possession or in Scotland, the Channel Islands, or the Isle of Man. (Ireland has the same system of law as England.)

(*i*) *Maraver*, (1828) 1 Hagg. 498. In that case the domicil having been Spain, the law of that country decided the probate.

(*k*) As to the effect of material invalidity—*i.e.*, the illegality of the *provisions* of the will by the law of the domicil—*vide ante*, p. 29; and see *Thornton* v. *Curling*, (1824) 8 Sim. 310; *Campbell* v. *Beaufoy*, (1859) Johns. 320.

(*l*) *Stanley* v. *Bernes*, (1830) 3 Hagg. 374 (this was a case in which the will was that of a British subject, as to whom the law was altered by 24 & 25 Vict. c. 114, but the decision is still applicable to the wills of foreigners); *Von Buseck*, (1881) 6 P. D. 211; *Bloxam* v. *Favre*, (1883) 8 P. D. 101, 9 P. D. 130, C. A.

(*m*) 24 & 25 Vict. c. 114.

Lord Kingsdown's Act, 1861, s. 1.

Wills of British subjects made out of the United Kingdom as regards personal estate.

Sect. 1 of that Act provides: "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall as regards personal estate (*n*) be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place (*o*) where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin."

What wills come within the section.

It will be noticed that a will, to come within this section of the Act, must be, first, a will "made out of the United Kingdom," secondly, a will "made by a British subject" (*p*), and, thirdly, a "will of personal estate" (*n*).

The law of the domicil at death still governs the *material* validity of the will.

A will executed in accordance with the provisions of this section is "well executed for the purpose of being admitted to probate." The law of the country in which the testator was domiciled at the time of his death still regulates all questions as to his capacity to make a will, and the material validity of its provisions (*r*).

Wills made in the form required by the law of the domicil are valid

As the Act does not invalidate any will which would have been valid if the Act had not passed (*s*), the will of personalty

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(*n*) This term as used in the Act *includes* leaseholds: *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584.

(*o*) *I.e.*, the law applicable to the case of the particular testator: *Lacroix*, (1877) 2 P. D. 94; *vide ante*, p. 30.

(*p*) *I.e.*, a natural-born British subject or a naturalized British subject: *Gally*, (1876) 1 P. D. 438. Notwithstanding the provision of the Naturalization Act, 1870, that property may be disposed of by an alien in the same way in all respects as by a natural-born British subject, the will of an alien is not within this section of Lord Kingsdown's Act, and is invalid unless executed with the forms and solemnities required by the law of the testator's domicil: *Von Buseck*, (1881) 6 P. D. 211; *Bloxam* v. *Favre*, (1883) 8 P. D. 101, 9 P. D. 130, C. A.

(*r*) *Vide ante*, p. 29, and see Dicey, Conflict of Laws, pp. 672, 680 *et seq.*; *Re Grassi, Stubberfield* v. *Grassi*, [1905] 1 Ch. 584; and cf. *Thornton* v. *Curling*, (1824) 8 Sim. 310; *Campbell* v. *Beaufoy* (1859), Johns. 320; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24. See also *Lyne* v. *de la Ferté*, (1910) 102 L. T. 143.

(*s*) 24 & 25 Vict. c. 114, s. 4.

independently of the statute.

of a British subject made in accordance with the formalities prescribed by the law of his domicil at the time of his death is valid, independently of the Act.

The Court will have regard to the law of one country only.

In determining the question what papers are testamentary under the provisions of Lord Kingsdown's Act, the Court will have regard to the law of one country only, and will not mix up the legal precepts of different countries (*t*).

Lord Kingsdown's Act, 1861, s. 2.

Wills of British subjects made within the United Kingdom as regards personal estate.

By sect. 2 of the Act "Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

What wills are within the section.

To come within this section of the Act, a will must be, first, a will made "within the United Kingdom," secondly, a will "made by a British subject," and, thirdly, a will of "personal estate" (*u*).

Wills made in the form required by the law of the domicil are valid independently of the statute.

A will which complies with these conditions will be held to be well executed if executed "according to the forms for the time being in force in that part of the United Kingdom where the same is made." And since the Act does not invalidate any will which would have been valid if the Act had not passed (*x*), such a will is well executed if executed according to the forms prescribed by the law of the testator's domicil.

The law of the domicil at death governs the *material* validity of the will.

A will executed in accordance with the provisions of this section must be held by the English Court to be "well executed"; but the law of the country in which the testator was domiciled at the time of his death still regulates all questions as to his capacity to make a will, and the material validity of its provisions (*y*).

(*t*) *Pechell* v. *Hilderley*, (1869) 1 P. & D. 673. As to cases in which no particular form is prescribed by the *lex loci* (in this case the Congo Free State), see *Stokes* v. *Stokes*, (1898) 78 L. T. 50.

(*u*) For an explanation of these terms *vide ante*, p. 33, notes (*n*) and (*p*); and see *Re Watson*, [1887] W. N. 142.

(*x*) 24 & 25 Vict. c. 114, s. 4.

(*y*) *Vide ante*, p. 29.

SUB-SECTION 4.—*Effect of a Change of the Testator's Domicil.*

Lord Kingsdown's Act, 1861, s. 3.

Change of domicil not to invalidate will.

Sect. 3 of the Act provides: "No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same."

The section applies to all wills, whether of foreigners or British subjects.

This section of the Act applies to all wills, whether of British subjects or aliens, wherever made (*z*).

Effect of the section.

Its effect is thus stated by Professor Dicey in his work on the Conflict of Laws: "A will made by a person capable of making it by the law of his domicil at the time of its execution, and made in the form required by such law, will not now be treated by any English Court as invalid, either because the testator was under a testamentary incapacity by the law of the country where he died domiciled (in which case the law seems to have been the same before the Act as it is now) or because the will is not made in the form required by the law of such country" (*a*).

Thus where a domiciled Scotsman made a will and afterwards married in Scotland, and later still acquired an English domicil, which he retained until his death, the English Court held that, as the will was valid up to the moment when the Scotch domicil was abandoned, it was not revoked by the subsequent change of domicil, and was entitled to probate in England (*b*).

And in *Westerman* v. *Schwab* (*c*) it was held that a will dealing with movable property, duly executed in England by a testatrix who was then a spinster domiciled in England, was not revoked by her subsequent marriage in England to a domiciled Scotsman (*c*).

(*z*) *Groos*, [1904] P. 269.

(*a*) Dicey, p. 682. On the question whether a will, which is *invalid* by the law of the testator's domicil at the time of its execution, can be rendered valid by his subsequent change of domicil, see Dicey, pp. 682, 683.

(*b*) *Reid*, (1866) 1 P. & D. 74; and see *Loustalan* v. *Loustalan*, [1900] P. 211.

(*c*) (1905), 8 F. 132, Ct. of Sess.

SUB-SECTION 5.—*Further Exception in Cases of Wills Exercising a Power.*

A will of personalty made in execution of a power is valid as an exercise of such power, if executed in the form required by the Wills Act, 1837, even though not executed in accordance with the law of the domicil.

A further exception to the rule under discussion exists in cases of wills of personalty made in exercise of a power of appointment conferred by an English instrument.

It has been established that where a will of personalty is made in exercise of a power of appointment conferred by an English instrument, it is, so far as form is concerned, a good exercise of the power if executed in accordance with the provisions of the Wills Act, 1837, ss. 9 and 10, even though the person appointing be domiciled abroad and the will be not validly executed according to the law of the domicil. In such a case the document may be admitted to probate for the purpose of the appointment, though it may not be admissible for any other purpose (*d*).

Thus where a foreign testator who was at the time of his death domiciled in France made a will in exercise of a power of appointment conferred by an English instrument, with the forms prescribed by sect. 9 of the Wills Act, 1837, the document was admitted to probate in England although invalid by the law of France (*e*).

(*d*) This rule, now finally and authoritatively established by the decision of the House of Lords in *Murphy* v. *Deichler*, [1909] A. C. 446, was at one time considered doubtful. First laid down by the Judicial Committee in *Tatnall* v. *Hankey*, (1838) 2 Moo. P. C. 342, it was dissented from by Sir C. Cresswell in *Crookenden* v. *Fuller*, (1859) 1 S. & T. 441; but in *Alexander*, (1860) 29 L. J. P. 93, the same learned judge departed from the view he had expressed in *Crookenden* v. *Fuller* (*ubi sup.*), and considered himself bound by the terms of the report of the Judicial Committee in *Tatnall* v. *Hankey* (*ubi sup.*; and see *Huber*, [1896] P. at p. 211, n. 2). In *Hallyburton*, (1866) 1 P. & D. 90, Lord Penzance, though following the decision in *Alexander* (*ubi sup.*), stated his strong impression that Sir C. Cresswell was right in the view he expressed in *Crookenden* v. *Fuller* (*ubi sup.*), and that the report on which he acted in *Alexander* (*ubi sup.*) was at variance with the view of the Privy Council subsequently expressed by Lord Brougham in *Barnes* v. *Vincent*, (1846) 5 Moo. P. C. 201. In *Huber*, [1896] P. 209, Sir Francis Jeune expressed his agreement with the opinion of Lord Penzance and the reasoning on which it was founded. But he held that, inasmuch as Lord Penzance in 1866 refused to disturb the law as laid down in *Alexander* (*ubi sup.*) because wills might have been made in reliance on that authority, *à fortiori* the same course must be pursued in 1896. See also *Tréfond*, [1899] P. 247. All doubt as to the authority of the rule was set at rest by the decision of the House of Lords in *Murphy* v. *Deichler*, [1909] A. C. 446.

(*e*) *Huber*, [1896] P. 209; see *Alexander*, (1860) 29 L. J. P. 93; *Hallyburton*, (1866) 1 P. & D. 90; *Tréfond*, [1899] P. 247.

The will is only good in so far as it exercises the power of appointment.

The will is only good in so far as it is an execution of the power of appointment, and is invalid in so far as it deals with personal property other than that which is the subject of the power (*f*).

A power to appoint by will "duly executed."

A power to appoint "by a will duly executed" is well exercised by a will executed in accordance with the formalities prescribed by the law of the testator's domicil at death, even though the instrument is invalid by English law (*g*). But where a will is not duly executed by the law of the testator's domicil at death, nor according to the provisions of the Wills Act, 1837, s. 9, it is not a valid exercise of an English power of appointment, even though made by a British subject and admitted to probate as within the provisions of Lord Kingsdown's Act, 1861 (*h*).

Where special formalities are required by the instrument creating the power.

Where special formalities are required by the instrument creating the power, it is not enough that the instrument purporting to execute the power should be a will according to the law of domicil, for in cases where the provisions of sect. 10 of the Wills Act do not apply the will must comply with the terms of the power (*i*).

SUB-SECTION 6.—*Questions as to what Person is entitled to be appointed Personal Representative of the Deceased are governed by the* Lex Domicilii.

The person entitled to be appointed personal representative of the deceased by the law of

It has been seen that where a person died domiciled in a foreign country, and the Court of that country has invested any person with the power and duty of administering his estate, the English Court will, as a general rule, constitute the same person representative of the deceased in England (*k*).

(*f*) *Tréfond*, [1899] P. 247.

(*g*) *D'Huart* v. *Harkness*, (1865) 34 Beav. 324; see *Hummell* v. *Hummell*, [1898] 1 Ch. 642; *Price*, [1900] 1 Ch. 442; *Scholefield*, (1905) 21 T. L. R. 675; *Re D'Este's Settlement*, [1903] 1 Ch. 898.

(*h*) *Re Kirwan's Trusts*, (1883) 25 Ch. D. 373, where it was held that Lord Kingsdown's Act does not affect s. 10 of the Wills Act, 1837, which makes an appointment by will—*i.e.*, by the will of a person domiciled in England—invalid if not executed in accordance with that Act; and see *Dolphin* v. *Robins*, (1859) 7 H. L. C. 390; *Hummell* v. *Hummell*, [1898] 1 Ch. 642.

(*i*) *Baretto* v. *Young*, [1900] 2 Ch. 339.

(*k*) *Ante*, pp. 22 *et seq.*

his domicil is entitled to the English grant.

And, on the principle that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and succession to his personalty (*l*), whenever an original administration to the effects of a person who died domiciled abroad is applied for in this country, whether the deceased was a British subject or an alien, the grant will be made to the person entitled to the effects of the deceased according to the law of the country of domicil, and as such entitled by that law to be appointed personal representative of the deceased (*m*).

Where subjects of foreign States die in his Majesty's dominions, and there is no person to administer their estates, the consuls of such foreign States may administer.

By the statute 24 & 25 Vict. c. 121, s. 4, "Whenever a convention shall be made between her Majesty and any foreign State, whereby her Majesty's consuls or vice-consuls in such foreign State shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by Order in Council to direct, and from and after the publication of such Order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign State shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign State, within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent shall immediately apply for and shall be entitled to obtain from the proper Court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such Court shall seem fit" (*n*).

(*l*) *Vide ante*, p. 28.

(*m*) *Johnston*, (1832) 4 Hagg. 182, and see as to the limitations of this rule *ante*, pp. 23 *et seq.*

(*n*) As to the right of a foreign consul to take possession of the property of a foreigner dying here *in itinere*, see *Aspinwall* v. *The Queen's Proctor*, (1839) 2 Curt. 241; *Wyckoff*, (1862) 3 S. & T. 20.

SUB-SECTION 7.—*The Validity of a Will of Lands is governed by the* Lex Situs.

The validity of a will of lands is governed by the law of the country where the land is situate (*lex situs* (*o*)). Accordingly a will of English immovables—and in this term are included English leaseholds and chattels real (*p*)—must, in order to be entitled to probate, be executed in accordance with the ordinary testamentary law of England, no matter what may have been the domicil of the testator (*q*).

The validity of a will of lands is governed by the *lex loci rei sitæ*.

Lands in England descend on intestacy according to the English law, whatever may be the nationality or domicil of the intestate (*r*).

(*o*) Dicey, Conflict of Laws, 500, 505.

(*p*) *Freke* v. *Lord Carberry*, (1873) 16 Eq. 461 ; *De Fogassieras* v. *Duport*, (1881) 11 L. R. Ir. 123 ; *Gentili*, (1876) Ir. R. 9 Eq. 541 ; *Duncan* v. *Lawson*, (1889) 41 Ch. D. 394 ; *Pepin* v. *Bruyère*, [1902] 1 Ch. 24.

(*q*) *Freke* v. *Lord Carberry*, (1873) 16 Eq. 461 ; *De Fogassieras* v. *Duport*, (1881) L. R. Ir. 123 ; *Gentili*, (1876) Ir. R. 9 Eq. 541 ; *Bovey* v. *Smith*, (1682) 1 Vern. 85 ; *Bowaman* v. *Reeve*, (1721) Pre. Ch. 577 ; *Brodie* v. *Barry*, (1813) 2 Ves. & Bea. 127, at p. 131.

(*r*) *Doe* v. *Vardill*, (1826) 5 B. & C. 438.

CHAPTER II.

OF TESTAMENTARY CAPACITY, AND HEREWITH OF THE TESTATOR'S KNOWLEDGE AND APPROVAL OF THE CONTENTS OF HIS WILL.

Who is capable of making a will.

It is said (*a*) that all persons are capable of disposing of their estate by testament who have sufficient discretion, their own free will, and who have not been guilty of certain offences. Wherefore it appears that there are three grounds of incapacity: (1) want of sufficient discretion, (2) want of liberty and free will, and (3) criminal conduct (*b*).

Before dealing in detail with these three grounds of testamentary incapacity, it may be convenient shortly to refer to wills made by aliens, and by the King or Queen of England.

An alien may make a will;

Aliens.—The Naturalization Act, 1870 (*c*), s. 2, provides that "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject."

This section has been held to confer upon an alien the power of disposing of his property by will (*d*).

but his will is not within the provisions of Lord Kingsdown's Act,

It was at one time argued that the effect of the provision in sect. 2 of the Naturalization Act, 1870, that property may be disposed of by an alien in the same manner in all respects as by a natural-born British subject was to extend to aliens the *privilegium* conferred by Lord Kingsdown's Act (*e*) on British subjects. But the contrary view prevailed,

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(*a*) Swinb., Part II., s. 1; Wms. on Exors., p. 8.

(*b*) 2 Black. Comm. 496.

(*c*) 33 & 34 Vict. c. 14.

(*d*) *Von Buseck,* (1881) 6 P. D. 211; *Bloxam* v. *Favre,* (1883) 8 P. D. 101, 9 P. D. 130, C. A.

(*e*) 24 & 25 Vict. c. 114; *vide ante,* pp. 32 *et seq.*

and it was held that that provision in the Naturalization Act, 1870, was not intended to confer upon aliens the particular privileges given by Lord Kingsdown's Act to British subjects; but leaves it to be determined in each particular case what is the form in which, according to the law of the alien's domicil at death, the testamentary disposition shall be carried out; and gives an alien power to dispose in England of *personalty* by will, subject to the laws of the country of his domicil as to the form in which he shall make that will (*f*).

and must be executed in the form required by the law of the country of his domicil.

The rules which guide the Court in granting or refusing probate of the will of an alien are dealt with at length in the preceding chapter (*g*).

The King or Queen.—The statute 39 & 40 Geo. III. c. 88, s. 10, confers upon the sovereign, power of disposing, by last will and testament in writing under his sign manual, of certain property which, it is therein provided, shall be deemed to be personal estate and effects of the sovereign and his successors.

The sovereign may make a will,

It would seem, however, that the Court of Probate has no jurisdiction to grant probate of the will of a deceased sovereign (*h*).

but his will cannot be proved in the Probate Court.

Section 1.

OF PERSONS INCAPABLE FROM WANT OF DISCRETION.

SUB-SECTION 1.—*Infants.*

The Wills Act, 1837, s. 7, enacts that "no will made by any person under the age of twenty-one years shall be valid." As, however, soldiers in actual military service and mariners or seamen at sea are, by sect. 11 of the Act, permitted to dispose of their personal estate as they might have done before the making of the Act, it has been held that a will

No infant can make a will, unless a soldier or seaman.

(*f*) *Von Buseck,* (1881) 6 P. D. 211; *Bloxam* v. *Favre,* (1883) 8 P. D. 101, 9 P. D. 130, C. A.; *vide ante,* Chap. I., p. 31.

(*g*) Chap. I., s. 3, pp. 27 *et seq.*

(*h*) *In the Goods of his late Majesty King George III.*, (1822) 1 Add. 255; *In the Goods of his late Majesty King George III.*, (1862) 3 S. & T. 199; see *Att.-Gen.* v. *Windsor (Dean and Canons)*, (1860) 8 H. L. C. 369.

made by an infant while a soldier in actual military service (*i*) or a mariner or seaman at sea (*k*) is valid (*l*).

SUB-SECTION 2.—*Persons of Unsound Mind.*

No person is capable of making a valid will who is not of sound mind, memory, and understanding.

The statute 34 & 35 Hen. VIII. c. 5, s. 14, provides that the will of an "idiot or any person *de non sane* memory shall not be taken to be good or effectual in the law." This provision was merely declaratory of the law as it had been from time immemorial (*m*), for by the law of England no person is considered capable of making a valid will unless he be—to adopt the language of the pleader—of "sound mind, memory, and understanding." By this phrase emphasis is laid upon two functions of the mind, which must be sound in order to create a capacity for making a will: there must be a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him (*n*); from which it follows that no person of unsound mind is capable of making a will.

By "sound mind" is not meant "a perfectly balanced mind," nor a mind actuated only by righteous motives.

This proposition involves a consideration of what amount and quality of intellect is requisite to constitute testamentary capacity (*o*). And, first, it is to be observed that the words "a sound disposing mind" do not mean a perfectly balanced mind. The law does not say that a man is incapacitated from making a will if he proposes to make a disposition of his property moved by capricious, frivolous, mean, or even bad motives. He may, either wholly or partially, disinherit his children, and leave his property to strangers to gratify

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(*i*) *Farquhar*, (1846) 4 N. C. 651; *Hiscock*, [1901] P. 78; *vide post*, p. 296.

(*k*) *McMurdo*, (1867) 1 P. & D. 540; *vide post*, p. 296.

(*l*) Before the Act males above the age of fourteen, and females above the age of twelve, were capable of making wills of personal estate; and that was the rule of the civil law: 2 Black. Comm. 497; *Hyde* v. *Hyde*, (1711) Pre. Ch. 316.

(*m*) Ency. of Laws of England, 2nd ed., tit. "Will," p. 671.

(*n*) *Per* Sir J. Hannen in *Boughton* v. *Knight*, (1873) 3 P. & D. at pp. 65, 66.

(*o*) Sir J. Hannen in *Boughton* v. *Knight*, (1873) 3 P. & D. at p. 67.

his spite, or to charities to gratify his pride (*p*), but still effect must be given to his will, however much such courses may be condemned, provided it be the will of a free and capable testator. "There is no country in the world," said Sir J. P. Wilde in *Smith* v. *Tebbitt* (*q*), "in which the law permits a larger exercise of volition in the disposal of property after death, than in England. But it requires, as a condition, that this volition should be that of a mind of natural capacity, not unduly impaired by old age, enfeebled by illness, or tainted by morbid influence. Such a mind the law calls 'a sound disposing mind.'"

For a man may leave his property as he pleases,

Cockburn, C.J., in *Banks* v. *Goodfellow* (*r*), after stating that the law of England leaves the disposition of his property by will to the unfettered discretion of the testator, said: "It is obvious that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

provided he understands the nature and extent of his property

and is capable of appreciating the claims to which he ought to give effect,

free from the influence of any insane disorder or morbid delusions.

"Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost,

But if the mind is perverted by disease

(*p*) Sir J. Hannen in *Boughton* v. *Knight*, (1873) 3 P. & D. at p. 66; see also the remarks of Lord Kenyon in *Greenwood* v. *Greenwood*, (1790) 3 Curt. App. xxx., xxxi.

(*q*) (1867) 1 P. & D. at p. 400.

(*r*) (1870) L. R. 5 Q. B. at p. 565.

or insane delusions,

and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand" (*s*).

the will cannot stand.

A high degree of mental soundness is requisite in order to constitute capacity to make a will:

In *Boughton* v. *Knight* (*t*), Sir J. Hannen, in summing up, made the following observation on the subject of testamentary capacity (*u*): "Whatever degree of mental soundness is required for . . . responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, I must tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition, . . . because it involves a larger and wider survey of facts and things than any one of those matters." The same learned judge, in *Burdett* v. *Thompson* (*x*), referred to and somewhat qualified this observation. He said: "It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. I never said, and I never meant to say so. What I have said—and I repeat it—is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then whatever is the highest degree of soundness is required to make a will. . . . From the character of the act, it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims and of determining in what proportion the property shall be divided amongst the claimants."

for this act entails the consideration of a large variety of circumstances.

(*s*) Compare, upon the question of the measure of mental capacity to be insisted upon, the observation of Erskine, J., in *Harwood* v. *Baker*, (1840) 3 Moo. P. C. at p. 290; Lord Kenyon in *Greenwood* v. *Greenwood*, (1790) 3 Curt. App. xxx.

(*t*) (1873) 3 P. & D. 64.

(*u*) *Ibid.*, at p. 72.

(*x*) (1873) 3 P. & D. 72, note (1).

A "sound disposing mind," then, is a mind which is capable of appreciating, uninfluenced by mental disorder or morbid delusion, the claims of others upon the testator's bounty, and of determining in what proportion his property shall be divided amongst them. But the very terms of the definition immediately suggest the question, What is the criterion of mental disorder, of unsoundness of mind? By what principles and rules shall the Court be guided in approaching the question whether the individual testator whose capacity is called in question was sane or insane, of sound or unsound mind, at the time of the execution of the will?

What is the criterion of mental disorder?

Many attempts have been made both by psychologists and by jurists to define insanity, but the definitions given are so imperfect that it would be difficult to find one which includes all who are insane, and excludes all who are sane. "The difficulty is fully accounted for," says a learned writer on medical jurisprudence (*y*), "by the fact that mental disorder varies in its degree as well as in its characters; and the shades of disordered intellect in the early stages are so blended as to be scarcely distinguishable from a state of sanity. It is this twilight condition of the mind, when it is fluctuating between sanity and insanity, which no definition can comprise, especially as the mind differs in its power and manifestations in most persons, and it is therefore difficult to fix upon a standard by which a fair comparison may be made." "The difficulty," said Lord Cranworth in *Boyse* v. *Rossborough* (*z*), "is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine" (*a*).

The difficulty in defining "insanity"

arises from the fact that mental disorder varies in degree, as well as in character, and the shades of disordered intellect in the early stages are scarcely distinguishable from a state of sanity.

Medical jurists have commonly recognised four forms which

Unsoundness of mind may manifest

(*y*) Taylor, Manual of Medical Jurisprudence, 12th ed., p. 724.

(*z*) (1857) 6 H. L. C. at p. 45.

(*a*) Cf. *per* Sir John Nicholl in *Dew* v. *Clark*, (1826) 3 Add. at p. 87.

itself in one of four ways. insanity may take: *mania*, *monomania*, *dementia*, and *idiocy* (*amentia*) (*b*).

Mania: *Mania.*—Mania is defined as the form of insanity which manifests itself by a general derangement or perversion of the mental faculties, accompanied by greater or less excitement, sometimes amounting to violent fury (*c*). Ideas flow through the its characteristics. mind without order or connection, the person losing all control over his thoughts, and believing and acting upon them, however absurd or inconsistent they may be. In this form of insanity there are usually remissions, more or less complete, and in some instances after a violent attack the reason appears to be perfectly restored, forming then what is termed a lucid interval (*d*).

Monomania: *Monomania.*—"This name is applied to that condition in which the mental alienation is apparently only partial; in other words, it is nothing more than insanity manifesting its characteristics. itself in one direction. In mania the mind is disordered on all kinds of subjects; in monomania the disorder is confined chiefly either to one subject or to one class of subjects. Monomaniacs are infected with false ideas on certain points, of which they cannot divest themselves, and out of which they cannot be reasoned: they start from false principles; but, setting this aside, their inferences and deductions from these principles often possess logical accuracy (*e*). In every subject not connected with their special delusions they are like the rest of the world; they talk and reason as justly upon facts as before the access of their malady, but their general deportment, habits, and character are changed. Thus a miser may become a spendthrift, and a hard-working and industrious

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(*b*) Taylor, p. 733. Ancient jurists recognised a fourfold—but different—classification of persons of unsound mind (*non compos mentis*): (1) idiot, or fool natural; (2) he who was of good and sound memory, but by the visitation of God has lost it; (3) *lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound memory and sometimes *non compos mentis*; (4) by his own act, as a drunkard: see *Beverley's Case*, (1603) 4 Co. Rep. at p. 124 b.

(*c*) Taylor, p. 733.

(*d*) *Ibid.*, p. 733; see *post*, p. 62. *Nichols* v. *Binns*, (1858) 1 S. & T. 239, was a case of this description.

(*e*) See Locke on the Human Understanding, Book II., Chapter XI., s. 13.

mechanic may pass his time in idleness; a man of moral habits may become immoral in conversation and conduct, and an abstemious man may become a drunkard" (*f*).

"Monomania in its early stage is liable to be confounded with eccentricity, but there is this difference between them: in monomania there is obviously a change of character—the person is different from what he was; in eccentricity such a difference is not remarked—he is, and always has been, singular in his ideas and actions, there is no observable change of character. An eccentric man may be convinced that what he is doing is absurd and contrary to the general rules of society, but he professes to set these rules at defiance: a true monomaniac cannot be convinced of his error, and he thinks that his acts are consistent with reason and the general conduct of mankind. In eccentricity there is the will to do or not to do: in real monomania the controlling power of the will appears to be lost" (*g*).

"Monomania" frequently discussed in testamentary suits under the name of "partial insanity."

The existence of this species of insanity has frequently been recognised by judges in testamentary suits, sometimes under the name of partial insanity, or, as Lord Brougham preferred to describe it (*h*), "insanity or unsoundness always existing, though only occasionally manifest." "Nothing is more certain," said the same learned judge (*i*), "than the existence of mental disease of this description. Nay, by far the greater number of morbid cases belong to this class. They have acquired a name, the disease called familiarly, as well as by physicians, 'monomania,' on the supposition of its being confined, which it rarely is, to a single faculty or exercise of the mind: a person shall be of sound mind, to all appearance, upon all subjects save one or two, and on these he shall be subject to delusions, mistaking for realities the suggestions of his imagination."

An early case in which this species of insanity was recognised.

The earliest reported case in which insanity of this description was considered in a testamentary suit, would appear to be

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(*f*) Taylor, p. 734.

(*g*) *Ibid.*, pp. 735, 736.

(*h*) *Waring* v. *Waring*, (1848) 6 Moo. P. C. at p. 350.

(*i*) *Ibid.*

Greenwood v. *Greenwood.*

the case of *Greenwood* v. *Greenwood* (*k*). That was a case where the testator, whilst insane, took up an idea that a most affectionate brother had administered poison to him. He recovered his senses, and returned to his profession as an advocate, was sound and eminent in his practice, but he could never dislodge from his mind the morbid delusion which disturbed it, and under the pressure, no doubt, of that diseased prepossession, he disinherited his brother (*l*). The case, in the Prerogative Court, terminated early in a compromise, and was, after two conflicting verdicts, compromised at common law.

Dew v. *Clark.*

A case in which the delusion from which the testator suffered took the form of an insane antipathy to his only daughter.

But the authoritative recognition of this species of insanity in a testamentary suit occurred in the great case of *Dew* v. *Clark* (*m*), which, to adopt the language of Sir Edward Vaughan Williams (*n*), obtained the most complete and solemn consideration, and led to the full investigation of what was there described as "partial insanity." That was a case in which a daughter pleaded, in opposition to her father's will, that the testator was not of sound mind at the time of the execution of the will, in that—in addition to exhibiting other symptoms of a diseased and disordered intellect—he had conceived an insane antipathy to her, his only child, from her infancy, and was actuated by that antipathy throughout the remainder of his life; and that the will in question was founded upon, and owing solely to this insane antipathy, and therefore not to be held valid.

Sir John Nicholl in admitting the allegation, after remarking that this was, in substance, a case of partial insanity, and that the possible occurrence of such a case must be admitted on the authority of *Greenwood* v. *Greenwood* (*o*), went on to warn the plaintiff as to what must be proved in a case of this

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(*k*) (1790) 3 Curt. App. i.—xxxi.

(*l*) See Mr. Erskine's speech on trial of James Hadfield, Howell's State Trials, xxvii., p. 1311.

(*m*) (1822) 1 Add. 279; (1824) 2 Add. 102; (1826) 3 Add. 79; (1828) 5 Russ. 163. The case is also reported by Dr. Haggard from the judge's notes.

(*n*) Wms. on Exors., p. 21.

(*o*) *Ubi supra.*

What must be proved in such a case.

character, where the general capacity of the testator was substantially not impeached. He said (*p*): "She must understand that no course of harsh treatment, no sudden outbursts of violence, no display of unkind or even unnatural feeling, merely, can avail in proof of her allegation. She can only prove it by making out a case of antipathy, clearly revolvable into mental perversion, and plainly evincing that the deceased was insane as to her ,notwithstanding his general sanity" (*q*).

Where the will is the offspring of a morbid delusion, it is null and void in law.

The case occupied several days in the hearing, and ultimately, after an exhaustive review of the evidence, the learned judge found that the will propounded was the direct unqualified offspring of a morbid delusion proved to have been ever present in the mind of the deceased as to the character and conduct of his daughter, and that therefore the deceased was insane at the time of his making the will, and consequently that the will itself was null and void in law (*r*).

The term "partial insanity" justified.

In the course of his judgment the learned judge observed (*s*): "It was said that 'partial insanity' was unknown to the law. The observation can only have arisen from mistaking the sense in which the Court used that term. It was not meant that a person could be partially insane and sane at the same moment of time: to be sane, the mind must be perfectly sound; otherwise it is unsound. All that was meant was that the delusion may exist only on one or more particular subjects" (*t*). The learned judge justified his use of the term by quoting a passage from Lord Hale's work (*u*).

(*p*) 1 Add. 284.

(*q*) *Cf.* the remarks of Sir J. Hannen in *Boughton* v. *Knight,* (1873) 3 P. & D. 64, at p. 69. A sane man may take an unduly harsh view of the character or conduct of his children, but "there is a limit beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect; . . . there is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind:" *ibid.*, p. 69.

(*r*) 3 Add. 208.

(*s*) Dr. Haggard's report, pp. 11, 12.

(*t*) Lord Lyndhurst agreed with this explanation of the term when the case came before him on commission of review: 5 Russ. at p. 167. See also Lord Brougham's remarks in *Waring* v. *Waring,* (1848) 6 Moo. P. C. at p. 350, cited *supra,* p. 47.

(*u*) Pleas of the Crown, Part I., Chap. IV., p. 30.

In *Waring* v. *Waring* (*x*) the existence of this species of insanity—monomania characterised by delusions upon one or more subjects while the mind remains in other respects apparently unimpaired—received further recognition; and in *Smith* v. *Tebbitt* (*y*) Sir J. P. Wilde said: "A person who is affected by monomania, although sensible or prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will. I conceive the decided cases to have established this proposition: that, if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable." It is thus clear that once an insane delusion is proved to have existed in the mind of the testator, and that delusion has had, or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to the validity of the will.

A person affected by monomania, though sensible and prudent on other subjects, is incapable of making a will.

Hereupon it becomes necessary to consider whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, *which delusions had in point of fact no influence whatever on the testamentary disposition in question*, are sufficient to deprive a testator of testamentary capacity and to invalidate his will.

Whether the existence of delusions which do not in fact influence the testamentary dispositions shall avoid a will.

Prior to the year 1870, in which year the case of *Banks* v. *Goodfellow* (*z*) was decided, this question would have been answered in the affirmative; for the doctrine which prevailed until that date may be thus stated:—To constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of those faculties, if it labours under any delusion arising from such disorder, though

In the earlier cases, it was held that the existence of *any* delusion made the patient incapable of making a will.

(*x*) (1848) 6 Moo. P. C. 342.

(*y*) (1867) 1 P. & D. at p. 401.

(*z*) L. R. 5 Q. B. 549.

its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence (*a*). But a different doctrine subsequently prevailed, and has since been fully accepted. According to that doctrine, the question under consideration must be answered in the negative; and the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.

But more recent authorities lay down the rule that the existence of delusions is not in itself a ground for setting aside a will, unless they were calculated to influence the testator in making it.

"No doubt," said Cockburn, C.J., in *Banks* v. *Goodfellow*, at the close of a long and most illuminating judgment (*b*)—"No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. Where insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded. But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld."

Where any delusion is proved to have existed, the presumption is against the will;

but if the Court is satisfied that the delusion could have no effect upon the will, the will must be upheld.

(*a*) See *per* Sir John Nicholl in *Groom* v. *Thomas*, (1829) 2 Hagg. at pp. 436, 453, 454; Sir H. J. Fust in *Frere* v. *Peacocke*, (1846) 1 Rob. at pp. 445, 446; Lord Brougham in *Waring* v. *Waring*, (1848) 6 Moo. P. C. at pp. 349—353; Sir C. Cresswell in *Symes* v. *Green*, (1859) 1 S. & T. at p. 410; Sir J. P. Wilde in *Smith* v. *Tebbitt*, (1867) 1 P. & D. at p. 401.

(*b*) (1870) L. R. 5 Q. B. at p. 570.

This statement of the law was followed by Sir J. Hannen in *Boughton* v. *Knight* (*c*) and in *Smee* v. *Smee* (*d*), and must now be regarded as well established.

Dementia: its characteristics.

Dementia.—The characteristics of this form of insanity are a total absence of reasoning power and an incapacity to perceive the true relations of things. "The language is incoherent, and the actions are inconsistent. . . . Memory is lost, and sometimes the same word or phrase is repeated for many hours together" (*e*).

"Dementia varies in degree. The disordered mind of aged persons is one form of dementia (*f*). . . . In some instances the disease comes on gradually, the faculties decaying one by one; in other cases, though more rarely, it may occur suddenly. Dementia may be acute or chronic, remittent or intermittent (*g*). It is distinguished from mania in that in mania there is an incoherence of ideas depending on too great rapidity of thought and excitement of the intellectual powers; in dementia there is a want of ideas, and the incoherence depends on the loss of the power of connecting them, owing to defect of memory. In fact, in dementia there is more or less complete abolition of the moral, intellectual, and voluntary powers; in mania, and also in monomania, they exist, but are in a state of perversion. But dementia is often a consequence of these states, and sometimes alternates with them" (*h*).

Idiocy: its characteristics.

Idiocy (*Amentia*).—Idiocy may be said to be characterised by a congenital deficiency of the mental faculties. "There is not here a perversion or a loss of what has once been acquired, but a state in which, from defective structure of the brain, the individual has never been able to acquire any degree of intellectual power to fit him for his social position" (*i*). There is, however, a state in which the mind is capable of receiving some ideas, and of profiting to a certain extent by instruction.

Imbecility.

(*c*) (1873) 3 P. & D. 64; see pp. 73 *et seq.*

(*d*) (1879) 5 P. D. 84, at p. 91.

(*e*) Taylor, 736.

(*f*) *Ibid.* 736.

(*g*) *Ibid.* 737.

(*h*) *Ibid.* 737.

(*i*) *Ibid.* 737.

Difficulty of distinguishing between imbecility and sanity.

This state is called "imbecility" (*k*). It is obvious that between the minor degrees of imbecility and sanity it may be exceedingly difficult, indeed almost impossible, to distinguish (*l*). In every case the question will be whether the mind of the testator was so impaired by want of intelligence arising from defective organisation, that sufficient intelligence to understand and appreciate the testamentary act in its different bearings did not exist (*m*).

"An idiot," says Swinburne (*n*), "*i.e.*, such a one as cannot number twenty, or tell what age he is, or the like, cannot make a will or dispose of his lands or goods; and although he make a wise, reasonable, and sensible will, yet it is void: but such a one as is of mean understanding only, that has *grossum caput*, and is of the middle sort, between a wise man and a fool, is not prohibited to make a will."

How disproved.

The characteristic of idiocy or imbecility is permanence, with very little or no variation: where, therefore, the case presented against the will is that of idiocy or imbecility, proof of acts of business is very important evidence to meet such a case, and to show that such a state did *not* exist at a given period. One afflicted with lunacy may sometimes manage pecuniary affairs with perfect propriety; but an idiot, never (*o*).

Relevance of the views of medical writers.

These views of medical writers are not irrelevant to the subject of our inquiry—namely, the true test of insanity. For, as Sir H. J. Fust said in *Mudway* v. *Croft* (*p*), in the investigation

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(*k*) Taylor, 737, 738. See also a very interesting description of this species of unsoundness of mind in *Ingram* v. *Wyatt*, (1828) 1 Hagg. at pp. 401 *et seq.*

(*l*) See *Bannatyne* v. *Bannatyne*, (1852) 2 Rob. 472.

(*m*) *Banks* v. *Goodfellow*, (1870) L. R. 5 Q. B. 566, and cases there cited.

(*n*) Swinb., Part II., s. 4; 2 Shep. Touch. by Prest., 403.

(*o*) Dr. Lushington in *Bannatyne* v. *Bannatyne*, (1852) 2 Rob. at pp. 491, 494. Some medico-legal writers have described a state which they call *moral insanity*, in which there are no hallucinations or illusions, and no evidence of delusions or intellectual aberration, but simply a perversion of the moral sentiments: see Taylor, p. 725. An unsuccessful attempt to upset a will on the ground of the existence of this species of insanity was made in *Frere* v. *Peacocke*, (1846) 1 Rob. 442. Sir H. J. Fust said: "Because a man does not duly appreciate the acts or feelings which generally influence mankind, that therefore he is to be considered mad, and unfit to make a disposition of his property, is *not* the law of this country. I am of opinion that perversion of moral feeling does not constitute unsoundness of mind, so as to render an act performed *per se* invalid": *ibid.* at p. 456.

Moral insanity.

(*p*) (1843) 3 Curt. 676.

of cases of suggested insanity "much assistance will often be derived from the observations and recorded experience of medical men, who have devoted much time and attention to this malady." "It is," said Sir J. P. Wilde in *Smith* v. *Tebbitt* (q), "the especial business of those who devote themselves to the mitigation or cure of this fearful malady, to study the ways and forms of thought and expression which attend upon it; the sort of things that the insane say and do; their bearing and demeanour; the occasions they choose or decline for the exhibition of their ruling ideas. All these become familiar to the medical attendant. Hence he is furnished with another road by which to approach the determination of insanity in a doubtful case. He can reason from the certainly to the probably diseased mind, and is enabled to trace in the latter, lineaments which are clearly marked in the former. Thus, while the world at large can only contrast the doubtful case with the sane, the physician has at hand the alternative contrast with the insane. It is a consequence of these alternative methods of judgment that the question of insanity, though it falls to the lot of a legal tribunal, is properly a mixed one—partly within the range of common observation, and in so far fit to be considered by a jury; partly within the range of special experience, and in so far the proper subject of medical inquiry. It is the office of the Court, then, to inform itself, as far as opportunity permits, of the general results of medical observation, and to approach the subject on the two opposite sides thus indicated—searching for a fit conclusion by alternately presenting the parallel of sanity and insanity to the sayings and doings of the deceased."

There is no one infallible test by which unsoundness of mind can be distinguished.

It has thus been seen that unsoundness of mind may manifest itself in many ways, and exist in varying degrees. Therefore it would appear that the correct answer to the suggested inquiry,—What is the true test by which unsoundness of mind, sufficient to involve testamentary incapacity, may be distinguished from mere eccentricity (r) and extravagance on the one hand, and dulness and feebleness of the intellect on the other?—

(q) (1867) 1 P. & D. at p. 404.

(r) See *Pilkington* v. *Gray*, [1899] A. C. 401.

should be that there is no one clear, certain, and infallible test. "It has frequently been attempted," said Sir H. J. Fust in *Mudway* v. *Croft* (*s*), "to furnish some general rules which might serve as guides to Courts of law in the investigation and decision of cases of this description, but all endeavours to do so have failed; each case has some distinguishing features; each case must be governed by its own peculiar circumstances. . . . It is absolutely and essentially necessary to look to the peculiar circumstances of each individual case: and to judge from the whole character of the person whose mental capacity is the subject of inquiry, what was the state and condition of the mind of that individual, not only with respect to the immediate times at which a will is executed, but at the intermediate stages of his life."

Each case must be governed by its own peculiar circumstances.

It was at one time suggested that the true test of unsoundness of mind was the presence of delusion. "The true criterion, the true test, of the absence or presence of insanity," said Sir John Nicholl in *Dew* v. *Clark* (*t*), "I take to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely delusion. Wherever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination, and wherever at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, such a patient is said to be under a delusion, in a peculiar half technical sense of the term; and the absence or presence of delusion so understood forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity to be almost, if not altogether, convertible terms; so that a patient under a delusion, so understood, on any subject or subjects in any degree is for that reason essentially mad or insane on such subject or subjects in that degree. On the contrary, in the absence of any such delusion, with whatever extravagances a supposed lunatic may be justly chargeable, and how like soever

At one time it was suggested that the presence or absence of delusions was the sole test.

(*s*) (1843) 3 Curt. at p. 675.
(*t*) (1826) 3 Add. at p. 90.

to a real madman he may speak or act on some or on all subjects, still, in the absence . . . of anything in the nature of delusion so understood as above, the supposed lunatic is, in my judgment, not properly or essentially insane" (*u*). But although the presence of delusion is indeed a prevailing characteristic of insanity, it is obvious from what has already been stated that this test breaks down in its application to the varying forms which insanity may assume. It excludes on the one hand cases of undoubted testamentary incapacity in which, although no actual delusions are present, the mind is so weakened and impaired as to be utterly incapable of coherent thought, such cases, for example, as have been described under the headings of dementia and idiocy (*x*). On the other hand, it includes cases in which testamentary capacity undoubtedly exists, for instance where delusions are present which neither affect the general faculties of the mind nor influence the testator in making his will. Nay more, sane people often imagine things to exist which have no existence in reality, and display the greatest obstinacy in adhering to their convictions (*y*).

This test breaks down when applied in practice.

"Delusion" defined.

(*u*) "Delusion" has been variously defined: "the belief of facts which no rational person would have believed": Sir J. Nicholl in *Dew* v. *Clark* (Dr. Haggard's report, p. 7); "a pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity": Dr. Willis, quoted by Sir J. Nicholl in *Dew* v. *Clark*, 3 Add. at p. 91 (see also *Wheeler* v. *Alderson*, (1831) 3 Hagg. at p. 598; *Frere* v. *Peacocke*, (1846) 1 Rob. 445); "the belief in things, as realities, which exist only in the imagination of the patient. The frame or state of mind which indicates his incapacity to struggle against such an erroneous belief constitutes an unsound frame of mind": Lord Brougham in *Waring* v. *Waring*, (1848) 6 Moo. P. C. at p. 354; "the belief in things impossible; the belief in things possible, but so improbable, under the surrounding circumstances, that no man of sane mind would give them credit, and the carrying to an insane extent impressions not in their nature irrational": Dr. Lushington in *Prinsep* v. *Dyce Sombre*, (1856) 10 Moo. P. C. at p. 247; see these definitions considered and commented on by Sir J. P. Wilde in *Smith* v. *Tebbitt*, (1867) 1 P. & D. at pp. 401 *et seq*.

(*x*) *Ante*, pp. 52, 53. Sir John Nicholl seems to doubt the existence of such cases: see *Wheeler* v. *Alderson*, (1831) 3 Hagg. 599; but *Bannatyne* v. *Bannatyne*, (1852) 2 Rob. 472 (see at p. 482), and *Nichols* v. *Binns*, (1858) 1 S. & T. 239, are cases where no delusion was alleged to exist.

(*y*) Sir H. J. Fust in *Chambers* v. *The Queen's Proctor*, (1840) 2 Curt. at p. 448, said: "I do not consider that the case of *Dew* v. *Clark* goes to the full extent that a will, under whatever circumstances, must necessarily be invalid because the deceased might entertain notions which might have no foundation; but the Court must look to see whether the delusion be an insane delusion, and continued to be an insane delusion, and was so

"What else gives rise," said Sir J. P. Wilde in *Smith* v. *Tebbitt* (*z*), "to unfounded fears, unjust suspicions, baseless hopes, or romantic dreams?"

It is therefore clear that the existence of mental delusions thus defined is not capable of being erected into an universal test of mental disease.

Where delusions exist, the jury are to ask themselves the question, "Can I understand how any man in the possession of his senses could have believed such a thing?"

Sir J. Hannen's observations to the jury in *Boughton* v. *Knight* (*a*) give, however, a very fair description of the test for insane beliefs where these exist. "You must remember," he said, "that the tribunal that is to determine the question, whether judge or jury, must of necessity take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure in this sense: that you should say, 'I do not believe such and such a thing, and therefore a man who believes it is insane.' Nay more, you must not say, 'I should not have believed such and such a thing; therefore the man who did believe it is insane.' But you must of necessity put to yourself this question and answer it: 'Can I understand how any man in possession of his senses could have believed such and such a thing?' And if the answer you give is, 'I cannot understand it,' then it is of the necessity of the case that you should say the man is not sane."

In arriving at a conclusion as to whether a given testator was sane or insane,

The remarks of Sir J. P. Wilde in *Smith* v. *Tebbitt* (*b*) on the subject of the test of mental disease, whether delusions are or are not present, deserve the closest attention. "No man knows aught of the condition of another's mind," said the learned judge, "except by comparison with his own. And in instituting this comparison we recognise the general fact that all mankind are endowed with the same senses, moved by the like emotions, governed by the same restraints, and guided by the same faculties. All these vary in their force and action in different individuals, or the same individual at different times. But they vary within certain limits, and

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indelibly fixed in the mind of the deceased, that no reasoning, no demonstration, no remonstrance of friends, could convince him that it was void of foundation."

(*z*) (1867) 1 P. & D. at p. 402.

(*a*) (1873) 3 P. & D. at p. 68.

(*b*) (1867) 1 P. & D. at pp. 403 *et seq.*

his words and deeds are to be referred to the standard which by experience is found to be the common standard of the human race

certain limits only. It is when the words or deeds of others, referred to our own standard and that which by experience is found to be the common standard of the human race, appear to transgress those limits, that we suspect these common senses, emotions, and faculties which we know to exist, to be the subjects of disorder or disease. If the divergence be very marked, and exhibit itself either on many subjects or with uniform constancy in the behaviour of the individual, we pronounce disease without hesitation. In proportion as the divergence is either casual or trifling, or open to some other probable solution, the inquiry is difficult, and the judgment hesitates. Here then, I think, is the simple rule by which mankind in general pronounce upon mental disease. But to those who have studied the subject of insanity another and alternative method is open. That alternative method," continued the learned judge in a passage which there has already been occasion to quote (*b*), "is the alternative contrast with the insane which the medical expert, through long familiarity with the symptoms of insanity, is enabled to make. It is the office of the Court, then, to inform itself, as far as opportunity permits, of the general results of medical observation, and to approach the subject on the two opposite sides thus indicated—searching for a fit conclusion by alternately presenting the parallel of sanity and insanity to the sayings and doings of the deceased."

and compared with the words and deeds of persons known to be insane,

and by this twofold comparison his sanity is to be judged.

It is submitted that this test, if strictly applied, will solve most, if not all of the difficulties which arise in investigations of this kind.

The testator's words and deeds at the time when he is alleged to have been insane are to be compared with his words and deeds at the time he was known to be sane,

There is one further point which demands notice in this connection. "When the sanity of an individual is in question," says Dr. Ray in his work on the Medical Jurisprudence of Insanity, in a passage more than once quoted by judges of the Prerogative and Probate Courts (*c*), "instead of comparing him with a fancied standard of mental soundness, . . . his natural character should be diligently investigated, in order to determine whether the apparent indication of

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(*b*) *Ante*, p. 54.

(*c*) Sir H. J. Fust in *Mudway* v. *Croft*, (1843) 3 Curt. 677; Sir J. P. Wilde in *Smith* v. *Tebbitt*, (1867) 1 P. & D. 421.

madness is not merely the result of the ordinary and healthy constitution of the faculties. Compare a man with himself, his acts and thoughts now, with his acts and thoughts at some previous period when his mind was in undoubted health. You will the better detect what is morbid, than if you set up a general comparison with the thoughts and acts of mankind."

or with those of mankind whom in general temperament and character he most resembled.

"It is a variation of this reflection," said Sir J. P. Wilde (*d*), "to say, 'Compare a man's acts and thoughts with those of mankind whom in general temperament and character he most resembles.' It may be that there is no period of undoubted health in the previous life of the patient to which you can refer, or the details of it may be wanting; and, in the absence of these, the best standard of comparison will present itself in persons whose general temperament and character have some resemblance, the closer the better, to those of the individual whose sanity is in question" (*e*).

The burden of proving that the testator was of sound mind is primarily on those who propound his will.

That burden is discharged, in a normal case, by proof of the execution of the will.

Burden of Proof.—A person who propounds a will undertakes to satisfy the Court of Probate that the testator who made it was of sound and disposing mind (*f*). But if a will rational on the face of it is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding (*g*). If therefore the will, not irrational on the face of it, is produced and its execution proved, and no other evidence is offered, the Court will, on that evidence alone, pronounce for the will (*h*). For, it is said, sanity must be presumed until the contrary is shown (*i*), and until proof of habitual insanity is made, the presumption is

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(*d*) In *Smith* v. *Tebbitt*, (1867) 1 P. & D. 421.

(*e*) Cf. *Austen* v. *Graham*, (1854) 8 Moo. P. C. 493.

(*f*) Lord Brougham in *Waring* v. *Waring*, (1848) 6 Moo. P. C. 355; see *Smee* v. *Smee*, (1879) 5 P. D. at p. 91. As to the admissibility as evidence of sanity of letters written *to* the testator, see *Wright* v. *Tatham*, (1837) 7 A. & E. 313, affirmed 4 Bing. N. C. 489.

(*g*) Sir C. Cresswell in *Symes* v. *Green*, (1859) 1 S. & T. 402.

(*h*) *Sutton* v. *Sadler*, (1857) 3 C. B. (N. S.) at p. 98; *Wheeler* v. *Alderson*, (1831) 3 Hagg. at p. 587.

(*i*) Sir John Nicholl in *Burrows* v. *Burrows*, (1827) 1 Hagg. 113; *Fulleck* v. *Allinson*, (1830) 3 Hagg. 542; *Wheeler* v. *Alderson*, (1831) 3 Hagg. 598; Sir C. Cresswell in *Nichols* v. *Binns*, (1858) 1 S. & T. at p. 243.

When execution is proved, those who impeach the will must displace the presumption that the testator was rational.

that the party agent, like all human creatures, was rational (*j*). And if the party opposing the will gives some evidence of incompetency, but not sufficient to disturb the belief of the Court in the sanity of the testator, the presumption in favour of competency will prevail (*k*).

But when the whole evidence is before the Court, the will must be pronounced against, unless the evidence as a whole establishes that the testator was of sound mind.

It has therefore been said that the burden of proof lies upon the party who undertakes, upon the ground of insanity, to defeat the will (*l*), and that, if derangement be alleged, it is incumbent on the party alleging it to prove such derangement (*m*). But when the whole case is before the Court on evidence given on both sides, the decree of the Court must be against the validity of the will, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it (*n*).

It thus appears that the burden of proof often shifts about in the process of the cause, according as the successive steps of the inquiry, by leading to inferences decisive until rebutted, cast on one or the other party the necessity of protecting himself from the consequences of such inferences (*o*).

An additional burden of proving the testator's sanity is on those who propound the will if circumstances of suspicion arise at the outset of the case,

It is to be observed that though, as a general rule, the onus of proving insanity rests upon those who seek to defea the will upon that ground, yet if circumstances of grave suspicion arise at the outset of a case, the burden of proving, and very satisfactorily proving, the testator's sanity rests upon the propounding party (*p*).

Thus, where the testator has been found a lunatic by inquisition from a period anterior to the execution of the will, that fact, though not in itself conclusive as against the will (*q*), is sufficient to rebut the ordinary presumption in

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(*j*) Sir William Wynne in *Cartwright* v. *Cartwright,* (1793) 1 Phill. at p. 100.

(*k*) *Sutton* v. *Sadler,* (1857) 3 C. B. (N. S.) at p. 98.

(*l*) Sir John Nicholl in *Dew* v. *Clark,* (1826) 3 Add. 86; *Wheeler* v. *Alderson,* (1831) 3 Hagg. 598.

(*m*) Lord Thurlow in *Att.-Gen.* v. *Parnther,* (1792) 3 Bro. C. C. 443.

(*n*) Sir C. Cresswell in *Symes* v. *Green,* (1859) 1 S. & T. 402; *Sutton* v. *Sadler,* (1857) 3 C. B. (N. S.) at p. 98; Sir J. P. Wilde in *Smith* v. *Tebbitt,* (1867) 1 P. & D. 436; *Keays* v. *McDonnell,* (1872) Ir. R. 6 Eq. 611.

(*o*) Lord Brougham in *Waring* v. *Waring,* (1848) 6 Moo. P. C. 355.

(*p*) *Ibid.*, p. 356; and see the cases cited *ante,* p. 59, note (*i*).

(*q*) *Rodd* v. *Lewis,* (1755) 2 Lee, 176; *Watts,* (1837) 1 Curt. 594.

as where the testator has been found a lunatic by inquisition,

favour of the will, and to require the party propounding it to prove that the testator was of sound mind at the time when the will was executed (*r*). The presumption of law, in such a case, is that the verdict of the jury under the commission of lunacy was well founded, and that the deceased continued lunatic so long as the commission was not superseded. It is true that a person so circumstanced may have entirely recovered before the commission has actually been superseded; it is true that he may have partially recovered, may have had lucid intervals; but the *onus probandi* must be upon whoever asserts the affirmation of complete or partial recovery (*s*).

or where the will "sounds to folly."

Again, if the will itself is couched in incoherent, irrational, or strange terms, or, as it is sometimes put, "sounds to folly," that in itself raises a doubt as to the testator's sanity in the mind of the Court, which it is the duty of the person propounding it to remove. Swinburne (*t*), indeed, says that, "if in the testament there be a mixture of wisdom and folly, it is to be presumed that the same was made during the testator's frenzy; insomuch that if there be but one word sounding to folly, it is presumed that the testator was not of sound mind and memory when he made the same." But this applies only to the case of a person who is sometimes sane and sometimes insane, and of whose state of mind when he wrote the will there is no direct proof (*u*). The mere extravagance and strangeness of the will, though sufficient to place upon the persons propounding it the burden of proving capacity, is not in itself conclusive evidence of unsoundness of mind (*x*).

The fact that the deceased became insane at a date subsequent, and even shortly subsequent, to the execution of the will,

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(*r*) Dr. Lushington in *Bannatyne* v. *Bannatyne*, (1852) 2 Rob. 477; *Prinsep* v. *Dyce Sombre*, (1856) 10 Moo. P. C. at p. 239.

(*s*) *Prinsep* v. *Dyce Sombre*, (1856) 10 Moo. P. C. at p. 244. Note that the reports made by "Chancery visitors" under the Lunacy Act, 1890, as to the condition of the lunatic from time to time, are to be destroyed on his death, and even if not destroyed, must be regarded as non-existent, and no order can be made to produce them: *Roe* v. *Nix*, [1893] P. 55.

(*t*) On Wills, Part II., s. 3.

(*u*) *Arbery* v. *Ashe*, (1828) 1 Hagg. 219.

(*x*) *Austen* v. *Graham*, (1854) 8 Moo. P. C. 493.

No inference of previous derangement arises from insanity *after* the execution of the will.

will not in itself invalidate the instrument by raising an inference of previous derangement, though where undoubted insanity is proved to have existed at a time subsequent to the execution of the will, previous acts otherwise of a doubtful character may assume a new complexion (*y*).

Where insane delusions are proved to have existed, the burden of proving that they did not affect the testamentary dispositions is on those who propound the will.

Further, if insane delusions upon any subject are proved or admitted to have existed, the burden of proving that the delusions under which the deceased laboured were of such a character that they could not reasonably be supposed to affect the disposition of his property is upon those who seek to support the will upon that ground (*z*). Unless the Court is satisfied that there can be no reasonable connection between the delusion and the bequests in the will, those who propound the will have not discharged the burden cast upon them, and the Court will pronounce against the instrument (*a*).

A will may be made by one generally of unsound mind during a lucid interval.

Will made during a Lucid Interval.—Although it may be proved or admitted that the testator was habitually of unsound mind, the Court will yet pronounce for his will if satisfied that, when the will was made, the testator was for the time being in the enjoyment of his sound senses. "If you can establish," said Sir William Wynne in *Cartwright* v. *Cartwright* (*b*), "that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it." Such intermissions are commonly called "lucid intervals."

By a lucid interval is meant a complete, though temporary, recovery of sanity.

By a "lucid interval" is meant not a cooler moment, an abatement of pain or violence or of a higher state of torture, but an interval in which the mind, having thrown off the disease, has recovered its general habit (*c*). "It must be

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(*y*) *Burrows* v. *Burrows*, (1827) 1 Hagg. 109; *Hoby* v. *Hoby*, (1828) 1 Hagg. 150; *Wheeler* v. *Alderson*, (1831) 3 Hagg. 599. It appears to be doubtful how far evidence that the deceased's relations were insane is admissible to prove hereditary constitutional insanity upon the part of the deceased himself: see *Marsh* v. *Tyrell*, (1828) 2 Hagg. 84, see 3 Curt. 667; *Frere* v. *Peacocke*, (1843) 3 Curt. 664, at p. 670.

(*z*) *Smee* v. *Smee*, (1879) 5 P. D. 91. *Vide ante*, pp. 50 *et seq.*

(*a*) *Ibid.*, p. 92.

(*b*) (1793) 1 Phill. 100.

(*c*) Lord Thurlow in *Att.-Gen.* v. *Parnther*, (1792) 3 Bro. C. C. at p. 444.

shown," said Sir John Nicholl in *Groom* v. *Thomas* (*d*), "not merely that the party whose act is the subject of inquiry was restored to a state of calmness, and to the ability of holding rational conversation on some topics, but that his mind, having shaken off the disease, was again become perfect, was sound upon all subjects, and that no delusion remained."

The mind need not be restored to all its former vigour, provided the morbid affection no longer vitiates the judgment.

But it is not necessary that the mind should be restored to all its former vigour. Although the mind, after the removal of the disease, may labour under a languor and debility, yet, if it be proved that the morbid affection no longer obscures or vitiates the judgment, that will suffice (*e*). But such a state will be examined with jealousy in order to ascertain whether the disorder was in fact removed (*f*). Nor is it necessary that the disorder should be permanently eradicated; it may only intermit; it may be liable to return; but if the mind be apparently rational upon all subjects, and no symptoms of delusion can be called forth on any subject, this may constitute a lucid interval (*g*).

Nor need the recovery be permanent.

The burden of proving a lucid interval is upon those who allege that the will was executed during its prevalence.

If derangement be proved or be admitted to have existed at any particular period anterior to the will, but a lucid interval be alleged to have prevailed at the time when the will was executed, then the burden of proof attaches on the party alleging such lucid interval, and he must show sanity and competence at the period when the act was done, and to which the lucid interval refers (*h*).

"If unsoundness extending over years be once proved by those who oppose a will," said Sir J. P. Wilde in *Smith* v. *Tebbitt* (*i*), "there is no doubt as a proposition of

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(*d*) (1829) 2 Hagg. at p. 434.

(*e*) *Holyland*, (1805) 11 Ves. at p. 11.

(*f*) *Att.-Gen.* v. *Parnther*, (1792) 3 Bro. C. C. 441.

(*g*) *Wheeler* v. *Alderson*, (1831) 3 Hagg. 599.

(*h*) *Per* Lord Thurlow in *Att.-Gen.* v. *Parnther*, (1792) 3 Bro. C. C. 443; see also *Hall* v. *Warren*, (1804) 9 Ves. 611; *per* Lord Eldon in *Holyland*, (1805) 11 Ves. at p. 11; Sir W. Wynne in *Cartwright* v. *Cartwright*, (1793) 1 Phill. at p. 100; Sir J. Nicholl in *White* v. *Driver*, (1809) 1 Phill. at p. 88; in *Kindleside* v. *Harrison*, (1818) 2 Phill. at p. 465; in *Groom* v. *Thomas*, (1829) 2 Hagg. at p. 434; see *Prinsep* v. *Dyce Sombre*, (1856) 10 Moo. P. C. at p. 245.

(*i*) (1867) 1 P. & D. at p. 434; see *Waring* v. *Waring*, (1848) 6 Moo. P. C. at p. 357.

A diseased state of mind is presumed to continue.

law that they are not bound to carry the evidence of insane actions or delusions up to the very moment of the testament. A diseased state of mind once proved to have established itself would be presumed to continue, and the burden of showing that health had been restored falls upon those who assert it."

The evidence in support of a lucid interval must be clear.

The evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement (*k*).

Proof of the existence of a lucid interval often a matter of extreme difficulty.

In this connection it may be well to observe that, in cases particularly of monomania, the proof of a lucid interval is a matter of extreme difficulty, for the reason that the patient so affected is not infrequently rational to all outward appearance, without any real abatement of his malady (*l*). Repeated cases have made it clear that persons essentially insane may be calm, may do acts, hold conversations, and even pass in general society as perfectly sane (*m*). Remarkable instances have occurred of the extraordinary power which madmen often possess of concealing their infirmity (*n*). However calm and rational, then, the conduct and

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(*k*) Lord Thurlow in *Att.-Gen.* v. *Parnther,* (1792) 3 Bro. C. C. 443; see *Ayrey* v. *Hill,* (1824) 2 Add. at p. 209; but see *per* Lord Eldon in *Holyland,* (1805) 11 Ves. at p. 11.

Frequent conflicts of evidence in cases where the testamentary capacity of the testator is in issue.

(*l*) *Brogden* v. *Brown,* (1825) 2 Add. 445. It is this circumstance—the different state and condition of the testator's mind at different times—coupled with the different abilities of witnesses to form opinions as to sanity or the reverse state, and their different opportunities of seeing the patient, that leads to the conflicts of evidence so often observable in testamentary suits of this description. So much the more is it incumbent upon the Court to weigh the evidence with very great attention, to rely but little upon mere opinion one way or the other, but to be guided in its own judgment by facts proved and by acts done rather than by the judgment of others: *Kindleside* v. *Harrison,* (1818) 2 Phill. 457, 459.

(*m*) *Groom* v. *Thomas,* (1829) 2 Hagg. 442.

(*n*) *Dew* v. *Clark,* (1826) 3 Add. 88. Two instances are mentioned in the trial of James Hadfield in Howell's State Trials, Vol. XXVII., pp. 1315 *et seq.* One is a case in which Mr. Erskine cross-examined for a whole day an alleged lunatic with a view to showing that he was insane. Not knowing the particular delusion under which the man was suffering, Mr. Erskine could extort no symptom of insanity. At length, the subject of the delusion having been communicated to Mr. Erskine, a question was put to the alleged lunatic upon that subject, upon which the latter said, with the utmost gravity and emphasis, "I am the Christ!" The other is a case where a lunatic named Wood, who twice indicted his keeper for detaining him in a madhouse, was on the first occasion trapped by a question on the subject

In cases of monomania, the patient's capacity for transacting business, etc., does not exclude the possibility of his being of unsound mind.

ordinary behaviour of the monomaniac may be, however great his apparent capacity in the management of his affairs, it is still possible that he nurtures insane ideas and hallucinations on particular subjects, and is thus diseased in mind (*o*). It has therefore been said that the fact that a man is capable of transacting business, whatever its extent, or however complicated it may be, and however considerable the powers of intellect it may require, does not exclude the idea of his being of unsound mind (*p*). The test of the existence of a lucid interval in such cases would appear to be that no symptom of delusion can be called forth at the time (*q*), even when the patient's attention is directed to the subject-matter of the delusion (*r*). The patient should be able to describe his feelings and talk *of the subject of his delusion* without betraying any signs of unnecessary vehemence or excitement (*s*).

The test of a lucid interval in such cases.

Distinction in this respect between various forms of insanity.

In this connection a distinction exists between cases of permanent insanity where delusions are present, on the one hand, and cases of temporary derangement resulting from delirium caused by illness or fever, on the other. For in delirium intervals of coolness and actual lucidity are much more common than when a permanent delusion has seized the mind (*t*); the apparently rational intervals of persons merely delirious are, for the most part, *really* such. Delirium being a fluctuating state of the mind, created by temporary excitement, in the absence of that excitement, to be ascertained by the appearance of the patient, the patient is most commonly really sane. Hence the probabilities, *à priori*, in favour of a

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of his delusion into displaying his madness on that point. On the second indictment all the ingenuity of the Bar and all the authority of the Court could not make him say one word upon the topic of his delusion, though he signified to those who were near him that it was still present in his mind; but, conscious that the delusion had occasioned his defeat on the former occasion, he obstinately kept it back. See also *Prinsep* v. *Dyce Sombre*, (1856) 10 Moo. P. C. 232.

(*o*) *Smith* v. *Tebbitt*, (1867) 1 P. & D. at p. 426.

(*p*) *Smee* v. *Smee*, (1879) 5 P. D. at p. 90.

(*q*) *Wheeler* v. *Alderson*, (1831) 3 Hagg. at p. 599.

(*r*) *Nichols* v. *Binns*, (1858) 1 S. & T. 245.

(*s*) Taylor, 732.

(*t*) *Hoby* v. *Hoby*, (1828) 1 Hagg. 158, 159.

lucid interval are infinitely stronger in a case of delirium than in one of permanent insanity (*u*).

Again, where a person is afflicted with habitual insanity *unaccompanied by delusions*, his apparent recollection of past transactions, and his reasoning justly with regard to them and with regard to the conduct of individuals, may be a true, and indeed the only indication of the existence of a lucid interval at the time when the will was made (*x*).

The weight to be given to the consideration that the provisions of the will are rational.

If any testamentary instrument originate with the deceased person himself, and all the contents thereof are rational and conformable to his habits and connection, to the state of his fortune and family, and especially if agreeable to former testamentary acts intended when the testator was undoubtedly of sound mind, then the contents furnish presumptive evidence that the testator was of sound mind when he did the acts necessary to carry such intentions into effect. But this is presumptive evidence only; for if it be proved *aliunde* that he was of unsound mind, then the act is void, for a man of unsound mind cannot make a valid will, even if the necessities of his family render it most desirable that he should do the act in question (*y*).

Strong presumptive evidence in favour of a lucid interval may arise from that circumstance,

It thus appears that very strong presumptive evidence in favour of the existence of a lucid interval may arise from the fact that the will itself is a rational instrument. Indeed, in *Cartwright* v. *Cartwright* (*z*) Sir William Wynne stated the proposition in terms so strong as to be, without the explanations and reservations which the context affords, to some extent misleading. "I think," he said, "the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to show the party did that which appears to

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(*u*) *Brogden* v. *Brown*, (1825) 2 Add. 445; *Dimes* v. *Dimes*, (1856) 10 Moo. P. C. 428.

(*x*) *Nichols* v. *Binns*, (1858) 1 S. & T. 245.

(*y*) Dr. Lushington in *Prinsep* v. *Dyce Sombre*, (1856) 10 Moo. P. C. 285.

(*z*) (1793) 1 Phill. at p. 100.

be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further" (*a*); and he cited Swinburne (*b*) in support of this proposition. "Unquestionably," added the learned judge, "there must be complete and absolute proof that the party who had so formed it did it without any assistance."

if the will is written by the testator without assistance.

The case of *Cartwright* v. *Cartwright* was the case of a lady, possessed of considerable property, who had for different periods of time been afflicted with insanity, accompanied by symptoms of the worst character. At and for some time preceding the period when the will was made, she was in such a state of mind that her hands were confined; she was tied down and not suffered to have a lighted candle. Being importunate for pen, ink, and paper, they were, by permission of her physician, given to her, and, her hands being untied, she sat down and wrote the will, which turned out to be a perfectly rational and proper instrument, the result of her own sole will and pleasure, not being dictated or suggested by any person. It was under these circumstances, and after an exhaustive review of all the evidence in the case, that Sir William Wynne came to the conclusion already adverted to. And therefore it must not hastily be concluded from his words that every rational act, rationally done, is under all circumstances sufficient to constitute a lucid interval; it was the particular manner in which the act was done in the case before him that led Sir William Wynne to the conclusion that there was a lucid interval in that particular case (*c*).

But not every rational act rationally done is sufficient to establish a lucid interval,

for after the paroxysm has passed away, insanity may still lurk in the mind of the patient.

It is, however, true to say that a rational act done in a rational manner, while not perhaps "the strongest and best proof," certainly not conclusive proof of a lucid interval, does contribute materially to the establishment of it (*d*). But it

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(*a*) And see Sir John Nicholl's remarks in *Scruby* v. *Fordham*, (1822) 1 Add. 90; *Evans* v. *Knight*, (1822) *ibid.* at p. 237.

(*b*) On Wills, Part II., s. 3.

(*c*) Sir H. J. Fust in *Chambers* v. *The Queen's Proctor*, (1840) 2 Curt. 446, 447.

(*d*) *Bannatyne* v. *Bannatyne*, (1852) 2 Rob. 501; *Nichols* v. *Binns*, (1858) 1 S. & T. 244.

must always be remembered that after the paroxysm has passed, insanity may still be lurking in the mind of the patient, with nothing apparent on the surface to show it. In such cases, particularly where delusions are proved to have existed, it is not sufficient that the will upon the face of it should be what might be considered a rational will. The Court will look below the surface and consider whether the testator was in such a state of mind that he could rationally take into consideration, not merely the amount and nature of his property, but the interest of those who by personal relationship or otherwise had claims upon him (*e*), free from the influence of morbid delusions which might affect his will.

The incoherence, etc., of the will may be evidence against the existence of a lucid interval.

On the other hand, as has already been stated, the incoherence or inofficious character of the will may in itself raise a doubt in the mind of the Court, which the persons propounding the will must dispel before the document will be pronounced for (*f*).

Incapacity arising from physical infirmity or the decay of advancing age.

It remains to consider the law relating to unsoundness of mind arising from another cause, namely, from want of intelligence occasioned by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement.

If by these means the mental power is so reduced that the testator is incapable of understanding and appreciating the testamentary act, the will is void.

If by these means the mental power is reduced below the ordinary standard to such a degree that sufficient intelligence to understand and appreciate the testamentary act in its different bearings is wanting, the power to make a valid will is gone. A man may not be so insane as to justify his being found a lunatic by inquisition, and yet may not be equal to the important act of disposing of his property by his will (*g*). 'In order to constitute a sound disposing mind," said Erskine, J. in *Harwood* v. *Baker* (*h*), "a testator must not only be able to understand that he is by his will giving

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(*e*) *Smee* v. *Smee*, (1879) 5 P. D. 92.

(*f*) See *ante*, p. 61; and see *Banks* v. *Goodfellow*, (1870) L. R. 5 Q. B. 570; *Clarke* v. *Lear*, (1791) cited in *Cartwright* v. *Cartwright*, (1793) 1 Phill. at p. 119.

(*g*) *Mountain* v. *Bennet*, (1787) 1 Cox, at p. 356.

(*h*) (1840) 3 Moo. P. C. at p. 290.

the whole of his property to one object of his regard; but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and the protection of the law is in no cases more needed than in those where the mind has been too much enfeebled to comprehend more objects than one." And it was held in *Combe's Case* (*i*) that sane memory for the making of a will is not at all times when the party can say yea or no, or has life in him, nor when he can in some things answer with sense; but he ought to have judgment to discern and to be of perfect memory, otherwise his will is void (*k*).

Secus if the testator, though his mind is to some extent enfeebled, can still appreciate the nature and extent of his property and the claims of others upon his bounty.

Old age or illness alone does not deprive a man of the power of making a testament.

On the other hand, though the mental powers may be reduced below the ordinary standard, yet if the faculties retain sufficient strength to comprehend the extent of the property to be disposed of and the claims of others upon the testator's bounty, the power to make a will remains (*l*). Old age alone does not deprive a man of the power of making a testament, for the law allows a person at any age to make a will, provided he retains the disposing faculties of his mind (*m*). Nor does the feebleness arising from illness. "*Non sani tantum*," says Voet, "*sed et in agone mortis positi, seminece ac balbutiente linguâ voluntatem promentes, recte testamenta condunt, si modo mente adhuc valeant*" (*n*). "By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest degree, otherwise very few could make testaments at all; neither has it been understood that

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(*i*) (1606) Moore (K. B.) 759; *S.C.* 8 Vin. Abr. 43, No. 22.

(*k*) See *The Marquis of Winchester's Case*, (1599) 6 Co. Rep. 23, where it was said: "By law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason"; and see *Marsh* v. *Tyrrell*, (1828) 2 Hagg. at p. 122.

(*l*) *Banks* v. *Goodfellow*, (1870) L. R. 5 Q. B. 566.

(*m*) *Kindleside* v. *Harrison*, (1818) 2 Phill. 462. Great age raises some doubt of capacity, but only so as to excite the vigilance of the Court: *ibid.*

(*n*) Commentary on the Pandects, lib. 28, tit. 1, s. 36, quoted by Cockburn, C.J., in *Banks* v. *Goodfellow*, (1870) L. R. 5 Q. B. 566.

Though the mind be in some degree enfeebled, there may still be the capacity to judge all the circumstances which enter into the nature of a testament.

he must possess them in as great a degree as he may formerly have done, for even this would disable most men in the decline of life. The mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory" (*o*).

Where a testator has given instructions for a will during health, and executes it during illness, a slight degree of mental capacity will suffice.

If a testator, while in a state of health, has given instructions for a will, and it is prepared in accordance with those instructions, a very slight degree of mental capacity at the time of the execution will, it should seem, suffice (*p*). Thus where a testatrix was on her deathbed in a state approaching insensibility at the time when the will, drawn up in accordance with the instructions she had previously given when perfectly capable, was submitted to her for execution: it was held that although she might not be in a state to remember and understand the instructions she had given; although she might be incapable—even if roused—of understanding each clause if it had been put to her; yet if she were capable of understanding, and did understand, that she was engaged in executing the will for which she had given instructions, that was sufficient (*q*).

The fact that the testator was ill or aged may render him susceptible to importunity and influence.

Feebleness and weakness of intellect caused by advanced age or illness, even though insufficient in itself to negative testamentary capacity, is frequently a very important element in testamentary cases upon another ground, namely, that persons so affected are peculiarly susceptible to importunity and improper influence in relation to their testamentary dispositions (*r*). For if a will be prepared by a person who benefits largely thereunder, and it be proved that the testator

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(*o*) *Den* v. *Vancleve*, 2 Southard, at p. 660, cited with approval by Cockburn, C.J., in *Banks* v. *Goodfellow*, (1870) L. R. 5 Q. B. 567; and see *Harrison* v. *Rowan*, (1820) 3 Washington's Rep. (U. S.), at p. 585; *Stevens* v. *Vancleve*, (1822) 4 Washington's Rep. (U. S.), at p. 267.

(*p*) *Harwood* v. *Baker*, (1840) 3 Moo. P. C. at p. 313.

(*q*) *Parker* v. *Felgate*, (1883) 8 P. D. 171.

(*r*) *Vide post*, p. 88.

was in a feeble and weak state at the time, that is a circumstance which will rouse the vigilance of the Court; and the Court, before pronouncing for the will, must be satisfied that the testator was cognizant of its contents and in a condition to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing (*s*).

It remains to consider the cases of certain other classes of persons who are, according to the old text-books on ecclesiastical law, incapable, from want of discretion, of making a will.

SUB-SECTION 3.—*Persons Drunk.*

One who is drunk at the time of making his will cannot make a valid testament if his drunkenness deprives him of reason and understanding,

"He that is overcome with drink," says Swinburne (*t*), "during the time of his drunkenness is compared to a madman; and therefore, if he make his testament at that time, it is void in law, which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding be obscured, and his memory troubled, yet he may make his testament being in that case." The effects of drunkenness or ebriety only subsist whilst the cause, the excitement, visibly lasts; there can scarcely be such a thing as latent ebriety (*u*). Therefore all that need be shown in the case of a will made by an habitual drunkard would seem to be that he was free from the exciting influence of drink at the time when the will was executed, or that the excitement, if it existed at that time, did not exist in such a degree as to prevent the testator from appreciating and understanding the testamentary act in all its bearings (*y*). Intoxication has, therefore, been said to be in truth temporary insanity; the brain is incapable of discharging its proper functions; there is temporary mania: but that species of derangement, when the exciting cause is removed, ceases; sobriety brings with it a return of reason (*z*).

but an habitual drunkard may make a will when he is sober, for there is no such thing as latent ebriety.

(*s*) *Dufaur* v. *Croft*, (1840) 3 Moo. P. C. 136; *Harwood* v. *Baker*, (1840) 3 Moo. P. C. 282.

(*t*) Part II., s. 6. As to wills destroyed by persons under the influence of drink, *vide post*, p. 199, note (*z*).

(*u*) *Ayrey* v. *Hill*, (1824) 2 Add. at p. 210.

(*y*) *Ibid.*; *Banks* v. *Goodfellow*, (1870) L. R. 5 Q. B. at p. 566.

(*z*) *Wheeler* v. *Alderson*, (1831) 3 Hagg. at p. 602.

SUB-SECTION 4.—*Persons Deaf and Dumb.*

One who is deaf and dumb may make a will by signs,

"One who is both deaf and dumb from his nativity," says Swinburne (*a*), "cannot make any kind of testament or last will (*b*); unless it sufficiently appears that he understands what a testament means, and has a desire to make one; then he may by signs and tokens declare his testament (*c*). One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then, in case he be learned and be able to write, he may with his own hand write his last will and testament, and so by art supply the defect of nature (*d*). But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, *i.e.*, if he have understanding he may make his testament by signs, otherwise not at all (*e*). Such as can speak and cannot hear may make their testaments as if they could both speak and hear, whether that defect came by nature or otherwise. Such as be speechless only, and not void of hearing, if they be learned, may very well make their testaments themselves by writing; if they cannot write, they also may make their testaments by signs, so that the same signs be sufficiently well known to such as then be present" (*f*).

or by writing,

Persons deaf, but not dumb.

Persons dumb, but not deaf.

(*a*) Part II., s. 10.

(*b*) Sir W. Page Wood, in *Harrod* v. *Harrod,* (1854) 1 K. & J. at p. 9, said: "The presumption is always in favour of sanity, and there is no exception to this rule in the case of a deaf and dumb person; but the onus of proving the unsoundness of mind of such a person must rest on those who dispute his sanity. There is nothing in our experience which would lead us to conclude that the deaf and dumb are generally of unsound mind."

(*c*) A testator who was deaf and dumb made his will by communicating his testamentary instructions to an acquaintance by signs and motions. The will, prepared in conformity with these instructions, was duly executed by the testator, and was admitted to probate by the Court, after an affidavit had been filed setting forth the signs by which the testator signified that he understood and approved of the provisions of the will: *Geale,* (1864) 3 S. & T. 431; and see *Owston,* (1862) 2 S. & T. 461.

(*d*) Swinb., Part II., s. 10.

(*e*) *Ibid.*

(*f*) *Ibid.*

SUB-SECTION 5.—*Persons Blind or Illiterate.*

The Court must be satisfied that a testator who was blind knew and approved of the contents of his will.

But it is not essential to prove that the will was read over to him.

The Court, before pronouncing for a will executed by a blind person, must be satisfied that the testator knew and approved of its contents (*g*). It is not, however, necessary to prove that the identical paper which the testator signed as his will was read over to him (*h*). If the will is proved to be in conformity with the instructions given by the testator, that will suffice, although not proved to have been read over to the testator previous to execution (*i*).

Persons who cannot read.

So also, if the testator is unable to read, the Court must be satisfied that the contents of his will were brought to his knowledge, and that he approved of them. For though the law in other cases may presume that the person who executes a will knows and approves the contents thereof, yet that presumption ceaseth, where by defect of education he cannot read (*k*).

Section 2.

OF PERSONS INCAPABLE FROM WANT OF LIBERTY AND FREE WILL.

Although a testator, at the time of the execution of the will, were of sound mind, memory, and understanding, and the will good so far as relates to its execution and attestation, yet it may be an instrument having no legal validity. For if the testator executed it under coercion or under the influence of fear, or in consequence of impressions created in his mind by fraudulent misrepresentations, in none of these cases can the instrument, in contemplation of law, properly be considered as his will (*l*).

(*g*) Swinb., Part II., s. 11; *Barton* v. *Robins,* (1768) 3 Phill. 455, n. (*b*); *Moore* v. *Paine,* (1728) 2 Lee, 595; *Fincham* v. *Edwards,* (1842) 3 Curt. 63, 4 Moo. P. C. 198 on appeal; *Axford,* (1860) 1 S. & T. 540.

(*h*) *Fincham* v. *Edwards, ubi supra.* A testator who was so blind that he could do little more than distinguish night from day was held capable of acknowledging his signature to a will: *King* v. *Berry,* (1871) Ir. R. 5 Eq. 309.

(*i*) *Fincham* v. *Edwards, ubi supra.*

(*k*) *Barton* v. *Robins, ubi supra;* 4 Burn's Eccl. Law, p. 74, 9th ed.

(*l*) *Boyse* v. *Rossborough,* (1856—7) 6 H. L. C. at p. 44.

SUB-SECTION 1.—*Wills obtained by Fraud.*

Wills obtained by fraud may be set aside; as where a false representation is made respecting the character of an individual.

Whether or not a fraud practised shall overthrow the will is in the discretion of the judge.

The fact that a will has been obtained by fraud (*m*) is sufficient ground for setting it aside (*n*). "If a testator be circumvented by fraud," says Swinburne (*o*), "the testament loseth its force." And there cannot be a stronger instance of fraud than a false representation respecting the character of an individual, made to the testator for the purpose of inducing him to revoke a bequest made in favour of that individual, or to exclude the person so calumniated from any benefit in his will (*p*). So if some person, by falsehood, raises prejudices in the mind of the testator against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions thus formed to their disadvantage may never be removed, such contrivance may be equivalent to positive fraud, and may render invalid any will executed under false impressions so kept alive (*q*). In every case it is left to the discretion of the judge, comparing the deceit with the capacity or understanding of the person deceived, to decide whether the fraud is such as may overthrow the testament or not (*r*).

SUB-SECTION 2.—*Wills obtained by Coercion, Force, or Fear.*

Wills obtained by

If it should be demonstrated that actual force was used to

Fraud must be specially pleaded, a plea of undue influence being insufficient to let in a charge of fraud.

(*m*) Fraud has sometimes been regarded as a species of undue influence; it is a mere question of terms, but by the rules of pleading, established in the Court of Probate since December, 1865, fraud, which includes misrepresentation, is the subject of a separate plea, and undue influence used in a plea raises the question of coercion alone: *Parfitt* v. *Lawless,* (1872) 2 P. & D. 471. A plea of undue influence is insufficient to let in a charge of fraud, but leave to amend by inserting a plea of fraud may be granted during the progress of the hearing—*White* v. *White,* (1862) 2 S. & T. 504—even after the plaintiff's case is closed: *Riding* v. *Hawkins,* (1889) 14 P. D. 56.

(*n*) *Lord Donegal's Case,* (1751) 2 Ves. Sen. at p. 408.

(*o*) Part I., s. 3, pl. 32.

(*p*) Lord Lyndhurst in *Allen* v. *McPherson,* (1845—7) 1 H. L. C. at p. 207, citing *Butterfield* v. *Scawen,* (1775) not reported. See *Grindall* v. *Grindall,* (1830) 4 Hagg. 10, which case was founded on a charge of this description, and failed from want of proof, but not upon any doubt of the duty of the Court to refuse probate had the charge been established: *White* v. *White,* (1862) 2 S. & T. 504.

(*q*) *Boyse* v. *Rossborough,* (1856—7) 6 H. L. C. 49.

(*r*) Swinb., Part V., s. 3, pl. 3. See *Marsh* v. *Tyrrell,* (1828) 2 Hagg. at p. 123.

compel the testator to make the will, there can be no doubt that although the formalities required had been complied with, and the testator were of perfect mind and memory, yet such a will could never stand; but it is incumbent on the party who impeaches the will to show this (*s*). A will obtained by threats (*t*) is invalid; but it is said that "it is not every fear, or a vain fear, that will have the effect of annulling the will, but a just fear, that is, such as that indeed without it the testator had not made his testament at all, at least not in that manner . . . whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened; in the person threatening, his power and disposition; in the person threatened, the age, sex, courage, pusillanimity and the like" (*u*).

force cannot stand.

Wills obtained by threats are invalid.

The quality of the threats and the circumstances of the parties are to be taken into account.

Sub-section 3.—*Wills Obtained by Undue Influence.*

There is another ground, which though not so distinct as that of actual force or fear, nor so easy to be proved, yet if it be made out, will equally suffice to invalidate a will. That is dominion or influence acquired over a testator so as to prevent the exercise by him of his own discretion in the making of his will (*x*).

Wills obtained by "undue influence."

"There is no subject," said Sir James Hannen, addressing the jury in the case of *Wingrove* v. *Wingrove* (*y*), "upon which there is a greater misapprehension than upon that of undue influence. The misapprehension . . . arises from the particular form of the expression. We are all familiar with the use of the word 'influence'; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore, when exercised, even

By "undue influence" is meant not persuasion however strong, from motives however improper,

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(*s*) Eyre, C.B., in *Mountain* v. *Bennet*, (1787) 1 Cox, 355.

(*t*) See *Nelson* v. *Oldfield*, (1688) 2 Vern. 76.

(*u*) Godolph., Part III., Chap. XXV., s. 8; Swinb., Part VII., s. 2, pl. 7; see *Marsh* v. *Tyrrell*, (1828) 2 Hagg. at p. 123. As to preventing a testator by threats from revoking his will, *vide post*, p. 91; *ante*, p. 7.

(*x*) Eyre, C.B., in *Mountain* v. *Bennet*, (1787) 1 Cox, 355.

(*y*) (1886) 11 P. D. at p. 82.

though it may be very bad indeed, it is undue influence in the legal sense of the word. A young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. . . . A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour." Neither of these cases, shocking as they are, amounts to undue influence (*z*).

but *coercion.*

"To be undue influence in the eye of the law," continued the learned Judge, "there must be—to sum it up in one word —coercion (*a*). It must not be a case in which a person has been induced, by means such as I have suggested, to come to a conclusion that he will make a will in a particular person's favour; because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence (*b*).

It is only when the testator is coerced into doing that which he did not desire to do that it is undue influence.

Such coercion may be of various kinds, actual violence, or importunity upon weakness.

"The coercion may of course be of different kinds; it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the

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(*z*) Compare Lord Cranworth's remarks in *Boyse* v. *Rossborough,* (1856—7) 6 H. L. C. at p. 48.

(*a*) "There must be proof of something amounting to force and coercion in obtaining the act itself": Sir John Nicholl in *Williams* v. *Goude,* (1828) 1 Hagg. at p. 596. "Undue influence, and the importunity which is to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility": Parke, B., in *Barry* v. *Butlin,* (1838) 2 Moo. P. C. at p. 491. "Influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud": Cranworth, L.C., in *Boyse* v. *Rossborough,* (1856—7) 6 H. L. C. at p. 48. But since "fraud, which includes misrepresentation, is now the subject of a separate plea (see note (*m*) on p. 73, *supra*), undue influence used in a plea in this Court raises the question of coercion, and that only": Lord Penzance in *Parfitt* v. *Lawless,* (1872) 2 P. & D. at p. 471; and see *Sefton* v. *Hopwood,* (1855) 1 F. & F. 578; *Lovett* v. *Lovett,* (1857) 1 F. & F. 581.

(*b*) See *Baudains* v. *Richardson,* [1906] A. C. 169, at p. 184.

mere talking to him at that stage of illness, and pressing something upon him, may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

But considerations however improper are not undue influence, unless if the testator could speak his wishes he would say "this is not my wish, but I *must* do it."

"These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of some one else offering them, do not amount to undue influence, unless the testator is in such a condition that if he could speak his wishes to the last, he would say 'this is not my wish, but I must do it.'

"If therefore the act is shown to be the result of the wish and will of the testator at the time, then, however it has been brought about—for we are not dealing with a case of fraud—though you may condemn the testator for having such a wish, though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view—still, it is not undue influence" (*c*).

The influence to vitiate a will must not be the influence of affection or attachment, or the desire of gratifying the wishes of another. The importunity must be such as cannot be resisted.

"The influence to vitiate an act," said Sir John Nicholl in *Williams* v. *Goude* (*d*), "must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be very strong ground in support of a testamentary act: further there must be proof that the act was obtained by this coercion—by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear."

No amount of persuasion or advice will amount to undue influence.

It is thus clear that no amount of persuasion or advice, whether founded on feelings of regard or religious sentiment, or any other consideration, will avail to set aside a will, so long as the free volition of the testator to accept or reject that advice was not invaded (*e*). Appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,—these are all legitimate, and may fairly be pressed upon the testator (*f*).

(*c*) See *Baudains* v. *Richardson*, [1906] A. C. at p. 184.

(*d*) (1828) 1 Hagg. at p. 581; see *Sefton* v. *Hopwood*, (1855) 1 F. & F. at p. 580.

(*e*) Lord Penzance in *Parfitt* v. *Lawless*, (1872) 2 P. & D. at p. 474.

(*f*) Sir J. P. Wilde in *Hall* v. *Hall*, (1868) 1 P. & D. at p. 482.

But pressure so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made.

But—and this is the point where legitimate persuasion ends and undue influence begins—pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made (*g*). "Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, the testator may be led but not driven; his will must be the offspring of his own volition, and not the record of some one else's" (*h*).

The testator may be led but not driven.

Though undue influence is equivalent to "coercion," actual violence need not be used.

It thus appears that, though true to state that undue influence is equivalent to coercion (*i*), in the interpretation of that word some latitude must be allowed (*k*). It is not necessary that actual violence should be used or threatened, provided the will of the testator were overborne (*l*). Roll, C.J., in a very early case (*m*) said: "If a man make his will in his sickness by the over importuning of another, to the end that he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will" (*n*). But the importunity must be such as the testator was too weak to resist; such as to render the act no longer that of the deceased (*o*).

The influence must be exercised in relation to the will.

The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions (*p*). It is not sufficient to establish that a person has the power unduly to overbear the will of the testator;

(*g*) Sir J. P. Wilde in *Hall* v. *Hall*, (1868) 1 P. & D. at p. 482.

(*h*) *Ibid.*

(*i*) See note (*a*) on p. 76, *ante*.

(*k*) *Boyse* v. *Rossborough*, (1856—7) 6 H. L. C. at p. 48.

(*l*) *Ibid.*

(*m*) *Hacker* v. *Newborn*, (1654) Style, 427.

(*n*) See *Lamkin* v. *Babb*, (1752) 1 Lee, 7.

(*o*) *Kindleside* v. *Harrison*, (1818) 2 Phill. at p. 551; *Constable* v. *Tufnell*, (1833) 4 Hagg. at p. 485.

(*p*) Cranworth, L.C., in *Boyse* v. *Rossborough*, (1856—7) 6 H. L. C. at p. 51.

it is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced (*q*). But this principle must not be carried too far. Where the evidence shows that at or near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the persons benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised (*r*).

Burden of proving undue influence.

Burden of Proof.—It is said that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator (*s*). "In the Court of Probate," said Parke, B., in *Baker* v. *Batt* (*t*), "where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, he is bound to pronounce his opinion that the instrument is not entitled to probate. For if the party upon whom the burden of the proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of evidence where there is, fails to satisfy the tribunal of the truth of the proposition which he has to maintain, he must fail in his suit."

The burden of proving that the document is the last will of a free and capable testator is primarily upon those who propound the will.

But that burden is in general discharged by proof of due execution by a capable testator,

The burden of proof thus cast upon the person propounding the will is in general discharged by proof of capacity and the fact of execution, and when these have been proved the Court will, under ordinary circumstances, assume from them the

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(*q*) Sir J. Hannen in *Wingrove* v. *Wingrove,* (1885) 11 P. D. at p. 83.

(*r*) Cranworth, L.C., in *Boyse* v. *Rossborough,* (1856—7) 6 H. L. C. at p. 51.

(*s*) Parke, B., in *Barry* v. *Butlin,* (1838) 2 Moo. P. C. at p. 482.

(*t*) (1838) 2 Moo. P. C. at pp. 319, 320.

knowledge of, and assent to the contents of the instrument by the deceased, and without requiring further evidence will pronounce for the will (*u*).

and when these are proved, the burden of proving undue influence is upon the party who alleges it.

When, therefore, the person propounding the will has once proved that it has been executed with due solemnities by a person of competent understanding, and apparently a free agent, he has *primâ facie* discharged the burden of proof cast upon him by the law, and the burden of proving that the will was executed under undue influence is on the party who alleges it (*x*). Undue influence cannot be presumed (*y*), and it is said that in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis (*z*).

But when all the evidence is before the Court, it must be satisfied affirmatively that the will propounded is the will of a free and capable testator;

But while it is true that undue influence cannot be presumed, it is equally true that in many cases wills have been pronounced against, not because fraud or undue influence has been conclusively proved against the persons propounding the will, but because those persons have failed to discharge the burden placed upon them of satisfying the conscience of the Court that the will propounded was the will of a free and capable testator. Though the Court will not presume fraud or undue influence, it may require strong proofs of intention (*a*).

particularly if the circumstances under which the will was prepared are such as to excite the suspicion of the Court.

Particularly has this been the case where the circumstances under which the will was prepared and executed have been such as to excite the suspicion and vigilance of the Court. When such circumstances exist, the Court may pronounce against the will—even though a charge of fraud or undue influence has not clearly been brought home to the persons propounding it—unless such suspicions are

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(*u*) *Barry* v. *Butlin*, (1838) 2 Moo. P. C. at p. 484.

(*x*) *Boyse* v. *Rossborough*, (1856—7) 6 H. L. C. at p. 49.

(*y*) *Ibid.*

(*z*) Cranworth, L.C., in *Boyse* v. *Rossborough*, (1856—7) 6 H. L. C. at p. 51.

(*a*) Sir J. Nicholl in *Billinghurst* v. *Vickers*, (1810) 1 Phill. at p. 194.

removed, and the Court is satisfied that the testator's knowledge and approval of the contents of the instrument has been affirmatively established.

As where the will was prepared by or on the instructions of a person who takes large benefits thereunder.

Foremost among the circumstances which will excite the suspicion and vigilance of the Court must be placed the fact that the will was prepared by, or on the instructions of a person who takes large benefits thereunder.

If a party writes or prepares a will under which he takes a benefit, that circumstance will excite the suspicion of the Court.

"If a party writes or prepares a will under which he takes a benefit," said Parke, B., in *Barry* v. *Butlin* (*b*), "that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

The learned judge proceeded to state that this principle was well established, and was laid down by Sir John Nicholl in *Paske* v. *Ollat* (*c*), *Ingram* v. *Wyatt* (*c*), and *Billinghurst* v. *Vickers* (*c*), as having been handed down to him by his predecessors; "and," added Parke, B., "the Privy Council has sanctioned and acted upon it in the case of *Baker* v. *Batt*" (*c*).

(*b*) (1838) 2 Moo. P. C. at p. 481.

(*c*) In *Paske* v. *Ollat*, (1815) 2 Phill. 323, Sir John Nicholl said: "The writer of the will, who was the deceased's attorney, is himself benefited under it to a considerable amount. The Court is always extremely jealous of a circumstance of this nature. By the Roman law, *qui se scripsit hæredem* could take no benefit under a will. By the law of England this is not the case; but the law of England requires, in all instances of this sort, that the proof should be clear and decisive;—the balance must not be left *in equilibrio*; the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper. In ordinary cases this is not necessary; but where the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person; propriety and delicacy would infer that he should not conduct the transaction; and *a fortiori* in a case where he is the confidential attorney of the deceased; and where the benefit conferred is to a considerable amount.

"The presumption and *onus probandi* are against the instrument: but as the law does not render such an act invalid, the Court has only to require strict proof:—and the onus of proof may be increased by

Where a beneficiary prepares the will, "the presumption and *onus probandi* is against the instrument."

"Their Lordships are fully sensible of the wisdom of this rule," continued the learned judge, "and the importance of its practical application on all occasions. At the same time their Lordships think it fit to observe . . . that some of the expressions used by Sir John Nicholl in laying down this doctrine, appear to them to be somewhat equivocal and capable of leading into error in the investigation and decision of questions of this nature. It is said that where the party benefited prepares the will 'the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing but to the knowledge of the contents of the paper' (*d*); and that 'where the capacity is doubtful there must be proof of instructions or reading over' (*e*). If by these expressions the learned judge meant merely to say, that there are cases of wills prepared by a legatee so pregnant with suspicion that they ought to be pronounced against in the absence of evidence in support of them, and that extending to clear proof of the actual knowledge of the contents by the supposed testator; and that instructions proceeding from him or the reading over the instrument by or to him are the most satisfactory evidence of such knowledge; we fully concur in the proposition so understood. In all probability the learned judge intended no more than this.

This statement criticised and explained.

"But if the words used are to be construed strictly; if it is intended to be stated as a rule of law, that in every case in which the party preparing the will derives a benefit under it the *onus probandi* is shifted, and that not only a certain measure but a particular species of proof is thereupon

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circumstances: such as unbounded confidence in the drawer of the will; extreme debility in the testator; clandestinity; and other circumstances which may increase the presumption even so much as to be conclusive against the instrument. These are the principles and rules handed down to me by my predecessors." See also the remarks of the same learned judge in *Billinghurst* v. *Vickers,* (1810) 1 Phill. at pp. 193, 194; *Ingram* v. *Wyatt,* (1828) 1 Hagg. at p. 391.

In *Baker* v. *Batt,* (1838) 2 Moo. P. C. 321, Parke, B., laid down the same principle in almost identical language to that used in *Barry* v. *Butlin.*

(*d*) *Paske* v. *Ollat,* (1815) 2 Phill. at p. 324.

(*e*) *Billinghurst* v. *Vickers,* (1810) 1 Phill. at p. 193.

required from the party propounding the will,—we feel bound to say that we assume the doctrine to be incorrect.

"The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed, and it cannot be that the simple fact of the party who prepared the will being himself a legatee is in every case and under all circumstances to create a contrary presumption, and to call upon the Court to pronounce against the will unless additional evidence is produced to prove the knowledge of its contents by the deceased.

"A single instance, of not unfrequent occurrence, will test the truth of this proposition. A man of acknowledged competence and habits of business, worth £100,000, leaves the bulk of his property to his family and a legacy of £50 to his confidential attorney who prepared the will: would this fact throw the burden of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so that if such proof were not supplied the will would be pronounced against? The answer is obvious, it would not.

If a person prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the other circumstances of the case.

"All that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances (*f*); for instance the *quantum* of the legacy, and

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(*f*) *Kindleside* v. *Harrison*, (1818) 2 Phill. at p. 559, Sir John Nicholl said: "The codicil is prepared through the agency of the person benefited, and without the professional person who prepared it having had access to the deceased for the purpose of taking his instructions . . . [that always excites the jealousy and vigilance of the Court] . . . but the Court must take care not to convert a circumstance which is only a reason for vigilance and caution into an actual defeasance of the right of testamentary disposition, and of the clear testamentary dispositions of a capable testator. The degree of alarm excited by such a circumstance depends upon the other circumstances which accompany it; the thing frequently happens without exciting much, though upon all occasions, a certain portion of caution."

In no case does that fact amount to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court.

the proportion it bears to the property disposed of, and numerous other contingencies: but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.

That suspicion may be removed by evidence, of whatever kind, satisfying the Court that the will did express the real intentions of the deceased.

"Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a will without it, but it has no right in every case to require it" (*g*).

This same principle was laid down and acted upon in *Fulton* v. *Andrew* (*h*) and *Brown* v. *Fisher* (*i*). In the former case (*k*) Lord Hatherley said: "There is one rule which has always been laid down by the Courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, and who obtains a bounty by that will, is placed in a different

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(*g*) This judgment is of such importance that it has been considered advisable to set out the material portions *in extenso*. Sir Herbert Jenner in *Durling* v. *Loveland*, (1839) 2 Curt. at p. 227, said that he acceded to every one of the doctrines and principles laid down in this judgment; and that he was not aware that the Court had ever acted on any other or different principles. See also *Hitchings* v. *Wood*, (1838—41) 2 Moo. P. C. at p. 436. The principle here laid down has been adopted in a number of subsequent cases, notably in *Fulton* v. *Andrew*, (1875) L. R. 7 H. L. 448, and in *Brown* v. *Fisher*, (1890) 63 L. T. 465, and is sometimes referred to as the "rule laid down in *Barry* v. *Butlin*, *Fulton* v. *Andrew*, and *Brown* v. *Fisher*." It has been made the basis of a doctrine as to the costs of an unsuccessful plea of undue influence and fraud, which will be found discussed at p. 689, *post*. In *Parker* v. *Duncan*, (1890) 62 L. T. 642, Sir J. Hannen said: "It is the duty of any man who expects that a will is about to be made in his favour to see that the testator receives proper and independent advice, and he should take care that the testimony called in support of the will should not be that of himself alone, but that it should be independent and impartial."

(*h*) (1875) L. R. 7 H. L. 448.

(*i*) (1890) 63 L. T. 465.

(*k*) L. R. 7 H. L. at p. 471.

position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction"(*l*). *Brown* v. *Fisher* (*m*) was a case in which the plaintiff, who took a large benefit under the will, had procured its execution; the will itself was prepared by a solicitor, who was, however, excluded from all communication with the testator. Although fraud or undue influence was not pleaded, the Court pronounced against the will on the ground that the doubt and suspicion raised by these circumstances had not been dispelled by the plaintiff, who had failed affirmatively to prove, as he was bound to do, that the testator knew and approved of the contents of the instrument.

Those who take for their own benefit, after being instrumental in preparing a will, must show the righteousness of the transaction.

And if the doubt and suspicion arising from that circumstance are not dispelled, the will is pronounced against.

The rule in *Barry* v. *Butlin*, *Fulton* v. *Andrew*, and *Brown* v. *Fisher* is not confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document: it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made by proving the will (*n*). For, before the question of fraud can arise, the

The rule is not confined to cases in which a will is prepared by or on the instructions of a beneficiary, but extends to all cases in which circumstances exist which excite the suspicion of the Court;

(*l*) See *Tyrell* v. *Painton*, [1894] P. at p. 160.

(*m*) (1890) 63 L. T. 465.

(*n*) *Tyrell* v. *Painton*, [1894] P. at p. 157, *per* Lindley, L.J. See *per* Davey, L.J., at p. 159. A further extract from Lord Lindley's judgment in this case will serve to show the duty thrown upon the Court in cases of this kind. "The President (in the Court below) appears to me to have attached too little weight to the rule expounded in the cases which have been referred to. He seems to have thought that he had only to address himself to the question of fraud—whether the will had been obtained by in which cases, before any question of fraud can arise, the suspicion must be dealt with and removed.

suspicion arising from the circumstances under which the will was executed has to be dealt with and removed (*o*). The vital and essential issue in a case of this description is not whether a case of fraud has been made out, but whether the plaintiffs have discharged the onus cast upon them by the law of showing the righteousness of the transaction, and that the paper propounded did express the true will of the deceased (*p*).

Dictum of Walton, J., in *Wilson* v. *Bassil*, that, under such circumstances, the plaintiff must prove that the will was *not* obtained by fraud or undue influence.

Walton, J., in *Wilson* v. *Bassil* (*q*) said that in cases of this character the defendant was entitled to presume what the law presumes, and to call upon the plaintiff to prove not merely the valid execution of the will, but also that it was *not* obtained by fraud or undue influence, and that it does really express the true will of the deceased. This dictum, having regard to the language used by Parke, B., in *Barry* v. *Butlin* (*r*), must, it is submitted, not be pressed too far. In *Spiers* v. *English* (*s*) Sir Gorell Barnes said: "I am not sure that I quite agree with the views of the learned judge who tried the case of *Wilson* v. *Bassil* (*t*) when he said there was a presumption against the will. I do not think that is quite the right way to put it. If the learned judge meant to say more than that the onus was especially heavy upon a person who obtains and puts forward for probate a will in his own favour, I do not agree with him. I doubt whether the fact of his having been instrumental in making a will under which he substantially benefits makes any difference in the presumption of law. The question always is whether a person propounding a will has made out a case in favour of the document. And in my view a plea of

Dissented from by Sir Gorell Barnes, P., in *Spiers* v. *English*.

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fraud; that the burden of proving that lay on the plaintiff [*i.e.*, on the person attacking the will] and that he had not discharged himself of that burden. Now, in my opinion, this will . . . was executed under such suspicious circumstances that he ought to have said 'Do the defendants affimatively establish to my satisfaction that the testatrix knew what she was doing when she executed this will?'" This view was fully endorsed and acted upon by the Court of Appeal in the recent case of *Finny* v. *Govett*, (1908) 25 T. L. R. 186.

(*o*) *Tyrell* v. *Painton*, [1894] P. at p. 159, *per* A. L. Smith, L.J.

(*p*) *Finny* v. *Govett*, (1908) 25 T. L. R. 186, at p. 188.

(*q*) [1903] P. at p. 242.

(*r*) *Vide supra*, p. 83.

(*s*) [1907] P. at p. 124.

(*t*) [1903] P. 239.

undue influence ought never to be put forward unless the person who pleads it has reasonable grounds upon which to support it."

The rule is not to be used as a cloak for charges of fraud and dishonesty.

It has recently been laid down that the rule in question is not to be used as a screen behind which a man may make veiled charges of fraud or dishonesty without assuming the responsibility of making those charges in plain terms (*u*).

Circumstances which may arouse the vigilance of the Court.

It may be useful to give some instances of circumstances which may arouse the vigilance and suspicion of the Court, though of course in many cases such circumstances admit of satisfactory explanation. The enumeration does not pretend to be exhaustive, and in the instances given the degree of suspicion aroused will vary with the whole circumstances of the case.

Will made by interrogatories.

A will made by interrogatories—*i.e.*, where the testator gives his instructions in answer to questions—is valid, but where the will is so made, the Court will—particularly if the questions were "leading" questions—be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition than it would be in an ordinary case (*x*).

Great change of testamentary dispositions.

A great change of testamentary dispositions, evidenced by a departure from former testamentary intentions long adhered to, requires explanation; especially if the person in whose favour the change is made possesses great influence and authority, and originates and conducts the whole transaction (*y*). Such a circumstance might, under certain conditions, give rise to a suspicion—requiring to be dissipated—that so sudden a change was not the result of the free volition of the testator (*z*). Such a suspicion might be dissipated by proof of change of circumstances, making an alteration of previous testamentary instruments probable (*a*).

(*u*) *Low* v. *Guthrie,* [1909] A. C. 278, at p. 281.

(*x*) *Green* v. *Skipworth,* (1809) 1 Phill. at p. 58; and see Swinb., Part II., s. 5.

(*y*) *Marsh* v. *Tyrrell,* (1828) 2 Hagg. at p. 87; *Mynn* v. *Robinson,* (1828) 2 Hagg. at p. 181.

(*z*) *Marsh* v. *Tyrrell,* (1828) 2 Hagg. at p. 110.

(*a*) *Constable* v. *Tufnell,* (1833) 4 Hagg. at p. 487.

Other suspicious circumstances.

Again the following circumstances may require satisfactory explanation, especially where the person who prepared the will was a beneficiary thereunder: the fact that the testator gave no instructions for the will (*b*), and was without independent advice, legal or otherwise; that persons who benefited assumed authority over him, while he was weak or debilitated; excluded his relations and friends; obtained money from him; and assumed control of his affairs. Any one of these circumstances, standing alone, may admit of explanation, but their cumulative effect would be to raise a strong suspicion that the testator was a mere passive instrument in their hands (*c*).

Another circumstance which will, it seems, excite the vigilance of the Court is the fact that the intellect of the testator was impaired or weakened by age or illness. When a person is in full and vigorous possession of his intellect, the mere act of execution would lead to the inference that he knew the contents of the instrument he signed; but where a person is of a lower grade of capacity, owing to age or intemperance, a very different degree of proof is required to satisfy the Court that the instrument contained his real intentions (*d*).

The weight to be given to the fact that testator and beneficiary occupy the relation of doctor and patient, attorney and client, confessor and penitent, etc.

It remains to consider, in this connection, what weight will be attached by the Court to the mere fact that the principal beneficiary under the will and the testator occupied the relation of doctor and patient, attorney and client, confessor and penitent, and the like.

"In equity," said Lord Penzance in *Parfitt* v. *Lawless* (*e*), "persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions made between them are brought in question; and if a gift or

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(*b*) *Middleton* v. *Forbes* (1787), cited in *Ingram* v. *Wyatt*, (1828) 1 Hagg. at p. 395.

(*c*) *Marsh* v. *Tyrrell*, (1828) 2 Hagg. at p. 139; *Constable* v. *Tufnell*, (1833) 4 Hagg. at p. 495; *Paske* v. *Ollat*, (1815) 2 Phill. at p. 324.

(*d*) *Durling* v. *Loveland*, (1839) 2 Curt. at p. 229; *Hampson* v. *Guy*, (1891) 64 L. T. 778—C. A.

(*e*) (1872) 2 P. & D. at p. 468.

contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of Equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence.

In the case of gifts *inter vivos*, equity casts upon the beneficiary, in such cases, the burden of proving that the transaction was fairly conducted as between strangers.

"Applying this view of the subject to the making of a will, it was contended that it was enough to show that a legatee fell within the class enumerated, and that, having done so, the onus was cast upon him of proving that his legacy was not obtained by undue influence." The learned judge stated that this was not the law in the Probate or any other Court with regard to wills, and, after quoting Lord Cranworth's dictum in *Boyse* v. *Rossborough* (*f*),—"Undue influence cannot be presumed,"—continued: "In the case of a legacy under a will a legatee may have, and in point of fact generally has, no part in or even knowledge of the act; and to cast upon him, on the bare proof of the legacy and his relation to the testator, the burden of showing how the thing came about, and under what influence or with what motives the legacy was made, or what advice the testator had, professional or otherwise, would be to cast a duty on him which in many, if not most cases, he could not possibly discharge. A more material distinction is this: the influence which is undue in the case of gifts *inter vivos* is very different from that which is required to set aside a will. . . . The natural influence of the parent or guardian over the child, or the husband over the wife, or the attorney over the client, may be lawfully exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing, and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, and obtaining a recognition of those claims in a legacy, provided that that persuasion stop short of coercion, and that the volition of the testator, though biassed and impressed by the relation in which he stands to the legatee, is not overborne

But this principle cannot be extended to the case of wills,

for the influence which is undue in the case of gifts *inter vivos* is very different from that which is required to set aside a will.

(*f*) (1856—7) 6 H. L. C. at p. 49.

and subjected to the domination of another." It is thus clear that the rules of Courts of Equity in relation to gifts *inter vivos* are not applicable to the making of wills. It is only when the person occupying a relationship such as has been indicated himself writes or procures from the testator a will in his own favour, or where other circumstances of a suspicious character surround the making and execution of the will, that the vigilance of the Court—in accordance with the principles already laid down—is aroused, and that affirmative proof of the righteousness of the transaction is required (*g*).

The Court of Chancery will not, on the ground of undue influence, refuse to enforce a will pronounced valid by the Court of Probate.

It is clear, since the decision of the House of Lords in *Allen* v. *McPherson* (*h*), that the Court of Chancery will not, on the ground of fraud or undue influence, set aside or refuse to enforce the provisions of a will which has been pronounced valid by the Court of Probate.

A part of the will may be rejected, if obtained by fraud or undue influence.

If it be proved that a part of the will alone, *e.g.*, the residuary bequest, was obtained by undue influence or fraud, that part may be rejected, and the remainder admitted to probate (*i*), at least if that part is so distinct and severable that its rejection does not alter the construction of the true part; for in such a case it has been held that the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone (*k*). But where the rejection of the words alters the sense of those which remain, it was at one time doubted whether any part of the

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(*g*) See *Paske* v. *Ollat,* (1815) 2 Phill. at p. 324; *Ingram* v. *Wyatt,* (1828) 1 Hagg. at pp. 394 *et seq.*, 470; *Wyatt* v. *Ingram,* (1832) 3 Hagg. at p. 468; *Raworth* v. *Marriott,* (1833) 1 My. & K. 643; *Hindson* v. *Weatherill,* (1854) 5 De G. M. & G. at p. 313; *Jones* v. *Godrich,* (1844) 5 Moo. P. C. at p. 20; *Ashwell* v. *Lomi,* (1850) 2 P. & D. 478. In *Atter* v. *Atkinson,* (1869) 1 P. & D. at p. 668, Sir J. P. Wilde said: "There is no special rule applying to attorneys, but the force of the observation (in *Barry* v. *Butlin*) is obviously increased in such a case, for we know that a person making a will confides more in a professional man than he generally does in any other person he may call in to assist him." As to a medical man, see *Greville* v. *Tylee,* (1851) 7 Moo. P. C. 320.

(*h*) (1845—7) 1 H. L. C. 191, see at p. 210.

(*i*) *Barton* v. *Robins,* (1775) 3 Phill. 455, n. (*b*); *Billinghurst* v. *Vickers,* (1810) 1 Phill. 187; *Allen* v. *McPherson,* (1845—7) 1 H. L. C. at p. 209; *Fulton* v. *Andrew,* (1875) L. R. 7 H. L. 448; *Farelley* v. *Corrigan,* [1899] A. C. 563.

(*k*) *Rhodes* v. *Rhodes,* (1882) L. R. 7 A. C. at p. 198.

instrument could be treated as valid (*l*). It has, however, since been held that words introduced into a will by fraud or mistake may be rejected, where the effect of their rejection may be to render ambiguous, or even insensible, the clause of which they formed a part (*m*).

Where the testator is prevented by force and threats from revoking his will.

In a case where a testator had executed a will in favour of the plaintiffs, and subsequently, it was alleged, being desirous of depriving the plaintiffs of all benefit conferred upon them by that will, had a will prepared to that effect, but was prevented by the force and threats of the plaintiffs from executing it, the defendants claimed that the plaintiffs should be held to be trustees of the shares devolving upon them by the former will, in favour of the persons who would have taken such shares, had the later will been executed. The case ended in a compromise (*n*).

SUB-SECTION 4.—*Wills of Married Women.*

Prior to the Married Women's Property Act, 1882, a married woman could not make a will without her husband's consent,

Prior to the passing of the Married Women's Property Act, 1882 (*o*), the capacity of a married woman to dispose of her real and personal estate by will was limited. She was incapable of devising lands; and her will of personal estate (except of property to which she was entitled *en autre droit* as executrix) could, in general, only be admitted to probate if her husband consented to the particular will that she had made being admitted to proof. A married woman could, however, make a valid will in pursuance of an agreement made before marriage, or of an agreement made after marriage, for consideration, as she might in the exercise of a power to appoint by will; and

except in pursuance of an agreement made before or after marriage, or by virtue of a power of appointment,

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(*l*) *Rhodes* v. *Rhodes*, (1882) L. R. 7 A. C. at p. 198; see *Harter* v. *Harter*, (1873) 3 P. & D. 11.

(*m*) *Boehm*, [1891] P. at p. 251.

(*n*) *Betts* v. *Doughty*, (1879) 5 P. D. 27. The Court would, it is submitted, make such an order if the facts as alleged had been proved. In the unreported case of *Niepel* v. *Kluge* (1909), an action in which the pleadings were based upon this case came before the Court; fraud was alleged against the plaintiffs in preventing the deceased from altering his will, and the relief claimed was that they should be held trustees of their share in trust to pay the defendant such sum as she would have been entitled to had such alteration been made. No exception was taken to the form of pleading either in the Probate Court or in the Court of Appeal, but the case failed for want of proof.

(*o*) 45 & 46 Vict. c. 75.

the Court of Probate would allow such a will to be proved without the husband's consent.

Besides the case of a will made by a married woman by virtue of a power, there were, even before the Married Women's Property Act, 1882, other circumstances under which a will made by her was valid without the consent of her husband, namely, where personal property was actually given or settled, or agreed to be given or settled, to the separate use of the wife. In such a case she might dispose of that property as a *feme sole*, to the full extent of her interest therein. A married woman who had obtained a protection order or a judicial separation from her husband was also entitled to dispose of property acquired by her after the date of the order or decree in all respects as a *feme sole*, and such property descended, on her death intestate, as if her husband had then been dead (*p*).

or of property settled to her separate use,

and in certain other exceptional cases.

The law as to the testamentary powers of married women has been completely altered by the Married Women's Property Act, 1882 (*q*). That Act applies to all wills made after the 1st of January, 1883, and it has, therefore, been considered unnecessary to enter in any detail into the law which prevailed before that date. The subject will be found fully treated in Sir Edward Vaughan Williams' book on Executors, upon which the preceding summary has been based (*r*).

The law completely altered by the Married Women's Property Act, 1882,

The Married Women's Property Act, 1882 (*s*), provides :—

"A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and *disposing by will* or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee (*t*)."

whereby a married woman may dispose of her separate estate by will as if she were a *feme sole*.

"Every woman who marries *after* the commencement of this Act" [*i.e.*, January 1, 1883] "shall be entitled to have and to hold as her separate property, *and to dispose of in manner aforesaid* all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or

Property of a woman married *after* the Act to be held by her as a *feme sole*.

(*p*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21 and 25; *vide post*, p. 314.

(*q*) 45 & 46 Vict. c. 75.

(*r*) Wms. on Exors., pp. 38—48.

(*s*) 45 & 46 Vict. c. 75.

(*t*) Sect. 1, sub-s. 1.

devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill" (*u*).

Property acquired after the Act by a woman married *before* the Act to be held by her as a *feme sole.*

"Every woman married *before* the commencement of this Act" [*i.e.*, January 1, 1883] "shall be entitled to have and to hold *and to dispose of in manner aforesaid* as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act," [January 1, 1883] "including any wages, earnings, money and property so gained or acquired by her as aforesaid" (*x*).

Before the Act, probate of the will of a married woman was limited, and her husband was entitled to a grant *cæterorum.*

Prior to the Married Women's Property Act, 1882, the probate of the will of a married woman made by virtue of a power, or disposing of property which she held to her separate use, was not general, but was limited to the property the testatrix had a right to dispose of and had disposed of by her will, and her husband was entitled to have a grant of administration *cæterorum* (*y*). The power under which the will purported to have been made was specified in the grant (*z*).

But, since the Act, general probate of the will of a married woman is granted to her executor,

But in consequence of the change in the capacity of married women brought about by the Act, a new rule was framed (*a*). This rule provides that in a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with the will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with the will annexed, without any exception or limitation, and shall

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(*u*) Married Women's Property Act, 1882, s. 2.

(*x*) *Ibid.*, s. 5.

(*y*) *Price*, (1887) 12 P. D. 137.

(*z*) Probate Rules, 1862, Rule 15, "Non-contentious Business."

(*a*) Amended Rule 15 (18 of the Rules for District Registrars), coming into force on the 19th April, 1887; see *Price*, (1887) 12 P. D. 137.

issue to an executor or other person authorized in the usual course of representation to take the same ; a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy.

except in cases where the will, though valid as the exercise of a power, is not executed in accordance with the law of the testatrix's domicil at death,

There are, however, cases in which the Court still refuses to make a general grant in respect of the wills of married women (*a*), *e.g.*, in cases where a married woman who is not a British subject has made a will which, though valid as the exercise of a power of appointment, is not executed in the form required for a will by the law of the country in which the testatrix was domiciled at the time of her death (*b*). In no case will *probate* be granted of such a will to the executor named therein as such, for he takes nothing *jure representationis* (*c*), but administration with the will annexed may be granted to the appointee limited to such property as the deceased had power to dispose of, and did dispose of to the appointee by her will (*d*). If, and only if, the consent of the husband is obtained, the applicant may take a general grant of administration with the will annexed, either under the 73rd section of the Court of Probate Act, 1857, or otherwise (*e*).

Sect. 24 of the Wills Act, 1837, applies to the will of a married woman made during coverture,

Sect. 3 of the Married Women's Property Act, 1893 (*f*), enacts "that sect. 24 of the Wills Act, 1837" (which provides that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will), "shall apply to the will of a married woman made during coverture whether she is or is not possessed of or

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(*a*) See *Donovan,* (1898) 78 L. T. 567 ; *Leman,* [1898] P. 215.

(*b*) *Vide ante*, pp. 36, 37.

(*c*) See *de Camisani,* (1892) unreported ; quoted Tristram & Coote, 14th ed., p. 117 ; *Vannini,* [1901] P. 330 ; *Tréfond,* [1899] P. 247. So as to all wills by a married woman in execution of a power before the Act of 1882 : *Tugman* v. *Hopkins,* (1842) 4 Man. & G. at p. 400 ; *O'Dwyer* v. *Geare,* (1859) 1 S. & T. 465 ; *Tomlinson,* (1881) 6 P. D. at p. 210 ; *Brownrigg* v. *Pike,* (1882) 7 P. D. at p. 64.

(*d*) *Tréfond,* [1899] P. 247, at p. 250 ; *Vannini,* [1901] P. 330. The grant in *Hallyburton,* (1866) 1 P. & D. 90, was, in fact, a limited grant, although the report makes it appear otherwise : see *Vannini,* [1901] P. at p. 332.

(*e*) *Tréfond,* [1899] P. at p. 250 ; *Vannini,* [1901] P. 330.

(*f*) 56 & 57 Vict. c. 63.

entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband" (*g*).

and such will need not be re-executed upon the death of the husband.

Sub-section 5.—*Wills of Seamen.*

Special indulgences and special protection granted by the law of this country in respect of wills made by seamen,

As to the wills of persons in the sea service, it is the policy of the law of this country to grant special indulgences and to extend special protection to the testamentary intentions of this class of persons. In some particulars they are (in common with soldiers on active service) excused from observing the formalities required from other members of society (*h*); while, on the other hand, greater formalities and special modes of attestation are in some respects required as to their written wills, in order to protect them against fraud and imposition, and to secure due effect to their real testamentary intentions (*i*).

on account of their susceptibility to improper influence and fraud.

"Seamen," said Sir John Nicholl (*k*), "are generally careless, unguarded, openhearted, and little prepared to defend themselves against the artful and designing part of mankind; yet they are more frequently under the pressure of urgent wants; and to procure an immediate supply of those wants (such as an outfit and the like) they will, without thought, comply with almost any conditions proposed to them, not weighing or even being aware of the future consequences. These temporary necessities operate upon them as a sort of duress, on the part of those who are to furnish the supply. These are partly the considerations on which the policy of the law is extended to guard the testamentary acts of this class of persons. Their wills are, in some respects, exceptions to the rules applicable to ordinary cases; not indeed exceptions to the great fundamental principle of all testamentary dispositions, *the intention of the testator;* but to some of the rules and presumptions by which the real intention is to be ascertained."

(*g*) The section applies to wills of married women who die after the 5th December, 1893, the date of the commencement of the Act: *Wylie* v. *Moffat,* [1895] 2 Ch. 116.

(*h*) *Vide post,* pp. 295 *et seq.*

(*i*) *Zacharias* v. *Collis,* (1820) 3 Phill. 176, 177; *vide post,* p. 300.

(*k*) *Zacharias* v. *Collis,* (1820) 3 Phill. at p. 177.

A seaman's will is invalid if written on the same instrument as a power of attorney,

The Navy and Marines (Wills) Act, 1865 (*l*), s. 4, enacts: "A will made after the commencement of this Act by any person while serving as a seaman or marine (*m*) shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney."

This section is a re-enactment of a provision which has formed part of the statute law since the ninth year of William III. (*n*). The statute of William III. (*o*), in consideration that wills and powers of attorney were obtained from seamen without their being aware of their contents and effect, rendered the will absolutely void if embodied in the same instrument with a power of attorney; thus holding the presumption conclusive *juris et de jure* that the party did not know and intend that the instrument should operate as a testamentary disposition.

and even if written on a separate instrument from the power of attorney, if executed *merely* as security for a debt.

The case of *Craig* v. *Lester* (*p*) followed not long after the statute; and in that case Sir Charles Hedges decided, and his sentence was affirmed by the Delegates, that the will was invalid, though executed on a different instrument from the power of attorney.

A will of a seaman, if executed *merely* as a security for debt, shall not operate as a disposition of the whole property.

From this case, and subsequent decisions of the Prerogative Court (*q*), the result to be deduced is that, when the relation of agent and seaman exists, there must be clear proof, not only of the subscription by the deceased of the instrument, but also of his knowledge of its nature and effect; that wherever it is executed *merely* as a security for debt, it shall not operate as a testamentary disposition of the whole

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(*l*) 28 & 29 Vict. c. 72.

(*m*) *I.e.*, a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of his Majesty's vessels, or otherwise belonging to his Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers and of kroomen: sect. 1 of the Act. *Vide post*, p. 453.

(*n*) 9 & 10 Will. III. c. 41, s. 6, re-enacted 55 Geo. III. c. 60, s. 4, re-enacted 11 Geo. IV. and 1 Will. IV. c. 20, s. 48, re-enacted 28 & 29 Vict. c. 72, s. 4.

(*o*) 9 & 10 Will. III. c. 41, s. 6.

(*p*) Deleg. 11th June, 1714; cit. *Zacharias* v. *Collis*, (1820) 3 Phill. at p. 189.

(*q*) The cases will be found collected in *Zacharias* v. *Collis*, (1820) 3 Phill. at pp. 189—201.

property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by will, the instrument shall be valid (*r*).

unless there is satisfactory evidence of the testator's intention.

The equity of the statutes never has been, and ought not to be, extended further than to the wills of mariners; there would be great mischief in extending it to the wills of people in general, for then no man could safely make his creditor his executor (*s*).

These principles are not to be extended to wills other than the wills of seamen.

Section 3.

PERSONS INCAPABLE ON ACCOUNT OF THEIR CRIMINAL CONDUCT.

Formerly a traitor attainted, from the time of the treason committed, could make no will of his lands or goods, for they were forfeited to the King; as were the lands and goods of one attainted or convicted of felony. Further, it was said that if a man killed himself, his will as to his goods and chattels was void, but as to his lands was good, because there was no attainder (*t*). Now, however, forfeiture of lands and goods for treason and felony (including *felo de se*) has been abolished by statute (*u*), and it follows that traitors, felons, and suicides are no longer incapacitated from making wills.

Formerly traitors, felons, and suicides were incapable of making a will,

but they are no longer under any incapacity;

By the civil law the wills of divers others, as excommunicate persons, heretics, usurers, libellers, and the like, are void; but by our law the wills of such persons are good (*x*).

nor are persons whose wills were void by the civil law.

In conclusion, all persons in general, male or female, old or young, lay or spiritual, at any time before their death, whilst they are able to speak so distinctly or write so plainly that another can understand them, and perceive that they understand themselves, may make a will of their lands, goods, and chattels; and none are restrained of this liberty but such as are before named (*y*).

All persons, save those before mentioned, may make a will.

(*r*) *Per* Sir John Nicholl in *Zacharias* v. *Collis*, (1820) 3 Phill. at pp. 202—204; see *Deardsley* v. *Fleming*, (1755) 2 Lee, 98.

(*s*) *Per* Sir George Lee in *Florance* v. *Florance*, (1755) 2 Lee, at p. 89.

(*t*) Bac. Abr., tit. Will (B.).

(*u*) 33 & 34 Vict. c. 23.

(*x*) Bac. Abr., tit. Will (B.).

(*y*) *Ibid.*

Section 4.

OF KNOWLEDGE AND APPROVAL BY THE TESTATOR OF THE CONTENTS OF HIS WILL; AND HEREWITH OF WORDS INTRODUCED INTO THE WILL BY MISTAKE.

He who propounds a will must satisfy the Court that the testator knew and approved its contents.

In all cases, the party who puts forward a document as the will of a testator must establish to the satisfaction of the Court that the testator knew and approved of its contents at the time when he signed it (*z*). For if the testator sign a document of the contents of which he is ignorant, that cannot be held to be a valid will (*a*). The testator's knowledge and approval of the contents of the alleged will is thus part of the burden of proof assumed by every one who propounds the document (*b*).

Knowledge and approval assumed where due execution and testamentary capacity are proved,

This burden is discharged, in the absence of special circumstances which excite the vigilance of the Court, by proof of capacity and of the fact of execution, from which knowledge and approval of the contents of the instrument are assumed (*c*). For if the execution of a will by a competent testator be duly proved, the presumption is that he was cognizant of the contents, and that the instrument expresses his will, unless some

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(*z*) *Barry* v. *Butlin,* (1838) 2 Moo. P. C. 482; *Guardhouse* v. *Blackburn,* (1866) 1 P. & D. at p. 116; *Atter* v. *Atkinson,* (1869) 1 P. & D. at p. 670; *Cleare* v. *Cleare,* (1869) 1 P. & D. at p. 657.

(*a*) It was at one time held that a plea that the deceased was ignorant of the contents of the will was a bad plea, for, it was said, the testator may, if he likes, authorize another to make a will for him, and may say, "I do not know what you have put down, but I am quite ready to execute it": Sir C. Cresswell in *Cunliffe* v. *Cross,* (1863) 3 S. & T. 37; *Middlehurst* v. *Johnson,* (1860) 30 L. J. P. 14; but in *Hastilow* v. *Stobie,* (1865) 1 P. & D. 64, Sir J. P. Wilde negatived this proposition, and held that it was essential to the validity of a will that at the time of its execution a testator should know its contents and should also approve of them; and that therefore a plea that the deceased, at the time he signed his will, did not know and approve of the contents thereof was good in law. Such a plea is now frequently used in Probate actions. A testator must also intend the paper he signed to operate as his will, and parol evidence is admissible to prove or disprove that fact: see *post,* p. 148.

(*b*) *Cleare* v. *Cleare,* (1869) 1 P. & D. at p. 657.

(*c*) *Barry* v. *Butlin,* (1838) 2 Moo. P. C. at p. 484; *Fawcett* v. *Jones,* (1810) 3 Phill. at p. 476; *Paske* v. *Ollat,* (1815) 2 Phill. at p. 324; *Ingram* v. *Wyatt,* (1828) 1 Hagg. at p. 401; *Durling* v. *Loveland,* (1839) 2 Curt. 225; *Durnell* v. *Corfield,* (1844) 1 Rob. at p. 63; *Browning* v. *Budd,* (1848) 6 Moo. P. C. at p. 435; *Hastilow* v. *Stobie,* (1865) 1 P. & D.

other circumstance leads to a different conclusion, or renders it too doubtful for the Court to act upon that presumption (*d*).

unless circumstances of suspicion rouse the vigilance of the Court, or the testator's capacity is doubtful,

But if there are circumstances surrounding the execution which rouse the suspicion and vigilance of the Court (*e*), or if the capacity of the testator at the time of execution were doubtful (*f*), the Court will not rest satisfied with such *primâ facie* presumption of knowledge and approval as arises from mere proof of the execution of the paper by a testator of sound mind, and the party propounding it must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate (*g*).

or those who impeach the will succeed in displacing the *primâ facie* case raised by proof of execution.

Knowledge and approval must also affirmatively be proved by the person propounding the will, if those who oppose it succeed, by cross-examination of the witnesses or otherwise, in meeting the *primâ facie* case raised by proof of execution (*h*).

Affirmative proof of knowledge and approval may take any form.

Such affirmative proof of knowledge and approval may take any form, provided it satisfies the Court. The fact that the deceased gave instructions for the will, or that it was read over to him or by him, is, no doubt, the most satisfactory, but not the only satisfactory form of proof by which the cognizance of the contents of the will may be brought home to the deceased. The Court will naturally look for such evidence; in some cases it may be impossible to establish a will without it, but the Court will not in *every* case require it (*i*).

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at p. 68 ; *Guardhouse* v. *Blackburn*, (1866) 1 P. & D. at p. 116 ; *Cleare* v. *Cleare*, (1869) 1 P. & D. at p. 658.

(*d*) *Browning* v. *Budd*, (1848) 6 Moo. P. C. at p. 435. If the testator by mistake executes a will prepared for another, he cannot be held to have known or approved of any part of the instrument : *Hunt*, (1875) 3 P. & D. 250 ; *Meyer*, [1908] P. 353.

(*e*) As, for example, the fact that the will was written or prepared upon the instructions of a beneficiary : *Paske* v. *Ollat*, (1815) 2 Phill. at p. 324 ; *Barry* v. *Butlin*, (1838) 2 Moo. P. C. at p. 484 ; *Atter* v. *Atkinson*, (1869) 1 P. & D. at p. 668 ; and *vide ante*, pp. 80 *et seq.*

(*f*) *Billinghurst* v. *Vickers*, (1810) 1 Phill. at p. 193 ; *Ingram* v. *Wyatt*, (1828) 1 Hagg. at p. 401 ; *Durling* v. *Loveland*, (1839) 2 Curt. at p. 230 ; *Durnell* v. *Corfield*, (1844) 1 Rob. at p. 63 ; *vide ante*, p. 88.

(*g*) *Cleare* v. *Cleare*, (1869) 1 P. & D. at p. 658 ; *Durnell* v. *Corfield*, (1844) 1 Rob. at p. 63 ; *Atter* v. *Atkinson*, (1869) 1 P. & D. at p. 668.

(*h*) *Cleare* v. *Cleare*, (1869) 1 P. & D. at p. 658.

(*i*) Parke, B., in *Barry* v. *Butlin*, (1838) 2 Moo. P. C. at p. 485. See *Durnell* v. *Corfield*, (1844) 1 Rob. at p. 56 ; *Mitchell* v. *Thomas*, (1847) 6 Moo. P. C. at p. 150.

The will need not originate with the deceased.

It is not essential that a will should originate with the testator, and therefore proof of instructions may be dispensed with, provided it be proved that the testator completely understood, adopted, and sanctioned the disposition proposed to him, and that the instrument itself embodied that disposition (*k*).

Where a testator gives instructions for the will while in health, and executes it while in illness, slight proof of knowledge and approval will suffice.

If a testator has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out" (*l*). So where a testatrix, lying in a state approaching insensibility, executed a will, drawn up in accordance with her previous instructions, it was held that, though she might not remember them, though she could not have understood the will, even if read to her clause by clause, yet, since she was capable of understanding and did understand that she was engaged in executing the will for which she had given instructions, therefore she knew and approved of its contents (*m*).

A testator must know and approve *all* the contents of his will; wherefore words introduced without his knowledge and approval may be rejected,

The above rules apply equally to a portion of the will as to the whole (*n*); and, therefore, if it can be proved to the satisfaction of the Court that any word or words (*o*) or any clause (*p*) in the document propounded as a will have been introduced without the knowledge and approval of the testator, such word or words or such clause may be rejected, and the remaining portion of the will alone admitted to probate.

For if the words introduced into the will are so distinct

(*k*) *Constable* v. *Tufnell*, (1833) 4 Hagg. at p. 477; *Forfar* v. *Heastie*, (1756) 2 Lee, at p. 310.

(*l*) Sir J. Hannen in *Parker* v. *Felgate*, (1883) 8 P. D. at p. 173.

(*m*) *Parker* v. *Felgate*, (1883) 8 P. D. 171; see *Goodacre* v. *Smith*, (1867) 1 P. & D. at p. 361; *Perera* v. *Perera*, [1901] A. C. at p. 361.

(*n*) *Guardhouse* v. *Blackburn*, (1866) 1 P. & D. at p. 116.

(*o*) *Morrell* v. *Morrell*, (1882) 7 P. D. at p. 75.

(*p*) *Fulton* v. *Andrew*, (1875) L. R. 7 H. L. 448; and see pp. 101—111, *post, passim*.

and severable from the rest of it that their rejection does not alter the construction of the part of which the testator knew and approved, it has been held that, consistently with the Statute of Wills, the execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone (*q*).

even though their rejection renders ambiguous or insensible the clause of which they formed a part.

A much more difficult question arises where the rejection of the words alters the sense of those which remain (*r*). But it has been held that the application of the principle of striking out words introduced into the will clearly without the knowledge and approval of the testator, may be extended to a case where the effect of their rejection is to render ambiguous, or even insensible, the clause of which the words formed part. The meaning of the words which remain is a question for the Court of construction; and even if to strike out words inserted in error and to leave a blank space will not give full effect to the testator's wishes, the Court of Probate will, so far as it can—though it may not completely—carry out the intentions of the testator by adopting this course (*s*).

Words introduced into a will *per incuriam*, and not in any way brought to the knowledge of the testator, may be rejected.

So where words are introduced in a testamentary paper *per incuriam* without any instructions from the testator, and the testator executes the paper in ignorance of the fact of the insertion of such words, the will containing the words not having been read over to or by him in such a way as to bring them to his notice (*t*), such words form no part of his will, and probate may be granted of the remainder of the document, omitting the words so introduced (*u*).

(*q*) *Rhodes* v. *Rhodes*, (1882) L. R. 7 A. C. at p. 198.

(*r*) *Ibid.*

(*s*) *Boehm*, [1891] P. at p. 251.

(*t*) *Vide post*, pp. 103 *et seq.*

(*u*) See *Duane*, (1862) 2 S. & T. 590, where the paper propounded consisted of a skeleton printed form of a will, partly filled in, and one of the printed clauses contained a disposition of residue. This clause was inadvertently not struck out by the person who prepared the will; it was not read over to the testator, or his attention drawn to it in any way, when the will was executed. The Court admitted the will to probate, omitting the residuary clause.

In *Oswald*, (1874) 3 P. & D. 162, a clause revoking all former wills was, *per incuriam*, introduced into the will without any instructions but the Court has no power to supply words accidentally omitted from the will.

But though the Court may, in certain cases, omit from the probate words introduced into the will by mistake, it has no power to supply words accidentally omitted from the will. The Wills Act provides that no will shall be valid unless it shall be in writing and unless executed in a certain manner, and this provision applies to every part of the will and admits of no qualification. Therefore the Court cannot admit to probate any words not contained in some duly attested testamentary document, however cogent the evidence

from the testatrix. The will was executed by the testatrix, but was not read over to her or by her, and she was not aware that it contained such words of revocation. The clause revoking all former wills was omitted from the probate. See *Moore*, [1892] P. 378, where a clause of revocation was part of the printed form of a will, filled in by the testatrix herself. The testatrix did not, however, fill up the blanks in that part of the form, and the clause was not read over to her at the time of execution, though the rest of the will was, and there was no evidence that she knew of such clause. The clause of revocation was omitted from the probate. And see *Marklew* v. *Turner*, (1900) 17 T. L. R. 10; but see *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. at p. 344, *post*, p. 110.

In *Morrell* v. *Morrell*, (1882) 7 P. D. 68, a testator, in the instructions for his will, directed that *all* his B shares should be given to his nephews, but in the will itself the word "forty" was several times inserted by the draftsman before the word "shares," and the will was executed in that state. The testator owned, in fact, 400 B shares. The jury found: 1. That the word "forty" was introduced by mistake. 2. That the particular mistake was in inserting the word "forty." 3. That the testator did not know of the insertion of the word; that the clauses in which it appeared were not read over to him. 4. That he only approved the will upon the supposition that all his B shares were given to his nephews. The Court ordered the word "forty," wherever it occurred in the will, to be struck out.

In *Boehm*, [1891] P. 247, a testator gave instructions that his will should contain a bequest of 10,000*l*. to each of his daughters "Georgiana" and "Florence." The conveyancer who prepared the will, by inadvertence, inserted the name of Georgiana in *both* bequests of 10,000*l*., and omitted the name of Florence altogether. The draft was not read over to the testator at any time, and the error was not brought to his notice. Held: That probate of the will might issue, omitting the name "Georgiana" in the second bequest of 10,000*l*.

An attestation clause forms no part of a will or codicil, and therefore where, in the attestation clause of a third codicil, it was stated by mistake that the first codicil was cancelled, it was held that the words might be rejected, and the first codicil admitted to probate: *Atkinson*, (1883) 8 P. D. 165.

The Court of Probate has authority to omit from the probate a clause introduced into the will by fraud, without the knowledge of the testator: *Barton* v. *Robins*, (1775) 3 Phill. 455, n.; *Allen* v. *McPherson*, (1845—7) 1 H. L. C. 191; *ante*, p. 90.

may be from oral or written instructions, that they were intended to be part of the will (*x*).

It is thus clear that, though words may be struck out of the will by the Court, no fresh word or words can be inserted.

It therefore becomes material, in cases where a mistake has been made in a will, to consider whether the mistake arose from the introduction into the will of words of which the testator did not know and approve, or from the omission of words which he intended to form part of his will (*y*). In the latter case, the error cannot be rectified; but where the mistake arose from the substitution of some word or phrase for another, such word or phrase may be struck out, although the effect of its rejection is to render ambiguous, or even meaningless, the clause of which it formed part (*z*).

How far the fact that the will was read over to or by the testator is conclusive as to his knowledge and approval of *all* its contents.

It has been stated that words introduced into a will *per incuriam* may be rejected by the Court, if the will containing the words so introduced has not been read over to or by the testator. It remains to consider how far the fact that the will was read over to or by the testator must be taken as conclusive proof of his knowledge and approval of the whole of its contents.

In *Guardhouse* v. *Blackburn* (*a*) Lord Penzance laid down the following proposition: "Although the testator did know

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(*x*) *Wilson,* (1841) 2 Curt. 853; *Birks* v. *Birks,* (1865) 4 S. & T. at p. 30; *Guardhouse* v. *Blackburn,* (1866) 1 P. & D. at p. 114; *Harter* v. *Harter,* (1873) 3 P. & D. at p. 19; *Morrell* v. *Morrell,* (1882) 7 P. D. at p. 70. In *Bushell,* (1887) 13 P. D. 7, Butt, J., substituted in the probate the word "Bristol" for the word "British," which occurred by mistake in the will. In *Huddleston,* (1890) 63 L. T. 255, the same learned judge substituted the word "excluding" for the word "including," which occurred by mistake in the will. But in *Schott,* [1901] P. at p. 192, Sir Francis Jeune, referring to these two cases, said: "I am afraid that it must be admitted that upon this point . . . the late Sir Charles Butt was heretical. I find that a note has been put, in manuscript, in the margin of *In the Goods of Bushell* in my copy of the Law Reports. It is in these words: 'By the President's direction this is not to be followed . . .' Under these circumstances I think that those two decisions of Sir Charles Butt must now be said to be finally disposed of." The law was different as to wills executed before the Wills Act, 1837, came into operation: see *Fawcett* v. *Jones,* (1810) 3 Phill. at pp. 447 *et seq.*, and the cases there collected. These cases are of no authority in reference to wills made since 1838: see *Guardhouse* v. *Blackburn,* (1866) 1 P. & D. at p. 114.

(*y*) *Harter* v. *Harter,* (1873) 3 P. & D. at p. 19; *Morrell* v. *Morrell,* (1882) 7 P. D. at p. 70.

(*z*) *Boehm,* [1891] P. at p. 251; *vide ante,* p. 101.

(*a*) (1866) 1 P. & D. at p. 116.

That fact conclusive of knowledge and approval in the absence of fraud.

and approve the contents, a paper may be refused probate if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Subject to this proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. The above rules apply equally to a portion of the will as to the whole."

In *Atter* v. *Atkinson* (*b*) the same learned judge restated this proposition in the following terms: "The question of fact is," he said, in his charge to the jury, "did the testatrix really ever read the contents of this document [*i.e.*, the will]? If you are satisfied that she read it, then, as a proposition of law, I feel bound to direct you that she must be taken to have known and approved of its contents. If, being of sound mind and capacity, she read this residuary clause, the fact that she afterwards put her signature to it is conclusive to show that she knew and approved of its contents. Reflect on the contrary proposition. Suppose that a long will with a number of complicated arrangements, is read to a competent testator, and is executed by him, if we were permitted some time after his death to enter into a discussion as to how far he understood and appreciated the bearings of all the different parts of the will, we should upset half the wills in the country. Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered. The real, practical question in this case is, did the testatrix ever read the residuary clause? Was it ever brought to her notice in that or any other way before the execution? If you think she was of a sound and capable mind, and really did read the will through, and put her name to it, she was bound by that act, and there is an end of the matter" (*c*).

(*b*) (1869) 1 P. & D. at p. 670.

(*c*) See *Fawcett* v. *Jones*, (1810) 3 Phill. at p. 489; *Hastilow* v. *Stobie*, But this rule must be read with two reservations:

This proposition was considered by the House of Lords in the case of *Fulton* v. *Andrew* (*d*), and the decision in that case—though not throwing any substantial doubt upon the proposition as a rule of law—is greatly to weaken the universality and unyielding character of its application (*e*). The Lord Chancellor, after stating that he should greatly deprecate in a matter of this kind the introduction or creation of fixed and unyielding rules of law which are not imposed by Act of Parliament, quoted the passage which has been cited from Lord Penzance's charge to the jury in *Atter* v. *Atkinson* (*f*). He then continued (*g*): "I do not know that there is anything in that direction, taken as a whole, to which I could venture to make any objection; but you will observe the very important qualification—I say, 'taken as a whole.' In the first place the jury must be satisfied that the will was read over, and in the second place must also be satisfied that there was no fraud in the case. Now applying those observations to the present case . . . It appears that the witnesses stated either that the will was read over to the testator, or that it had been left with him overnight for the purpose of being read over. The jury may, or may not, have believed that statement, or may have thought, even if there had been some reading of the will, that that reading had not taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effect of the residuary clause—and it may well be that the jurors . . . were not satisfied that there was any such proper reading or explanation of the will as would apprise the testator of the change, if there was a change, between the instructions and the will.

(1) The reading of the will to or by the testator may not have been such a proper reading or explanation as would apprise the testator of its contents,

"Moreover, how does the qualification that there must be no fraud bear upon the present case? It is very difficult to define the various grades or shades of fraud; but it is a very important qualification to engraft upon the general state of

and (2) failure to bring home to the mind of the testator the effect of his act may,

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(1865) 1 P. & D. at p. 69; and see *Beamish* v. *Beamish*, [1894] 1 Ir. R. 7.

(*d*) (1875) L. R. 7 H. L. 448.

(*e*) *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. at p. 341.

(*f*) (1869) 1 P. & D. at p. 670; quoted *ante*, p. 104.

(*g*) L. R. 7 H. L. at p. 462.

under certain circumstances, amount to fraud.

things that the reading over of a will to a competent testator must be taken to have apprised him of the contents. If your Lordships find a case in which persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared, for their own benefit, a will disposing in their favour of a large portion of the property of the testator; and if you submit that case to a jury, it may well be that the jury may consider that there was a want, on the part of those who propounded the will, of the execution of the duty which lay upon them, to bring home to the mind of the testator the effect of his testamentary act; and that that failure in performing the duty which lay upon them, amounted to a greater or less degree of fraud on their part. The qualification of Lord Penzance in the charge I have read may entirely apply to such a case" (*g*).

It is still open to the Court to consider whether the will was read over in a proper way.

It therefore follows that, where there are strong reasons for supposing that the will or any particular part of it does not meet the testator's intentions, it is still open for the tribunal —without impugning the general rule of law that a competent testator to whom a will is read is to be held to have approved of its contents—to consider whether the will was read over in a proper way (*h*). And if the tribunal finds as a fact that a particular portion of the will was not brought to the knowledge of the testator in such a way that he must be assumed to have confirmed it by his subsequent execution of the will, and that the words were introduced by mistake, its duty is to hold that those words do not form part of the will of the testator (*i*).

Words introduced into the will by mistake of the draftsman.

Where words which do not express the intention of the testator have been introduced into a will by the draftsman, a distinction exists between cases in which such words were

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(*g*) *Per* Cairns, L.C., in *Fulton* v. *Andrew*, (1875) L. R. 7 H. L. at pp. 462—464; see also the remarks of Lord Hatherley at pp. 469, 473.

(*h*) *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. at p. 341. Thus for the testator merely to cast his eye over his will might not be deemed enough: *ibid.*, at p. 343; or that a draft was sent to the testatrix for perusal, accompanied by a letter to the effect that there had been no material departure from the instructions: *Brisco* v. *Baillie Hamilton*, [1902] P. 234. See also *Atter* v. *Atkinson*, (1869) 1 P. & D. at p. 669; *Fulton* v. *Andrew*, (1875) L. R. 7 H. L. at p. 473.

(*i*) *Brisco* v. *Baillie Hamilton*, [1902] P. at p. 237.

unintentionally and inadvertently introduced, and cases in which they were introduced by the draftsman with the intention of carrying out the instructions of the testator, but from ignorance or error inappropriate terms were used. It is a matter of some difficulty to extract a definite principle from the cases on this subject, but it is submitted that they establish the following rules:—

(1) Where the testator instructs another person to draw up the will, and the draftsman misunderstands the instructions or uses inappropriate language, the testator, is bound by the mistake.

First. Where the mind of the draftsman has really been applied to the particular clause (*j*), then, whether the error has arisen from the fact that he misunderstood the instructions of the testator (*k*), or, having understood the instructions, has used inappropriate language in seeking to give effect to them, the testator who executes the will is—in the absence of fraud (*l*)—bound by the error so made as if it were his own, even if the mistake were not directly brought to his notice; and the Court will not omit from the probate the words so introduced into the will.

Thus in *Harter* v. *Harter* (*m*), the testator gave instructions to his attorney for the preparation of a will. The residuary clause, according to the instructions noted by the attorney, was as follows: "And the residue equally amongst all my sons." From these instructions a draft will was drawn, which disposed of the residue in the following terms: "the trustees to stand possessed of all the residue and remainder of my *real* estate in trust to divide the same," etc. The person who drafted the will stated in evidence that he understood the word "residue" in the instructions to mean "*real and*

(*j*) See *Dyke,* (1881) 6 P. D. at p. 208; *Stedham, ibid.* at p. 206; and see *Chilcott,* [1897] P. 223.

(*k*) But see *Brisco* v. *Baillie Hamilton,* [1902] P. 234. In that case the solicitor who drew the will mistook the extent of the testatrix's interest in certain landed estates, and the will was accordingly executed devising only "her undivided moiety of and in" the said estates. The estates, in fact, belonged entirely and absolutely to the testatrix. The Court, notwithstanding the fact that the draft of the will had been sent to her for her approval, and that she had returned the draft with certain alterations in other parts, found as a fact that she did not know and approve of the clause so drawn, and directed that the restrictive words should be eliminated from the probate. It is difficult to reconcile this case with those cited on pp. 108—110, *post.*

(*l*) See *Collins* v. *Elstone,* [1893] P. at p. 5.

(*m*) (1873) 3 P. & D. 11.

personal," but that by inadvertence he drew the will as above, and never noticed the error. The draft will was left with the testator, and on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause. The testator in his letters stated that he had carefully perused the draft, and the will with the words above quoted was duly executed by him.

Sir J. Hannen contrasted this case with that of *In the goods of Duane* (*n*), where the words rejected were part of a printed form and ought to have been struck out as inconsistent with the instructions; they were not read by or to the testator, but the person who prepared the will omitted to strike them out. The learned judge said (*o*): "The facts of that case distinguish it in an essential manner from the present. There an entire clause of which the testator was altogether ignorant was introduced by accident, and it was contrary to the intention of the person who drew the will that the clause should be in it. In the present case the testator intended that a clause disposing of the residue of his personalty should be in the will, but he left it to another person to choose the language by which his intention should be carried into effect, and he read and adopted as his own the language so chosen. Inappropriate language having been used, the Court is asked to remedy the mistake not by rejecting words of which the testator is proved to have been ignorant, but by modifying the language used by the draftsman, and adopted by the testator, so as to make it express the supposed intention of the testator. This is, in fact, to make a new will." Partly on this ground, and partly on the ground that the testator, having read the will, must be taken to have known and approved of its contents, the learned judge refused to strike out the word "real" from the residuary clause.

In *Morrell* v. *Morrell* (*p*) the same learned judge said (*q*): "Where the testator prefers to rely on the judgment and skill of a trained mind to express his wishes rather than to run the

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(*n*) (1862) 2 S. & T. 590.

(*o*) 3 P. & D. at p. 20.

(*p*) (1882) 7 P. D. 68.

(*q*) *Ibid.* at p. 70.

risk of selecting words himself . . . he adopts the words used by that person just as though they were his own. There is no difference between the case of his referring it to a particular person to express his wishes who makes the mistake, and himself, knowing what his own wishes are and setting about to express them, making the mistake. He might foolishly attempt to use technical language; if, for instance, he had put down 'heir-at-law' when in fact he meant 'next of kin,' he must bear the consequences; and so if he trusts to anybody else to express his wishes and adopts the words used by that person as his own, then that alone can remain as the evidence of his intention" (*r*). Later in his charge to the jury the learned judge added (*s*): "When you employ a lawyer either to draw a will or a deed which requires skill you rely on his skill and, of course, on his integrity, and when he tells you 'I have drawn this will according to your instructions,' and he puts it before you to sign, do you not adopt his words as expressing your wish? I do not desire, as far as this is a question of fact, to take it out of your hands, but . . . it appears to me the man does approve of the words which his solicitor puts in for him." This was a case in which the draftsman by inadvertence inserted in the will the words "my *forty* B shares" instead of "all my B shares," as instructed. The jury found that the testator did not know and approve of the insertion of the word "forty," and that word was struck out.

In *Rhodes* v. *Rhodes* (*t*) Lord Blackburn said: "There is no difference between the words which a testator himself uses in drawing up his will, and the words which are *bonâ fide* used by one whom he trusts to draw it up for him. In either case there is a great risk that words may be used that do not express the intention. However this may be, the Court which has to construe the will must take the words as it finds them." The Court therefore held that the plaintiff was not entitled to have the probate amended by omitting the words

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(*r*) Compare Lord Blackburn's observations in *Rhodes* v. *Rhodes*, (1882) L. R. 7 A. C. at pp. 199 *et seq.*

(*s*) 7 P. D. at p. 73.

(*t*) (1882) L. R. 7 A. C. 192.

"from and after the decease of my said wife without issue" on the ground that the draftsman introduced them without reason or special instructions, and that their effect had not been intelligently appreciated by the testator. In this case the will was read over to the deceased, who remarked, after the execution, "I can hardly say I have heard the will read at all, but I think it is sure to be all right. Mr. H. (the draftsman) is an honest man, and I trust him."

Collins v. *Elstone* (*u*) was a case in which the draftsman introduced into a will, disposing only of a small policy of insurance on the testatrix's life, a clause revoking all former wills. The will was read over to the testatrix, who objected to this clause, saying that she did not wish to revoke her first will and codicil. The draftsman assured her that the clause would not have that effect, and that to erase it might invalidate the will. The testatrix was satisfied with this assurance, and duly executed the will containing the clause of revocation. Sir F. H. Jeune, after referring to the case of *Morrell* v. *Morrell* (*v*), said: "This lady thought it right to employ this gentleman to make her will for her; she thought it right to trust him. No doubt he was mistaken, but according to the view of Lord Hannen, his mistake was her mistake." The learned judge refused to strike out the revocation clause from the will, as there was no suggestion of the interposition of fraud between the draftsman and the testatrix.

In *Garnett-Botfield* v. *Garnett-Botfield* (*x*) the Court was asked to omit from the probate several clauses of a will, including a clause of revocation, on the ground that the testator gave no instructions for their insertion and did not know and approve of their introduction. The Court was satisfied that the testator read the will. Sir F. H. Jeune said (*y*): "That he did not, perhaps, appreciate the full effect of the clauses is quite possible. I strongly suspect that . . . as regarded the legal drafting and its effect on the devolution of the property in question, those were matters on which he trusted his lawyer, who

(*u*) [1893] P. 1.
(*v*) (1882) 7 P. D. 68; *vide ante*, p. 108.
(*x*) [1901] P. 335.
(*y*) At p. 343.

admitted having made a mistake in the carrying out of the technical details. It is quite likely that the draftsman did not notice it at the time, and the testator also did not notice or appreciate it. But then comes in the judgment of Sir James Hannen in *Morrell* v. *Morrell*. . . . The view taken in that case it is impossible for this Court now to depart from. It would be quite out of the question to hold that because it is the solicitor who has made the slip, the testator is not to be held responsible for that slip. It cannot, in such circumstances, be successfully contended that the testator did not know and approve of the contents of the will which he signed, although it clearly did not carry out the instructions."

(2) Where the words are introduced by the draftsman *per incuriam*, the testator is not bound by the mistake.

Second. Where the mind of the draftsman has never really been applied to the words of the particular clause, and the words are introduced into the will *per incuriam*, without advertence to their significance and effect, by a mere clerical error on the part of the draftsman or engrosser, the testator is not bound by the mistake unless the introduction of such words was directly brought to his notice (*z*).

(*z*) Thus, the word "Georgiana," introduced into the will by the draftsman in mistake for the word "Florence," was omitted from the probate: *Boehm*, [1891] P. 247; the figures "103," introduced by the draftsman in mistake for the figures "105," were omitted: *Walkeley*, (1893) 69 L. T. 419; the word "British," introduced by the draftsman in mistake for the word "Bristol," was omitted: *Bushell*, (1887) 13 P. D. 7; the word "including," introduced into the will by the engrosser in mistake for the word "excluding," omitted: *Huddleston*, (1890) 63 L. T. 255 (see as to these two cases *Schott*, [1901] P. at p. 192); the word "revenue," inserted in the will by the draftsman in mistake for "residue," omitted: *Schott*, [1901] P. 190; the words "undivided moiety of and in" (applying to the testator's interest in certain estates), introduced into the will by the draftsman in ignorance of the extent of the testator's share in the estates, omitted: *Brisco* v. *Baillie Hamilton*, [1902] P. 234 (*vide ante*, p. 107, note (*k*)). The word "real," introduced into the will in the process of copying in mistake for the word "said," struck out: *Vaughan* v. *Clerk*, (1902) 87 L. T. 144; and see *Wrenn*, [1908] 2 Ir. R. 370; *Cooper*, [1899] P. 193.

Will wrongly dated.

Parol evidence is admissible to show that a will or codicil has, by mistake, been wrongly dated. The wrong date cannot be altered, but probate will issue of the document "as having been executed on" the correct date: *Randfield* v. *Randfield*, (1860) 6 Jur. N. S. 901; *Thomson*, (1865) 1 P. & D. 8; *Reffell* v. *Reffell*, (1866) 1 P. & D. 139. If probate has issued of the will so wrongly dated, before the mistake is detected, the Court may order a memorandum to be endorsed on the probate as to the true date on which the will was executed: *Allchin*, (1869) 1 P. & D. 664. For cases in which the testator—intending to confirm an earlier will—has by mistake inserted the date of a will other than that which he intended to confirm, see *post*, pp. 243 *et seq.*

CHAPTER III.

OF THE FORM AND MANNER OF MAKING A WILL OR CODICIL.

Wills made since January 1st, 1838.

THE execution and attestation of English wills (*a*) executed on or since the 1st day of January, 1838, must be in accordance with the provisions of the Wills Act, 1837 (*b*), as amended by the Wills Act Amendment Act, 1852 (*c*).

By sect. 5 of the Statute of Frauds, wills of real estate were required to be executed in accordance with certain prescribed formalities,

Prior to the year 1837, the execution and attestation of wills of real estate was regulated by the 5th section of the Statute of Frauds (*d*), which provides that from and after the 24th day of June, 1677, all devises and bequests of any lands or tenements "shall be in writing, and signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

but no formalities were required for the execution of wills of personal estate.

This section did not, however, extend to wills of personal property; and until the passing of the Wills Act, 1837, wills of that description were not required to be signed or attested ;- it was sufficient that the will was reduced into writing in the lifetime of the testator, and that it contained his real wishes and intentions (*e*).

The Wills Act, 1837, applies to all

The Wills Act, 1837, repeals the sections of the Statute of Frauds which relate to wills (*f*) and extends to all wills

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(*a*) Under certain circumstances wills of personal estate are entitled to probate in England though not executed in accordance with English law, *i.e.*, where they are executed with the formalities prescribed by the law of the testator's domicil: *vide ante*, Chap. I. The expression "English will" here means the will of a person domiciled in England.

(*b*) 1 Vict. c. 26.

(*c*) 15 Vict. c. 24.

(*d*) 29 Car. II. c. 3; *post*, pp. 727, 728.

(*e*) See *Ferraris* v. *Hertford*, (1843) 3 Curt. at p. 477; ss. 19 and 20 of the Statute of Frauds.

(*f*) Sects. 5, 6, 12, 19—24; *post*, pp. 727, 728.

executed on or after the 1st day of January, 1838, whether they dispose of real or personal property; and its effect is to abolish the distinction between wills disposing of real and wills disposing of personal property, so far as the formalities for their due execution and attestation are concerned.

wills, whether of real or personal estate.

The sections of the Wills Act, 1837, which relate to the execution and attestation of wills are as follows:

Provisions of the Wills Act, 1837.

Sect. 9. "No will (*g*) shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned: (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Sect. 9.

Sect. 11. "Provided always that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

Sect. 11.

Sect. 13. "Every will executed in manner hereinbefore required shall be valid without any other publication thereof."

Sect. 13.

It will be observed that sect. 9 of the Wills Act, 1837, though departing from the provisions of sect. 5 of the Statute of Frauds in several important respects, yet reproduces in identical language some of the expressions used in the latter section. It has been said that where there have been no decisions as to the statute in question, recourse may be had to decisions upon preceding statutes *in pari materia*; but great caution is necessary in the use of such materials, for the minutest diversity of words may make a distinction, or such decisions may be founded upon erroneous principles, and if so, however sanctioned by use, they are not to be implicitly followed (*h*). With this reservation, decisions upon the

Cases on the construction of expressions in sect. 5 of the Statute of Frauds, are applicable to the construction of the same expressions in the Wills Act, 1837, s. 9.

(*g*) This term includes a testament, codicil, an appointment by will in exercise of a power, and any other testamentary disposition: see s. 1 of the Act.

(*h*) Dr. Lushington in *Hudson* v. *Parker*, (1844) 1 Rob. at p. 23.

construction of expressions in the Statute of Frauds are applicable to the construction of the same expressions in the Wills Act, 1837, and are, therefore, referred to occasionally in the succeeding pages.

Presumption as to wills bearing no date.

It has been held that where a will—valid in accordance with the law in force before the 1st of January, 1838, but invalid if governed by the provisions of the Wills Act, 1837—bears no date, and there is nothing to lead to a contrary conclusion, the Court will presume that it was made before the Wills Act, 1837, came into operation, and so pronounce for its validity (*i*).

It is proposed to deal with the requirements of sect. 9 of the Wills Act, 1837 (*j*), in their order.

Section 1.

A WILL MUST BE IN WRITING.

Provision of Wills Act, 1837, s. 9.

The first provision of the section is: "No will shall be valid unless it shall be in writing."

What the expression "in writing" includes.

Sect. 20 of the Interpretation Act, 1889 (*k*), provides that in every Act of Parliament expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form.

A will may be written in pencil, or in a foreign language.

A will may be written in pencil wholly or in part (*l*); neither is it material in what language a will is written, whether in Latin, French (*m*), or any other tongue (*n*).

But no will may be made by word of mouth.

The effect of this provision of the Wills Act, 1837, is to invalidate all nuncupative wills made after the 1st of January, 1838, except the nuncupative wills of soldiers in actual

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(*i*) *Pechell* v. *Jenkinson*, (1839) 2 Curt. 273.

(*j*) *Vide ante*, p. 113.

(*k*) 52 & 53 Vict. c. 63.

(*l*) *Rymes* v. *Clarkson*, (1809) 1 Phill. 22, 35. As to the presumption which arises when a will is altered partly in pencil and partly in ink, see *Hall*, (1871) 2 P. & D. 256; *Adams*, (1872) 2 P. & D. 367; and *post*, pp. 217, 218.

(*m*) See *Whiting* v. *Turner*, (1903) 89 L. T. 71.

(*n*) Swinb., Part IV., s. 25, pl. 3; *Foubert* v. *Cresseron*, (1698) Show. P. C. 194; *Reynolds* v. *Kortright*, (1854) 18 Beav. 417.

military service, and mariners or seamen at sea, which are excepted from the operation of the Act by sect. 11 thereof (*o*).

Section 2.

THE TESTATOR'S SIGNATURE.

Provision of Wills Act, 1837, s. 9.

The section further provides that the will must be signed by the testator, or by some other person in his presence and by his direction.

A mark is sufficient, though the testator is able to write his name,

A mark.—If the testator, instead of signing his name to the will, place his mark upon it, that is a sufficient signing; and it is not necessary to prove that he could not write his name at the time (*p*). The testator's mark is sufficient, even though his hand is guided in making it (*q*).

though the testator's name is not written against the mark,

or a wrong name is written.

It is immaterial that the name of the testator is not placed against the mark, even though the name does not appear anywhere upon the face of the instrument (*r*); or even though a wrong name is written against the testator's mark by another person, for the mark is a sufficient execution, and that which some one else wrote cannot vitiate it (*s*).

But probate will not be granted where there is no evidence, or only highly suspicious evidence, to identify the person affixing the mark and executing the will with the testator (*t*).

Initials.

Initials.—The initials of a testator's name placed by him upon the will are a valid signature (*u*).

A wrong name signed *animo testandi* will suffice.

Wrong name.—If the testator, intentionally or unintentionally, signs under a wrong or assumed name, still if he signs *animo testandi*, that is a sufficient signature, for the name so written may stand for and pass as the mark of the testator (*x*).

(*o*) *Vide post*, pp. 295 *et seq.*

(*p*) *Baker* v. *Dening,* (1838) 8 A. & E. 94; *Field,* (1843) 3 Curt. 752.

(*q*) *Wilson* v. *Beddard,* (1841) 12 Sim. 28.

(*r*) *Bryce,* (1839) 2 Curt. 325.

(*s*) *Clarke,* (1858) 1 S. & T. 22, where a will purporting to be that of S. Clarke was executed by a mark, against which appeared the name of S. Barrel (the testatrix's maiden name); and see *Douce,* (1862) 2 S. & T. 593, where a testator was wrongly named in the body of the will, and the wrong name was also placed against his mark.

(*t*) *Edmonds* v. *Lewer,* (1865) 11 Jur. (N. S.) 911.

(*u*) *Savory,* (1851) 15 Jur. 1042; *Wingrove,* (1850) 15 Jur. 91; *Hinds,* (1852) 16 Jur. 1161.

(*x*) *Redding,* (1850) 2 Rob. 339, where the will was signed under an

Sealing with an ordinary seal, *semble*, will not suffice,

Sealing.—It was at one time held, on the construction of sect. 5 of the Statute of Frauds, that sealing was signing, on the analogy of a signature by a mark (*y*); but upon a review it was held that sealing without signing is not a sufficient execution of a will (*z*). For it was said, "any one may put a seal, no particular evidence arises from that seal; common seals are alike, and one man's may be like another's; no certainty or guard therefore arises from thence" (*a*).

On the analogy of these cases, it would seem that sealing with an ordinary seal, with nothing to identify it with that of the testator, is not a sufficient signature under the Wills Act, 1837 (*b*).

but if the seal is inscribed with the testator's initials

But where a seal inscribed with the initials of the testator was affixed to the will by him in the presence of the witnesses, and he placed his finger upon the seal and said "This is my hand and seal," that was held to be a sufficient signature (*c*).

or name, that may be regarded as a signature by mark.

And where a testator, towards the end of his life, had his usual signature engraved so that it might be stamped on documents requiring his signature, and his will was so stamped with his name by a person in his presence and by his direction, Sir Cresswell Cresswell said: "Whether the mark is made by a pen or some other instrument cannot make any difference, neither can it in reason make a difference that a facsimile of the whole name was impressed on the will instead of a mere mark or cross. The mark made by the instrument or stamp used was intended to stand for and represent the signature of the testator. In the case where it was held that

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assumed name; *Glover,* (1847) 11 Jur. 1022, 5 N. C. 553, where a woman whose name was "Glover" signed her name as "Reed," that being the name of her first husband; but with reference to the signatures of witnesses, see *Leverington,* (1886) 11 P. D. 80, and *post,* pp. 138, 139.

(*y*) *Lemayne* v. *Stanley,* (1685) 3 Lev. 1; *Warneford* v. *Warneford,* (1727) 2 Str. 764.

(*z*) *Ellis* v. *Smith,* (1754) 1 Ves. Jun. 11, 15; *Smith* v. *Evans,* (1751) 1 Wils. K. B. 313; see *Wright* v. *Wakeford,* (1810) 17 Ves. at p. 459.

(*a*) *Grayson* v. *Atkinson,* (1752) 2 Ves. Sen. 454, at p. 458.

(*b*) See *Byrd,* (1842) 3 Curt. 117, where it was held that sealing by the witnesses did not amount to a subscription by them. *Sed quære,* whether even a common seal, if affixed by the testator by way of a signature, would not be sufficient: see *Jenkins* v. *Gaisford,* (1863) 3 S. & T. 93, 96.

(*c*) *Emerson,* (1882) 9 L. R. Ir. 443.

sealing was not signing, the seals were not affixed by way of a signature" (*d*). Accordingly the learned judge held the will to have been validly executed.

A will may be signed for the testator by some other person.

Signature by another for the testator.—The section provides that the will may be signed by some other person in the presence of the testator and by his direction.

Such person may be one of the attesting witnesses or the person who drew the will,

The person who signs the testator's name in his presence and by his direction may be one of the witnesses who attests the execution of the will (*e*), or the person who drew the will (*f*).

and may sign in his own name,

It is a sufficient compliance with the Act if some other person, at the testator's request, signs the will for him, not in the testator's name, but his own (*g*).

or by a mark,

or by impressing a facsimile of the testator's signature on the will.

It has been held that the word "signed" in the section must have the same meaning whether the signature is made by the testator himself, or by some other person in his presence and by his direction; therefore a mark made by some other person under such circumstances must suffice (*h*). And whether the mark is made by a pen or by some other instrument can make no difference; neither can it make any difference that a facsimile of the whole name was impressed on the will instead of a mere mark or cross, provided the mark made by the instrument or stamp used, was intended to stand for and to represent the signature of the testator (*i*).

The testator must indicate to the witnesses that the signature is placed on the will at his request.

Where the will is signed by a third party in the presence of the testator and of the attesting witnesses, it has been held that the testator must, by act or word, in some way indicate to the two witnesses present that the signature was put there at his request. If a previous positive direction had

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(*d*) *Jenkins* v. *Gaisford,* (1863) 3 S. & T. 93, 96.

(*e*) *Bailey,* (1838) 1 Curt. 914; *Smith* v. *Harris,* (1845) 1 Rob. 262.

(*f*) *Elcock,* (1869) 20 L. T. 757.

(*g*) *Clark,* (1839) 2 Curt. 329, where the other person wrote "Signed on behalf of the testator, in his presence and at his direction by me. C. F. F., Vicar of Warfield"; *Blair,* (1848) 6 N. C. 528, where the words were "This will was read and approved by G. F. B. (the testator) by C. C. in the presence of," etc.

(*h*) *Jenkins* v. *Gaisford,* (1863) 3 S. & T. 93, at p. 96.

(*i*) *Ibid.* A name pencilled beforehand merely to indicate where the testator is to sign is not sufficient: *Reeves* v. *Grainger,* (1908) 52 Sol. Jo. 355.

been given to the agent to sign the will, it might not be that the testator would repeat that direction in the presence of the witnesses; but he must do something to show that he understood at the time that the other party was signing for him (*k*).

Quære, is it necessary to call affirmative evidence that the signature was made in the testator's presence and by his direction?

Where a will was produced bearing the name of the testator, and there was no evidence that the name was in his handwriting, it was suggested that there ought to be some evidence that the signature was made in his presence, and by his direction. Sir H. J. Fust observed, "Surely, if a testator acknowledges a signature to be his, that is sufficient, unless the contrary be proved" (*l*).

The third person must sign "in the presence" of the testator.

With regard to the signature being made in the presence of the testator, it is assumed that the cases which relate to the presence of the witnesses would apply (*m*).

Section 3.

POSITION OF TESTATOR'S SIGNATURE.

Provision of Wills Act, 1837, s. 9: the will must be signed "at the foot or end."

Sect. 9 (*n*) of the Wills Act, 1837, provides that the will must be signed "at the foot or end thereof" by the testator, or by some other person in his presence and by his direction.

Restrictive interpretation of this provision caused grave injustice,

This provision, designed perhaps to prevent future controversy as to whether a will containing the name of the testator only at the commencement—thus: "This is the last will and testament of A. B."—was a complete and perfect instrument (*o*), gave rise to much litigation, with the result that probate of a very great number of wills was refused on the ground that they were not properly signed at the foot or end. For it was held that these words invalidated all wills in which the signature was not so affixed as to leave no blank space for any interpolation between the end of the will and the signature (*p*).

(*k*) *Marshall*, (1866) 13 L. T. 643; and see *Summers*, (1850) 2 Rob. 295; *Morritt* v. *Douglas*, (1872) 3 P. & D. 1.

(*l*) *Gaze* v. *Gaze*, (1843) 3 Curt. 451.

(*m*) See *post*, pp. 136, 137.

(*n*) *Ante*, p. 113.

(*o*) *Smee* v. *Bryer*, (1848) 1 Rob. 616, 623.

(*p*) *Smee* v. *Bryer*, (1848) 1 Rob. 616, 6 Moo. P. C. 404; and see *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 457.

But this construction was found to produce such extensive injustice that the Legislature intervened to alter the law so established.

and necessitated an intervention by the Legislature.

The Wills Act Amendment Act, 1852 (*q*), provides:

Accordingly the Wills Act Amendment Act, 1852, was passed, by which a very wide construction is placed upon the words "at the foot or end."

Sect. 1. "Where by [the Wills Act, 1837] it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*r*); and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will (*s*), or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*t*),

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(*q*) 15 Vict. c. 24.

(*r*) *Beside.*—See *Jones,* (1865) 4 S. & T. 1, where the signature was written down the lower part of the edge of the paper; *Wright,* (1865) 4 S. & T. 35, along the sides of the will upon the third page; *Coombs,* (1866) 1 P. & D. 302, on the second page, crossways, the will ending at the bottom of the third page: see, as to this case, *Royle* v. *Harris,* [1895] P. 163, 166; *Ainsworth,* (1870) 2 P. & D. 151, beside the two last lines of the will; *Usborne,* (1909) 25 T. L. R. 519, in the side margin of the will.

Opposite.—See *Williams,* (1865) 1 P. & D. 4, signature on the third page, opposite to the conclusion of the will in the middle of the second page. A signature to a codicil in the margin of the *will* was held not to be a due execution of the codicil: *Hughes,* (1887) 12 P. D. 107. As to the intention of the testator to give effect to the will by his signature, see *post,* pp. 122, 123.

Under.—See *Woodley,* (1864) 3 S. & T. 429, where the signature was written partly across the last line but one of the will, and entirely above the last line, with the exception of one letter which touched the last line; *Powell,* (1865) 4 S. & T. 34, where the attestation clause and names of the attesting witnesses were at the bottom of the second side; a dispositive clause was written on the third side, and all the letters of the testator's signature, excepting the two last, which extended over to the third side, were on the second side.

(*s*) See *Page* v. *Donovan,* (1857) Dea. & Sw. 278, at the end of a notarial minute which followed the last dispositive clause of the will.

(*t*) *Vide post,* p. 120, note (*a*).

or by the circumstance that the signature shall be placed among the words of the testimonium clause (*u*), or of the clause of attestation (*x*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening (*y*), or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses (*z*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature (*a*); and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath

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(*u*) See *Mann,* (1858) 28 L. J. P. 19, where the will ended "In witness whereof I, M. H. M., have hereunto set my hand," and that was the only signature; *Trott* v. *Skidmore,* (1860) 2 S. & T. 12, where the concluding words of the will, all in the handwriting of the testator (Joseph Skidmore), were "a receipt to be provided by the receiver from all further claim upon the estate of their departed brother Joseph Skidmore," and that was the only signature; and see *Winsor* v. *Pratt,* (1821) 5 J. B. Moore, 484, where it was held that a testator's signature at the foot of a will is sufficient, even if the testimonium clause refers to other signatures to the preceding pages which were in fact not made.

(*x*) See *Walker,* (1862) 2 S. & T. 354, where it was held that the deceased intended to give effect to his will by his signature in the attestation clause, in spite of the fact that there was a subsequent unattested signature by him; *Huckvale,* (1867) 1 P. & D. 375; *Casmore,* (1869) 1 P. & D. 653, where the circumstances were similar to those in *Walker* (*supra*); *Pearn,* (1875) 1 P. D. 70; *Harris,* (1875) 23 W. R. 734; *Torre,* (1862) 8 Jur. (N. S.) 494.

(*y*) See cases in note (*z*), *infra.*

(*z*) See *Puddephat,* (1870) 2 P. & D. 97, where the name of the deceased was written beneath the signatures of the attesting witnesses, and no evidence could be given of the order in which the signatures were made; *Jones,* (1877) 46 L. J. P. 80, where the circumstances were similar to those in *Puddephat* (*supra*); *Horsford,* (1874) 3 P. & D. 211, where the signature of the testator was on the sixth page of a will, the attestation clause and the signatures of the witnesses appearing at the bottom of the fifth page.

(*a*) See *Wright,* (1865) 4 S. & T. 35, where the will filled two pages or which follows it (*b*), nor shall it give effect to any disposition or direction inserted after the signature shall be made" (*c*).

Sect. 2. The Act to extend to certain wills already made.

Sect. 2. "The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some

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of a sheet of notepaper, and the signatures were written along the sides of the will upon the third page; *Williams,* (1865) 1 P. & D. 4, on the third page, the will ending in the middle of the second page, and see *Derinzy* v. *Turner,* (1851) 1 Ir. Ch. Rep. 341; *Hunt* v. *Hunt,* (1866) 1 P. & D. 209, on the top of the fourth page, the will ending in the middle of the third page; *Coombs,* (1866) 1 P. & D. 302, crossways on the second page, the will filling the first and third pages; *Fuller,* [1892] P. 377, on the fourth page, the will being written on the first page, the second and third pages blank, see *Rice,* (1870) 5 Ir. R. Eq. 176; *Millward* v. *Buswell,* (1904) 20 T. L. R. 714, where the will, written on three pages, was signed only on the first page, and that page was admitted to probate.

Back.—When the signature is so placed that the witnesses are unable to see the body of the will or codicil, there must be some evidence to satisfy the Court that the will was written on the paper before the signatures were put there: *Hammond,* (1863) 3 S. & T. 90. In *Archer,* (1871) 2 P. & D. 252, where the signatures were written on the back of a sheet of paper, which was otherwise blank, the will being wholly written on the other side, the Court, on proof that the deceased wrote the whole will in the presence of the witnesses, held that it was well executed.

On separate sheet attached to the will.—If the signatures are upon a separate piece of paper, attached to the end of the will, the Court must be satisfied that the piece of paper was so attached at the time the signatures were made. See *Gausden,* (1861—2) 2 S. & T. 362, where the signature was upon a piece of paper pasted on the right-hand bottom corner of the parchment on which the will was written; *Cook* v. *Lambert,* (1863) 3 S. & T. 46, which is a similar case to *Gausden* (*supra*); *Horsford,* (1874) 3 P. & D. 211, where the paper on which the signature was written was attached to the body of the will with string; *Lewis* v. *Lewis,* [1908] P. 1, where the two pieces of paper were, at the time of execution, held together for the moment by the testator's finger and thumb; but see *Lambert,* (1862) 31 L. J. P. 118; *West,* (1863) 32 L. J. P. 182.

(*b*) See *post,* pp. 123 *et seq.*

(*c*) See *Arthur,* (1871) 2 P. & D. 273, where the testator, after signing his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature.

other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will."

Sect. 3. Interpretation of "will."

Sect. 3. "The word 'will' shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the [Wills Act, 1837]."

Whatever be the position of the testator's signature, it must be intended to give effect to the will.

It is to be observed, with reference to the provisions of this statute, that whatever position the signature of the testator occupies, the Court must be satisfied that the testator intended to give effect, by such signature, to the writing signed as his will.

A signature made to the *wrong* document by mistake will not give effect to it as a will.

Thus, where one of two sisters prepared two wills for their respective execution, the legacies in each and the disposition of the residue being almost identical, and in each case a life interest being given to the survivor in the bulk of her sister's property, and the deceased by mistake executed the will prepared for her sister, the Court held that, as she did not know and approve of any part of the contents as the will she had signed, and as it was quite clear that if she had known of the contents she would not have signed it, probate of the paper so executed must be refused (*d*).

Primâ facie, signatures on all sheets except the last are signatures of authentication and not of execution.

And where the will is in several sheets, and each sheet is signed by the testator, such signatures upon all sheets *except the last* will *primâ facie* be regarded as placed there by the testator merely to authenticate the sheets so signed and to guard against other sheets being interpolated, and not effective as an execution of the whole will or any part thereof (*e*).

(*d*) *Hunt*, (1875) 3 P. & D. 251; *Meyer*, [1908] P. 353. See *Anon.*, (1850) 14 Jur. 402.

(*e*) *Ewen* v. *Franklin*, (1855) Dea. & Sw. 7. In this case a will was signed by the testator and the witnesses in the margin of the first four sheets, but the testator alone signed the fifth and last sheet. Sir J. Dodson thought that the signatures on the earlier sheets were intended only to prevent the interpolation of other sheets, and that there was nothing from which it could be inferred that the signatures on the four sheets were intended to attest the signature of the testator to the whole will.

Again, in *Sweetland* v. *Sweetland*, (1865) 4 S. & T. 6, the deceased signed his name on five sheets of a testamentary paper, which consisted of six sheets; the names of the attesting witnesses appeared on each of the

On the other hand, where there was a duly executed will followed by a number of additions and alterations, some of which were informally executed, and at the end of them all appeared the signatures of the testator and attesting witnesses, with an attestation clause, the presumption was held to be that the signatures applied to all that stood written above them at the time when they were placed there, and all the alterations and additions were admitted to probate (*g*).

Primâ facie the signature at the end of the will applies to all that is written above it.

The statute further provides that "no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

No signature shall give effect to anything written beneath or following it, or inserted after the signature is made.

Where, from the obvious sequence and sense of the context, it appears to the satisfaction of the Court that the signature of

Words physically

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five sheets; on the sixth appeared an attestation and testimonium clause, and the names of the witnesses, but not the signature of the deceased; the writing at the end of the fifth sheet broke off in the middle of a sentence, which was continued on the sixth sheet. Sir J. P. Wilde said: "It was contended that probate might be granted of the first five sheets, and the signature at the bottom of the fifth sheet treated as an execution of the will. . . . The first difficulty is, *quo animo* did the testator sign the fifth sheet? Ordinarily such a signature would be, I think, intended to guard against other sheets being interpolated. Certainly no one would, on the face of the will, conclude that it was intended as the final signature by which the testator's affirmation of the will was to be signified." On these grounds, and on others which will presently be discussed (*post*, p. 125), the learned judge refused to regard such signature as an execution of the whole or any part of the will. And see Lord Mansfield's judgment in *Right* v. *Price*, (1779) 1 Doug. at p. 243.

See *Dilkes*, (1874) 3 P. & D. 164, where the will extended over the first and second sides of a sheet of foolscap paper, and there was a printed attestation clause at the foot of each side; the deceased made a mark on each side in the blank space left for the purpose in both clauses. The witnesses signed their names at the bottom of the first side only, and before the deceased made her mark on the second side. Sir J. Hannen said: "The question in this case is with what intention the deceased made her mark on the first side of the paper? . . . The signature on the first page was made merely to authenticate what was written thereon, and it was intended to execute the will by the subsequent signature; but such intention was not formally carried out. The mark at the end was made as an execution of the will, but then it was not attested by the witnesses." The learned judge accordingly refused to grant probate of any part of the document. *Phipps* v. *Hale*, (1874) 3 P. & D. 166, is a similar case; and see *Leonard* v. *Leonard*, [1902] P. 243; *Dearle*, (1878) 47 L. J. P. 45; *Keating* v. *Brooks*, (1845) 4 N. C. 253, 260.

(*g*) *Cattrall*, (1863) 3 S. & T. 419.

occupying a position beneath or following the signature, may be shown to be above it by the obvious sequence and sense of the context,

the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such parts or part may be admitted to probate (*h*).

Again, words which physically follow the signature of the

(*h*) Thus, in *Kimpton,* (1864) 3 S. & T. 427, where the codicil was commenced low down upon a page and continued to the bottom, the words at the bottom being "In witness whereof, I the said," and then, on the *upper* part of the page, was written "Sarah Kimpton, the testatrix, have hereunto set my hand," etc., followed by the signatures of the testatrix and witnesses, and an attestation clause, Sir J. P. Wilde said: "Where any portion of the writing appears to the satisfaction of the Court to form part of the context, anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different. I think from the case of *Peach,* (1858) 1 S. & T. 138, that the late Sir C. Cresswell was inclined so to hold."

Again, in *Wotton,* (1874) 3 P. & D. 159, the deceased had obtained a form of will lithographed on the first side of a sheet of foolscap paper; she wrote her will on the second and third sides, leaving the lithographed form not filled up, save as to the appointment of executors. She signed her name in the presence of witnesses, *at the foot of the lithographed form.* Sir J. Hannen said: "Must I hold that the dispositive part of the will follows the signature of the deceased and the attestation? I think I am not so bound, because it appears from the affidavit of the attesting witnesses that the whole document was written before the execution by the testatrix, and if so, the true way to look at the transaction seems to be that, as the will was begun on the second and continued on the third side of the paper, these must be taken to be the first and second pages of the will, and so we are brought round to what, under ordinary circumstances, would be called the first page, but which, upon these facts, must be treated as the last page of the will, as I hold it was when executed. The fact that the fourth side of the paper is in blank is immaterial. I hold that the will was duly executed."

This case was followed in *Gilbert,* (1898) 78 L. T. 762, where the facts were very similar, save that the blanks in the lithographed form on the first page had been filled in more completely.

In *Royle* v. *Harris,* [1895] P. 163, the case of *Wotton* (*ubi supra*) was considered and explained. There the testamentary document consisted of a sheet of paper containing on the first page a lithographed form of will. The form on the first page was filled in by the testatrix, and contained bequests to "my sisters and friends." Her signature and those of the attesting witnesses were at the bottom of the form on the first page. The second and third pages contained a list of bequests to persons, some of whom were the sisters and other friends of the testatrix. Sir F. Jeune, after pointing out differences in the form of the document and in the evidence in the case of *Wotton,* and the case then under consideration, said: "I should be glad if in this case I could come to a conclusion similar to that reached in *Wotton;* but I cannot do so. I have no doubt that the fact is that the words on the second and third pages were not intended to commence the will." The learned judge accordingly admitted the first page alone to probate. See also *Malen,* (1885) 54 L. J. P. 91; *Madden,* [1905] 2 Ir. R. 612, where the sheets had been misplaced by accident.

testator may be admitted to probate if they can fairly be regarded as interlineations in the body of the will (*i*), or as incorporated by reference therein (*k*); but the question of incorporation can only arise if the Court is of opinion that the writing which follows the testator's signature was not parcel of the will, or so part of it as to invalidate the execution as not complying with the Wills Act Amendment Act, 1852. And in any event it must be established that the clause following the signature was written before execution, and it must be made manifest by words of reference in the executed part of the will that the testator was describing that clause (*l*).

or be regarded as interlineations, or as incorporated by reference in the body of the will.

The Court may admit to probate all that is written above the signature of the testator, and reject what is written below; but only if satisfied that such signature was intended by the testator to give effect to the words preceding it as his will (*m*). The Court will not take this course where it appears that the signature is one of authentication and not of execution of the part which precedes it (*n*), or where to do so would be to defeat the testator's intention and to make nonsense of his testamentary dispositions (*o*).

In what cases the Court will admit to probate all that is written above the signature, and reject what is written below.

(*i*) In *Birt*, (1871) 2 P. & D. 214, there was in the body of a will, executed at the bottom of the first side of a sheet of paper, an incomplete sentence followed by an asterisk and the words "see over." On the second side was a corresponding asterisk, followed by words completing the unfinished sentence on the first side. These words were written before the will was executed. Lord Penzance held that the words on the second side might be regarded as an interlineation, and be read in the place in which the testator intended they should be read, and therefore preceding the signature: see *White*, (1860) 30 L. J. P. 55; *Malen*, (1885) 54 L. J. P. 91; *Greenwood*, [1892] P. 7. But the mere fact that the executed part of the will terminates with an incomplete sentence continued overleaf, is not sufficient to justify the Court in admitting the words following the signature to probate as interlineations: *Anstee*, [1893] P. 283; *Gee*, (1898) 78 L. T. 843.

(*k*) See *Watkins*, (1865) 1 P. & D. 19; *Dallow*, (1866) 1 P. & D. 189; and see *post*, p. 233.

(*l*) *Dallow*, (1866) 1 P. & D. 189; *Watkins*, (1865) 1 P. & D. 19; and see *post*, p. 233.

(*m*) See *Anstee*, [1893] P. 283; *Royle* v. *Harris*, [1895] P. 163; *Millward* v. *Buswell*, (1904) 20 T. L. R. 714; *Gee*, (1898) 78 L. T. 843.

(*n*) See *Sweetland* v. *Sweetland*, (1865) 4 S. & T. 6; *Phipps* v. *Hale*, (1874) 3 P. & D. 166; *Dilkes*, (1874) 3 P. & D. 164; *ante*, p. 122, note (*e*).

(*o*) In *Sweetland* v. *Sweetland*, (1865) 4 S. & T. 6, Sir J. P. Wilde said: "The statute imperatively demands that a will should be signed at

Where the will is written on several sheets, only the last sheet need be signed and attested.

Presumption where the will consists of several sheets.

A will may be written upon several separate sheets of paper, and when this is the case it will suffice if the last sheet alone is signed by the testator and attested by the witnesses. And where a will is found to be written on several sheets, and the last only is signed and attested, although the witnesses did not observe the others, the *primâ facie* presumption is that all the sheets were in the room and formed part of the will at the time of its execution (*p*). This rule, which applies to a will composed of numerous papers which together make one instrument, cannot, however, be extended to a series of separate and independent documents (*q*).

Section 4.

ACKNOWLEDGMENT OF HIS SIGNATURE BY THE TESTATOR.

Provision of Wills Act, 1837, s. 9.

The section provides that the signature must be made "or acknowledged by the testator in the presence of two or more witnesses present at the same time."

What is required in in order to

In cases where his signature is not written by the testator, or by another on his behalf (*r*), in the presence of the attesting

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'the foot or end thereof.' . . . To what has the word 'thereof' reference? Clearly, I think, to the whole will—to the whole of that which the testator then intended to execute as his will. . . . The Court would not be justified in fixing upon a signature in the midst of what the testator intended as his will, and treating it as an execution of all that preceded it, and granting probate of so much of the will, to the disregard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes." So in *Margary* v. *Robinson*, (1886) 12 P. D. 8, where the testator's mark was put by a blunder in the very middle of the will, Sir J. Hannen refused to give effect to all that was above the mark and reject what followed. The remarks of Sir J. P. Wilde in *Sweetland* v. *Sweetland* (*supra*) were quoted with approval by the learned judge, and he refused to admit to probate any part of the document so signed. And see *Dilkes*, (1874) 3 P. & D. 164; but see *Royle* v. *Harris*, [1895] P. 163, where these cases were distinguished.

(*p*) *Bond* v. *Seawell*, (1765) 3 Burr. 1773; *Gregory* v. *The Queen's Proctor*, (1846) 4 N. C. 620, 639; *Marsh* v. *Marsh*, (1860) 1 S. & T. 528; *Rees* v. *Rees*, (1873) 3 P. & D. 84; *vide post*, pp. 187, 218.

(*q*) *Pearse*, (1867) 1 P. & D. 382; *Hatton*, (1881) 6 P. D. 204.

(*r*) Some doubt was raised soon after the passing of the Act as to whether an acknowledgment was not confined to cases where the signature was made by "some other person" for the testator, but the Court was of opinion that the acknowledgment extended to the signature, whether made by the testator himself or by another for him: *Regan*, (1838) witnesses, there cannot be a sufficient acknowledgment of the signature by him in their presence, unless the Court is satisfied:—

constitute a valid acknowledgment.

(1) That the signature of the testator was upon the document at the time of the acknowledgment, and that the witnesses saw or had an opportunity of seeing the signature at that time.

(2) That some words were spoken or some act done by the testator, or suffered by him to be spoken or done by another in his presence and on his behalf, that may properly be regarded as an acknowledgment of his signature to the document.

There can be no valid acknowledgment unless the witnesses see or have an opportunity of seeing the signature.

1. It must be taken as an established proposition of law that there can be no valid acknowledgment by a testator of his signature to a testamentary instrument, unless the witnesses at the time of the acknowledgment see or have the opportunity of seeing the signature. "What is the plain meaning," said Dr. Lushington in *Hudson* v. *Parker* (*s*), "of acknowledging a signature in the presence of witnesses? What do the words import but this: 'Here is my name written, I acknowledge that name so written to have been written by me;—bear witness'? How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it? They might swear that the testator *said* he acknowledged a signature, but they could not depose to the fact that there was an existing signature to be acknowledged." And in the much later case of *Blake* v. *Blake* (*t*) Jessel, M.R., said: "What is in law a sufficient acknowledgment under the statute? What I take to be the law is correctly laid down in Jarman on Wills (*u*) in the following terms: 'There is no sufficient acknowledgment unless the witnesses either saw or might have

This rule is now authoritatively settled.

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1 Curt. 908. A name pencilled beforehand by his solicitor merely to indicate where the testator is to sign cannot comply with the requirements of the section and cannot be acknowledged by the testator: *Reeves* v. *Grainger,* (1908) 52 Sol. Jo. 355.

(*s*) (1844) 1 Rob. 14, at p. 25.

(*t*) (1882) 7 P. D. 102, at p. 107.

(*u*) 4th ed., p. 108.

seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will'; and I may add," continued the learned judge, "in my opinion, it is not sufficient even if the testator were to say 'My signature is inside the paper,' unless the witnesses were able to see the signature" (v).

It is sufficient that the witnesses had the opportunity of seeing the

But it is sufficient that the witnesses had an opportunity of seeing the signature of the testator at the time of the acknowledgment, even although they are not able affirmatively to state that they did see it. Thus Brett, J., in *Blake* v. *Blake* (*x*) said: "It has been brought to this: where the witnesses cannot see, *have no opportunity of seeing*, the signature, it is immaterial what the testator says, there cannot be an acknowledgment; but that when the signature is there, and they see or *have the opportunity of seeing it*, then if the testator says 'this is my will,' or words to that effect, that is sufficient acknowledgment, although he does not say 'this is my signature'" (*y*).

(v) There are certain cases which seem to cast doubt upon this proposition.

In *Gwillim* v. *Gwillim,* (1859) 3 S. & T. 200, neither of the witnesses recollected seeing the name of the testator upon the document when they attested it. They did not deny it was there, but said they did not recollect seeing it there. Sir Cresswell Cresswell, from a consideration of the circumstances of the case, came to the conclusion that the name of the testator was written at the time of attestation, and that by asking the witnesses to witness his will the testator duly acknowledged his signature.

In *Beckett* v. *Howe,* (1869) 2 P. & D. 1, the will was folded in such a way as completely to conceal the signature from the witnesses. The witnesses did not see and could not have seen the signature, the testator did not say it was there, but he told one of them that he was going to execute a will. Lord Penzance said: "The doctrine in *Gwillim* v. *Gwillim* (*supra*) is this, that if the testator produces a paper, and gives the witnesses to understand it is his will, and gets them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the will at the time." Relying on that view of the proposition laid down by *Gwillim* v. *Gwillim,* his Lordship held that there had been a valid acknowledgment of his signature by the testator.

But in *Blake* v. *Blake,* (1882) 7 P. & D. 102, Jessel, M.R., held that no such proposition had been laid down by Sir C. Cresswell in *Gwillim* v. *Gwillim* (*supra*), for in that case it was impossible for the witnesses to sign their names without seeing the signature if it was there, and the only question was whether the Court was satisfied that the signature was there or not. "I cannot find one word," said the learned judge (7 P. D. at p. 110), "in the judgment in *Gwillim* v. *Gwillim* (*ubi supra*) to show that Sir C. Cresswell was of opinion that, if the witnesses were unable to see the signature, the testator saying he had signed would be sufficient. I do not think the decision bears out the interpretation put upon it by Lord Penzance, namely, that there was any new doctrine laid down in that case different from the doctrine of *Hudson* v. *Parker* (*ante,* p. 127). The existence of any such doctrine rests entirely upon the statement of Lord Penzance in *Beckett* v. *Howe* (*supra*); and, as I think there was no sufficient ground for that statement, I am of opinion that the case of *Beckett* v. *Howe* is no authority." This view of the Master of the Rolls as to the effect of *Gwillim* v. *Gwillim* (*supra*) was confirmed by the Earl of Selborne, L.C., in *Wright* v. *Sanderson,* (1884) 9 P. D. 149, at p. 153.

signature at the time of the acknowledgment even though they cannot state that they actually saw it.

Where the witnesses cannot positively affirm that they saw the signature at the time of the acknowledgment, the Court must be satisfied that it was upon the paper at that time (*z*); and, in cases where the witnesses saw no writing at all upon the paper, the Court must be satisfied that the will itself existed in writing on the paper at the time of the acknowledgment (*a*).

The Court must be satisfied that the signature was upon the will at the time of the acknowledgment.

(*x*) (1882) 7 P. D. 102, at p. 114.

(*y*) See *Gwillim* v. *Gwillim*, (1859) 3 S. & T. 200. Thus in *Blake* v. *Knight*, (1843) 3 Curt. 547, where the witnesses were unable to state positively that they saw the signature, but would not swear that it was not there at the time, and there was nothing to prevent them from seeing it had it been there, the Court, on coming to the conclusion that the signature was there at the time, held that there had been a valid acknowledgment. And see *Davis*, (1843) 3 Curt. 748; *Cooper* v. *Bockett*, (1843) 3 Curt. 648; *Vinnicombe* v. *Butler*, (1864) 3 S. & T. 580; *Huckvale*, (1867) 1 P. & D. 375; *Pearn*, (1875) 1 P. D. 70. In *Daintree* v. *Fasulo*, (1888) 13 P. D. 102, at p. 103, Cotton, L.J., stated that if the signature was so placed that the witnesses could see it, *whether they actually did see it or not*, and the paper bearing the signature of the testatrix was put before two persons who were asked by her or in her presence to sign as witnesses, that was an acknowledgment of the signature by her.

(*z*) Thus where there was no proof that the signature was upon the paper at the time of the acknowledgment, and the testatrix did not inform the witnesses that the paper was a will, nor was either of them aware of its nature, probate on motion was refused: *Ashton*, (1847) 5 N. C. 548; *Swinford*, (1869) 1 P. & D. 630. In *Pearson* v. *Pearson*, (1871) 2 P. & D. 451, in the absence of all evidence that the signature was upon the will when the witnesses signed, the Court held that the mere asking of persons to sign as witnesses was not enough without any statement that the document was a will, and without any proof that there was a signature upon it. See, as to this case, *Daintree* v. *Fasulo*, (1888) 13 P. D. 102, at p. 104; and see *Fischer* v. *Popham*, (1875) 3 P. & D. 246; but see *Pascoe* v. *Smart*, (1901) 17 T. L. R. 595.

(*a*) *Hammond*, (1863) 3 S. & T. 90; *Pearsons*, (1864) 33 L. J. P. 177; *ante*, p. 121, n.; but see *Lloyd* v. *Roberts*, (1858) 12 Moo. P. C. 158.

It is not, however, necessary to adduce positive affirmative evidence of these facts.

It is not, however, essential that there should be positive affirmative evidence of these facts. The Court is at liberty to judge, from the circumstances of the case, whether the name of the testator was on the will at the time of the attestation or not. Thus Sir J. P. Wilde said in *In the Goods of Huckvale* (*b*), "Where there is no direct evidence on the point one way or the other, but a paper is produced to the witnesses and they are asked to witness it as a will, the Court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from those circumstances, and from the appearance of the document itself, whether the name of the testator was or was not upon it at the time of the attestation" (*c*). This conclusion has been arrived at as the result of a series of cases; but since these raise the question as to what evidence will satisfy the Court that the requirements of the statute generally have been complied with, they are dealt with in detail in a later section (*d*).

If the witnesses at the time of the acknowledgment neither saw nor had an opportunity of seeing the signature of the testator, the acknowledgment is invalid (*e*).

Some act equivalent to an acknowledgment of his signature must be done by the testator.

2. The Court must be satisfied that some words were spoken or act done by the testator, or suffered by him to be spoken or done in his presence, that may properly be regarded as an acknowledgment of his signature to the document.

Dr. Lushington, in *Hudson* v. *Parker* (*f*), after stating that

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(*b*) (1867) 1 P. & D. 375, at p. 378.

(*c*) And see *Pascoe* v. *Smart*, (1901) 17 T. L. R. 595.

(*d*) *Post*, pp. 149 *et seq.;* see *Blake* v. *Knight*, (1843) 3 Curt. 547; *Cooper* v. *Bockett*, (1843) 3 Curt. 648; S.C. on appeal, 4 Moo. P. C. 419; *Gwillim* v. *Gwillim*, (1859) 3 S. & T. 200; *Huckvale*, (1867) 1 P. & D. 375; *Pearn*, (1875) 1 P. D. 70; *Wright* v. *Sanderson*, (1884) 9 P. D. 149, at pp. 153, 160.

(*e*) Thus in *Ilott* v. *Genge*, (1842) 3 Curt. 160, S.C. on appeal, 4 Moo. P. C. 265, where the paper was so folded that the witnesses did not see any writing upon it, and they neither saw nor was there any possibility of their seeing the signature if there, and the testator did not state the nature of the document, it was held that there had been no valid acknowledgment, and this decision was affirmed on appeal. And see *Hudson* v. *Parker*, (1844) 1 Rob. 14; *ante*, p. 127; *Croft* v. *Croft*, (1865) 4 S. & T. 10; *Blake* v. *Blake*, (1882) 7 P. D. 102, C. A., overruling *Beckett* v. *Howe*, (1869) 2 P. & D. 1 (*ante*, p. 128, note (*v*)).

(*f*) (1844) 1 Rob. 14, at p. 25.

No particular form of expression is required.

the word "acknowledgment" imports: "Here is my name written, I acknowledge that name so written to have been written by me; bear witness," proceeds as follows:—

"Acknowledgment may be expressed in any words that will adequately convey that idea, if the signature be proved to have been then existent; no particular form of expression is required either by the word 'acknowledge,' or by the exigency of the act to be done. It would be quite sufficient to say 'that is my will,' the signature being there and seen at the time, for such words do import an owning thereof; indeed, it may be done by any other words which naturally include within their true meaning acknowledgment and approbation."

Mere production of the will, with a request to the witnesses to attest it, may constitute an acknowledgment,

Again, in *Ilott* v. *Genge* (*g*), Sir H. J. Fust said: "The production of a will by the testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment." And in *In the Goods of Thomson* (*h*) the same learned judge said: "When a paper is produced by a testator to the witnesses, with his name signed thereto, and they have an opportunity of seeing his name, and they attest the same by subscribing the paper, they being present at the same time, this is a sufficient acknowledgment of his signature by the testator" (*i*).

even though the witnesses are not told the nature of the document.

Even though the witnesses are not told that the document is a will or a testamentary paper, yet if they see or have an opportunity of seeing the signature of the testator and are asked to sign their names as witnesses, that is a sufficient acknowledgment (*j*).

(*g*) (1842) 3 Curt. 160, at p. 172.

(*h*) (1846) 4 N. C. 643, at p. 644.

(*i*) This case was held not to have been overruled or contrary to any other decision by Cotton, L.J., in *Daintree* v. *Fasulo*, (1886) 13 P. D. 102, 103. It had previously been suggested that it was inconsistent with *Ilott* v. *Genge*, (1844) 4 Moo. P. C. 265; see *Pearson* v. *Pearson*, (1871) 2 P. & D. 451. See also *Keigwin* v. *Keigwin*, (1843) 3 Curt. 607, at p. 611; *Leech* v. *Bates*, (1849) 6 N. C. at p. 704.

(*j*) All doubt as to the validity of this proposition, which was first laid down in *Thomson*, (1846) 4 N. C. 643—if doubt there had been—was finally set at rest by the decision of Butt, J., in *Daintree* v. *Fasulo*, (1888) 13 P. D. 67, affirmed by the Court of Appeal (13 P. D. 102). In that case

If the witnesses are asked to sign by some person in the presence and hearing of the testator, that may amount to a tacit acknowledgment by the testator.

If the witnesses are asked to sign the document by some person in the presence and hearing of the testator, and see or have an opportunity of seeing the signature, that may be a valid acknowledgment of his signature by the testator, though he himself speak no word; for the request of another in the presence of the testator may be equivalent to a request by the testator himself (*k*).

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the learned judge laid down the proposition substantially as given in the text.

The previous cases in which language was used which might seem to imply that there could not be a good acknowledgment unless the witnesses were aware that the document which they were attesting was testamentary, were cases in which the witnesses neither saw nor had an opportunity of seeing the signature of the testator at the time of the suggested acknowledgment.

Thus in *Ilott* v. *Genge,* (1844) 4 Moo. P. C. 265, Lord Lyndhurst said: "We are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by a testator." But in that case, as Cotton, L.J., pointed out in *Daintree* v. *Fasulo* (*ubi supra*), the paper was so folded that the witnesses could not see the signature; so that there is nothing in that case inconsistent with the rule in the text.

Again, in *Pearson* v. *Pearson,* (1871) 2 P. & D. 451, where Lord Penzance appears to cast doubt on the decision in *Thomson* (*ubi supra*) as inconsistent with *Ilott* v. *Genge* (*ubi supra*), there was no evidence that there was any signature on the will when the witnesses signed. And an examination of the following cases, where it was suggested that in order to constitute a valid acknowledgment the witnesses must know that they were signing a testamentary instrument, will show that in all of them there were other grounds for holding the acknowledgment invalid: *Ashton,* (1847) 5 N. C. 548; *Blake* v. *Blake,* (1882) 7 P. D. 102; *Swinford,* (1869) 1 P. & D. 630.

Further, in support of the proposition in the text, see *Keigwin* v. *Keigwin,* (1843) 3 Curt. 607; *Ashmore,* (1843) 3 Curt. 756; *Faulds* v. *Jackson,* (1845) 6 N. C. Suppl. i.; and see *post,* p. 134.

(*k*) Thus in *Faulds* v. *Jackson,* (1845) 6 N. C. Suppl. i., the testator having signed his will showed it to his clerk, and then sent him to fetch a second witness. When the latter came into the room, the first witness said, "William, Mr. Jackson [*i.e.*, the testator] wants you to sign this paper." Whilst the second witness was in the room, the testator spoke no word. Held: that there had been a valid acknowledgment. And see *Bosanquet,* (1852) 2 Rob. 577; *Jones,* (1855) Dea. & Sw. 3. Again, in *Inglesant* v. *Inglesant,* (1874) 3 P. & D. 172, the deceased signed her will in the presence of one witness. On the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so, and the first witness also subscribed the will. The deceased was in the room, but said no word during the proceeding. Sir J. Hannen, following *Faulds* v. *Jackson* (*ubi supra*), and being satisfied that the words were heard by the testatrix, held that there had been a valid acknowledgment.

But where the signature has been written for the testator, a more formal acknowledgment is necessary.

If, however, the signature has not been written by the testator, but by some person in his presence and by his direction, it would seem that a more formal acknowledgment is necessary (*l*).

A signature may be acknowledged by gestures.

The testator may acknowledge his signature by means of gestures (*m*).

The subscription by *both* witnesses must be *after* the testator has signed or acknowledged his signature to *both* of them, present at the same time.

The section is not complied with unless *both* witnesses attest and subscribe the will *after* the testator's signature has been made or acknowledged to them, when *both* were present at the same time (*n*).

In *Moore* v. *King* (*o*) Sir H. Jenner Fust said: "If the one witness has previously subscribed the paper, and merely points out that subscription when the testator acknowledges his signature in his presence and in that of the other witness, which latter witness alone then subscribes, that I hold not sufficient; I have no explanation why the first witness did not resubscribe (*p*). The Act says the testator may acknowledgê his signature, but does not say that the witnesses may acknowledge their subscriptions" (*q*).

(*l*) Thus where the name of the testator had been signed to his will at his request by the drawer thereof, who on a subsequent day asked two persons, in the presence of the testator, to sign their names as witnesses, which they did, and the testator *then* placed his seal on the paper and said "I deliver this as my act and deed," Sir H. J. Fust refused to consider such request as an acknowledgment by the testator himself of the signature made for him by the drawer: *Summers*, (1850) 2 Rob. 295. See also *Morritt* v. *Douglas*, (1872) 3 P. & D. 1. And in *Marshall*, (1866) 13 L. T. 643, it was held that if the signature of a testator be signed in his presence and that of the attesting witnesses to a will by a third party, the testator must, by act or word, in some way indicate to the two witnesses present that the signature was put there at his request: he must do something to show that the other party was signing for him.

(*m*) *Davies*, (1850) 2 Rob. 337.

(*n*) *Moore* v. *King*, (1842) 3 Curt. 243.

(*o*) 3 Curt. at p. 253.

(*p*) As to what amounts to a resubscription, see *post*, p. 139.

(*q*) *Hindmarsh* v. *Charlton*, (1861) 2 H. L. C. 160, is to the same effect; and see *Casement* v. *Fulton*, (1845) 5 Moo. P. C. 130, 138; *Allen*, (1839) 2 Curt. 331; *Simmonds*, (1842) 3 Curt. 79. See also *Hudson* v. *Parker*, (1844) 1 Rob. 14, at p. 35; *Faulds* v. *Jackson*, (1845) 6 N. C. Suppl. i. In *Wyatt* v. *Berry*, [1893] P. 5, the testator produced his will to the first witness (A.) alone, and A. signed it; the second witness (B.) was then called in and was asked to sign the paper, and B. then signed the will, all three being present. Sir Gorell Barnes, following *Moore* v. *King*, (1842) 3 Curt. 243, and *Hindmarsh* v. *Charlton* (*ubi supra*), held that the

The execution is invalid if the testator signs *after* the witnesses have subscribed the will.

It seems scarcely necessary to add that, if the witnesses subscribe before the signature of the deceased is upon the will, the will is not duly executed, though the testator afterwards sign in their presence (*r*).

The witnesses must be both mentally and bodily present.

Further, the statute is not satisfied, even if the signature is made in the presence of the two witnesses, if they are ignorant of that fact. The witnesses must see and be conscious of the act done and be able to prove it by their own evidence; they must be both mentally and bodily present, for if not, they might be asleep or intoxicated or of unsound mind (*s*).

If the witnesses see the testator writing what the Court is satisfied was his signature, that will suffice.

If the witnesses see the testator writing what the Court is satisfied was his signature to the will, that is sufficient, although they do not see the signature and the testator does not acknowledge it (*t*).

The witnesses need not know that the document is a will.

As already stated, whether the testator signs in the presence of the witnesses or acknowledges his signature previously made, it is not necessary that the witnesses should know that the document which they are asked to attest is a will (*u*). Nay, it has been said that the result of sect. 13 of the Wills Act, 1837, which provides that every will executed in the manner

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will was not duly executed. And in *Brown* v. *Skirrow*, [1902] P. 3, the same learned judge said: "According to the decided cases the acknowledgment must be made in the presence of the two witnesses, who must *afterwards* attest it." See *Swift*, (1900) 17 T. L. R. 16; and see, on the point that the witnesses may not acknowledge their signatures, *Betts* v. *Gannell*, (1903) 19 T. L. R. 304.

(*r*) *Cooper* v. *Bockett*, (1843) 3 Curt. 648, at p. 659; *Brenchley* v. *Still*, (1850) 2 Rob. at p. 167; see *Olding*, (1841) 2 Curt. 865; *Byrd*, (1842) 3 Curt. 117.

(*s*) *Per* Dr. Lushington in *Hudson* v. *Parker*, (1844) 1 Rob. at p. 24; and see *Thomson* v. *Hall*, (1852) 2 Rob. 426. Thus in *Brown* v. *Skirrow*, [1902] P. 3, a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness being at the time engaged at the other side of the shop, did not see them sign and did not know or have an opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness. It was held that the testatrix did not sign "in the presence" of the second witness. Sir Gorell Barnes said: "You cannot be a witness to an act that you are unconscious of. . . . In my view, at the end of the transaction the witness should be able to say with truth 'I know that this testator or testatrix has signed this document.'" See *Killick*, (1864) 3 S. & T. 578; and *post*, p. 136.

(*t*) *Smith* v. *Smith*, (1866) 1 P. & D. 143.

(*u*) *Ante*, p. 131.

therein mentioned shall be valid without any other publication thereof, is to render valid the execution of a will, even if the testator deceives the witnesses and leads them to believe that the instrument is a deed and not a will (*x*).

Even if the testator deceives them as to the nature of the document, the execution is valid.

Section 5.

ATTESTATION OF WILLS.

Wills Act, 1837, s. 9.

The witnesses must attest and subscribe the will in the presence of the testator.

The section further provides that the witnesses "shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Corresponding words of the Statute of Frauds.

The corresponding words of the Statute of Frauds are "and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses." It should seem that cases as to the meaning of the words "in the presence" of the testator in the Statute of Frauds are equally applicable to the construction of the same words in the Wills Act.

Distinction between attestation and subscription

The section provides that the witnesses "shall attest and shall subscribe the will"; and in this connection a distinction has been drawn between attestation and subscription. For by attestation is meant bearing witness to the making of the signature or its acknowledgment, which, as has already been seen, must be made in the presence of both witnesses, present at the same time. "Here are two things which the witnesses are to do," said Dr. Lushington (*y*); "they are to *attest* and to *subscribe*—mark the words: 'shall attest and shall subscribe,' the word 'shall' is repeated; subscription alone will not do, it will not satisfy the statute. . . . Then if 'attest' means something more than subscription, what does it mean? To attest is to bear witness to a fact; . . . the witnesses in a will bear witness to all that the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence. The statute does say that no form of attestation shall be necessary, still the witnesses must attest,

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(*x*) Sugden's Essay, p. 140, citing *Trimmer* v. *Jackson*, 4 Burn, Eccl. Law, 102, 9th ed.; *British Museum* v. *White*, (1829) 3 Moo. & P. 689.

(*y*) In *Hudson* v. *Parker*, (1844) 1 Rob. 14, at p. 26.

although the outward work of attestation be subscription only" (*z*).

The witnesses need not subscribe in the presence of one another.

The two witnesses, when they subscribe the will, need not be simultaneously present; but each must subscribe in the presence of the testator (*a*).

The expression "in the presence" of the testator means actual visual presence.

The testator must be able to see the witnesses if he chooses to look.

The witnesses must attest and subscribe the will "in the presence of the testator." This expression must be taken to mean visual presence (*b*). The witnesses must be within the reach of the organs of sight (*c*). But it is not necessary that the testator should actually see the witnesses sign, provided he is in such a situation that he might see them if he chose to look (*d*).

If a testator is in a state of insensibility when his will is

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(*z*) The distinction is a somewhat barren one, but is the basis of the rule that the witness must be mentally as well as bodily present when the signature is made or acknowledged (*ante*, p. 134). The words quoted in the text do not mean that the attestation can be independent of the subscription, but only that subscription does not necessarily amount to attestation: *Charlton* v. *Hindmarsh*, (1859) 1 S. & T. 433, 439.

(*a*) Thus in *Faulds* v. *Jackson*, (1845) 6 N. C. Suppl. i., it was held that the statute does not require that both witnesses should sign in the presence of one another, so long as the signature of the testator is made or acknowledged in the presence of both before either has signed; and see *Cooper* v. *Bockett*, (1843) 3 Curt. 648, 659; *Webb*, (1855) Dea. & Sw. 1. *Casement* v. *Fulton*, (1845) 5 Moo. P. C. 130, is a decision to the contrary, but this case has not been followed.

(*b*) *Brown* v. *Skirrow*, [1902] P. 3; *vide ante*, p. 134, note (*s*).

(*c*) Lord Ellenborough, C.J., in *Doe* v. *Manifold*, (1813) 1 M. & S. 294, 295.

(*d*) *Ibid.* In *Hudson* v. *Parker*, (1844) 1 Rob. 14, at p. 35, Dr. Lushington said: "The witnesses are to see the signature made or acknowledged, because they are to attest it and to bear witness thereof; the witnesses are to subscribe in the presence of the testator for another and different purpose, for the completion of the instrument. . . . It may therefore be that the words 'subscribe in the presence of the testator' may be satisfied with less stringent proof; that the cognizance of the subscription of the witnesses may not be so absolutely necessary, or may be inferred by bodily presence."

In *Shires* v. *Glascock*, (1688) 2 Salk. 688, 1 Lord Raym. 507, the testator was ill in bed, and signed, published, and declared his will in his bedchamber, and the witnesses subscribed their names in the dining-room, and, because there was a possibility that if the testator had been raised up in his bed he might have seen through glass doors the witnesses subscribing their names, it was held to be a good will.

In *Casson* v. *Dade*, (1781) 1 Bro. C. C. 99, the testatrix executed her will in her carriage, which stood at the office of her solicitor. The witnesses retired into the office to subscribe it, and it was proved that the carriage was accidentally put back, so that the testatrix was in such a

If the testator is in a state of insensibility when his will is attested, the will is not duly executed.

attested, the will is not duly executed, although he is corporally present when the witnesses subscribe their names (e). And it would seem that the testator must be aware of the presence of the attesting witnesses (f).

Where the testator is blind.

Though the testator is blind, it must be shown that he could, had he had his eyesight, have seen the witnesses sign (g).

Form of subscription,

To constitute a valid subscription by a witness, the witness must place upon the will his name, or some mark intended

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situation that she might see, through the window of the office, the witnesses sign the will; this was held to be tantamount to being present. Sir Herbert Jenner in *Newton* v. *Clarke,* (1839) 2 Curt. at p. 323, referring to this case, said that it carried the doctrine of constructive presence to a great length.

In *Newton* v. *Clarke,* (1839) 2 Curt. 320, the testator signed the codicil while lying in bed, there being present in the room the two attesting witnesses; the curtains of the bed were drawn, so that one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribe. Sir H. Jenner held that the will was subscribed in the presence of the testator, and said: "I am of opinion . . . where a paper is executed by the deceased in the same room where the witnesses are, and they attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign."

But in *Tribe* v. *Tribe,* (1849) 1 Rob. 775, where the testator lay in bed with the curtains closed, and it was impossible, from the state in which the testator was, for him to have turned himself in his bed so as to have seen the witnesses sign, the same learned judge said that he could not consider that there had been a sufficient compliance with the statute. The distinction between the cases would appear to be that in the former the testator could have seen the witnesses sign if he chose to look, in the latter he could not.

Thus in *Trimnell,* (1865) 11 Jur. (N. S.) 248, 249, Sir J. P. Wilde laid it down that the true test is whether the testator might have seen, not whether he did see, the witnesses sign their names.

In *Longford* v. *Eyre,* (1721) 1 P. Wms. 739, Lord Chancellor Macclesfield said that the bare subscribing the will by the witness in the same room did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room, in a clandestine, fraudulent way.

In the following cases it was held that the witnesses had not subscribed the will "in the presence" of the testator: Where the witnesses subscribed the will in an adjoining room to that in which the testator then was, but the latter was not in such a position that he could have seen them: *Doe* v. *Manifold,* (1813) 1 M. & S. 294; and see *Newman,* (1838) 1 Curt. 914; *Ellis,* (1840) 2 Curt. 395; *Colman,* (1842) 3 Curt. 118; *Jenner* v. *Ffinch,* (1879) 5 P. D. 106; *Carter* v. *Seaton,* (1901) 85 L. T. 76; *Betts* v. *Gannell,* (1903) 19 T. L. R. 304.

(e) *Right* v. *Price,* (1779) 1 Dougl. 241.

(f) *Killick,* (1864) 3 S. & T. 578; *Jenner* v. *Ffinch,* (1879) 5 P. D. 106.

(g) *Piercy,* (1845) 1 Rob. 278.

to represent and stand for his name, with the intention of attesting the execution of the will.

A mark is sufficient, though another writes a wrong name against it; even though the witness can write. Initials. Description.

It is not necessary that the witnesses should subscribe their names. The mark of a witness is sufficient, if placed on the will by him for his signature as attesting the execution, though another person writes the witness' correct name (*h*), or even a wrong name, against it (*i*). If a witness puts a mark, though he can write, it is a good subscription (*k*). So also if he puts his initials (*l*). For, as Lord Chelmsford said in *Hindmarsh* v. *Charlton* (*m*), "The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials or by writing the name in full." A witness, instead of signing his name, may describe himself in some other way, provided it is clear that he intended what he wrote to be his subscription as attesting the will (*n*). Thus where a witness subscribed the will "servant to Mr. Sperling" without any name, the Court held the subscription sufficient (*o*).

Seals.

It appears that the witnesses do not validly subscribe by placing their seals alone upon the paper (*p*).

A witness's hand may be guided, but another may not sign on his behalf.

The hand of the witness may be guided in subscribing the will (*q*), but the witness must himself subscribe, another cannot do it for him. One witness cannot subscribe for the

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(*h*) *Ashmore*, (1843) 3 Curt. 756; *Harrison* v. *Harrison*, (1803) 8 Ves. 185; *Addy* v. *Grix*, (1803) 8 Ves. 504.

(*i*) *Ashmore* (cited *supra*).

(*k*) *Amiss*, (1849) 2 Rob. 116.

(*l*) *Christian*, (1849) 2 Rob. 110; and see *Blewitt*, (1880) 5 P. D. 116; but see *post*, p. 141, note (*e*).

(*m*) (1861) 8 H. L. C. 160, 171.

(*n*) *Duggins*, (1870) 39 L. J. P. 24.

(*o*) *Sperling*, (1863) 3 S. & T. 272; *Olliver*, (1854) 2 Ecc. & Adm. 57.

(*p*) *Byrd*, (1842) 3 Curt. 117.

(*q*) *Harrison* v. *Elvin*, (1842) 3 Q. B. 117; *Frith*, (1858) 1 S. & T. 8. In *Kileher*, (1848) 6 N. C. 15, where the two attesting witnesses were able to write, and merely held the top of the pen while another wrote their names, Sir H. J. Fust held that was not a good subscription; but in *Lewis* v. *Lewis*, (1861) 2 S. & T. 153, where the circumstances were similar, save that the witnesses could not write, Sir C. Cresswell held that, as the witnesses took some share in the act of signing, the subscription was good. It was suggested that in *Kileher* (*ubi supra*) there were other circumstances of suspicion which led Sir H. J. Fust to reject the motion, rather than the mere fact of the witnesses' names having been so written.

other even at the desire of the latter (*r*), and where a witness subscribed in the name of her husband, who was not present, it was held that the will was not properly executed (*s*).

A witness may not acknowledge his signature already on the will, but must resubscribe if he has signed before the acknowledgment in the presence of both witnesses.

It has already been pointed out (*t*) that the witnesses must *both* subscribe the will *after* the signature of the testator has been made or acknowledged in the presence of *both* of them. If the signature of the testator is made in the presence of one witness, who subscribes his name to the will, and the second witness is then called in, it is not sufficient for the first witness to acknowledge his signature already upon the will; he must resubscribe the will after the signature of the testator has been acknowledged in the presence of both witnesses (*u*). It is not a resubscription if he traces over with a dry pen the signature already written, for that at most can only amount to an acknowledgment, which, as has just been said, will not suffice (*x*). "It cannot be too well understood," said Sir C. Cresswell in *In the Goods of Cunningham* (*y*), "that tracing with a dry pen is not equivalent to a signature."

Tracing over his signature with a dry pen is not a resubscription.

The subscription must be intended to represent the name of the witness as attesting the due execution of the will.

Whatever form the attestation may take, the Court must be satisfied that what was written upon the will by the witness was intended to represent his name, and was so written by him for the purpose of attesting the due execution of the will (*z*).

(*r*) *Cope*, (1850) 2 Rob. 335; *White*, (1843) 2 N. C. 461; *Duggins*, (1870) 39 L. J. P. 24.

(*s*) *Leverington*, (1886) 11 P. D. 80.

(*t*) *Ante*, p. 133.

(*u*) *Moore* v. *King*, (1842) 3 Curt. at p. 253; *Casement* v. *Fulton*, (1845) 5 Moo. P. C. 130. See, as to the latter case, *ante*, p. 136, note (*a*).

(*x*) *Playne* v. *Scriven*, (1849) 1 Rob. 772; *Cunningham*, (1860) 4 S. & T. 194; *Maddock*, (1874) 3 P. & D. 169.

(*y*) Cited *supra*.

(*z*) Thus in *Trevanion*, (1850) 2 Rob. 311, where an attesting witness attested and subscribed a second execution of the will by adding the word "Bristol" (the name of the city) at the end of her name and address which had been written on the former execution, but did not otherwise resubscribe, that was held to be an insufficient attestation and subscription of the re-execution.

In *Charlton* v. *Hindmarsh*, (1859) 1 S. & T. 433, S.C. on appeal 8 H. L. C. 160, the testator signed in the presence of F. W.; F. W. subscribed; B. was then called in, and after the testator had acknowledged his signature in the presence of both, B. signed. F. W. thereupon wrote the date upon the will, and, noticing that he had inadvertently signed his name as T. W., corrected the first initial of his signature

Where the signature of a legatee appears upon the will.

Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who is also residuary legatee, appears at the foot of the will, the Court will receive evidence to explain why such signature was written, and if satisfied that it was not written with the intention of attesting the signature of the deceased, will order it to be omitted in the probate (*a*).

Position of witnesses' signatures.

It has been held in several cases that the signatures of the witnesses need not be in any particular part of the will, but that they will suffice wherever placed if intended to attest the operative signature of the testator (*b*).

The witnesses may subscribe on any part of the will,

In *Roberts* v. *Phillips* (*c*) it was held that the word by crossing the T., and so making it F. It was held that that was not a sufficient subscription and attestation. The Lord Chancellor (Lord Campbell) said: "I will lay down this as my notion of the law, that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name. But on this occasion the name is not written, nor do I think that there was anything written that was intended to represent the name."

In *Eynon,* (1873) 3 P. & D. 92, the deceased executed his will in the presence of two witnesses, one of whom made a mark in attestation of the signature of the deceased. The second witness then wrote the names of the deceased and of the first witness against their respective marks, and also the word "witness" against the mark of the latter, but did not subscribe his own name. Sir J. Hannen held that the second witness did not validly subscribe the will, for "he never made any mark with an idea of attesting the execution of the will."

In *Maddock,* (1874) 3 P. & D. 169, the deceased executed her will in the presence of two witnesses, one of whom signed his name thereto, but the other, after writing his Christian name (Saml.), was unable, through feebleness, to complete his signature. Sir J. Hannen said: "I take it as a rule that if a witness makes any mark with an intention thereby to subscribe the will, it will be sufficient. . . . In this case I think the witness has failed to do what is necessary. I have come to the conclusion that . . . the witness did not put the word 'Saml.' on the paper with the intention at the time that it should be a perfect subscription to the will. Having done something, he broke off without completing the intention."

In *Griffiths* v. *Griffiths,* (1871) 2 P. & D. 300, where against the name of one of the witnesses the word "executors" was written, and it appeared that the deceased intended that witness to be one of his executors, and asked him to sign his name in that character, Lord Penzance came to the conclusion that such person did not sign the will exclusively as executor, but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid.

(*a*) *Sharman,* (1869) 1 P. & D. 661; *Smith,* (1889) 15 P. D. 3; *vide post,* p. 301, note (*u*).

(*b*) *Per* Sir J. Hannen in *Phipps* v. *Hale,* (1874) 3 P. & D. 166, 168.

(*c*) (1855) 4 El. & Bl. 450.

"subscribe" in the Statute of Frauds might well be understood as merely denoting a signing of the name without any reference to the part of the paper on which the name is to be written; and that if the witnesses signed their names on any part of the will at the testator's request with the intention of attesting his signature, that is a sufficient subscription (*d*).

provided their signatures are intended to attest the operative signature of the testator.

But in considering whether persons have subscribed a will as attesting witnesses, the position of the signatures may be most material. If they are written under the attestation clause no difficulty arises, but if they are placed under a particular clause or statement the inference is, *primâ facie*, that they were put there to give effect or to testify to the words of that clause or statement (*e*).

But the position of the signatures is material in ascertaining the intention with which they were written.

(*d*) Accordingly, in *Chamney*, (1849) 1 Rob. 757, where the attesting witnesses subscribed their names, not under the signature of the testator upon the first page of the will, but under an endorsement upon the fourth page, Sir H. J. Fust said: "The statute does not point out the place where the witnesses are to sign. In the absence of such a direction I am not prepared to say they have not duly subscribed the will by signing in the manner they have."

In *Davis*, (1843) 3 Curt. 748, where the signatures of the witnesses were on the second side of the sheet of paper, after a clause appointing executors, the signature of the testator being on the first side of the sheet, Sir H. J. Fust pronounced for the will.

In *Braddock*, (1876) 1 P. D. 433, 434, Sir J. Hannen said: "The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting."

And in *Streatley*, [1891] P. 172, where the attesting witnesses signed their names in the margin of the first and second sheets opposite to certain amendments, Butt, J., following *Roberts* v. *Phillips*, on proof that the witnesses signed with the intention of attesting the testator's signature, held that this was a valid subscription; and see *Ellison*, [1907] 2 Ir. R. 480, where the witnesses signed in the body of the will, in a blank space left for the names of the executors.

(*e*) *Per* Sir J. P. Wilde in *Wilson*, (1866) 1 P. & D. 269, at p. 271. Thus in *Martin*, (1849) 1 Rob. 712, where a will purported to have been re-executed after certain alterations had been made, and the attesting witnesses placed their initials in the margin opposite those alterations, Sir H. J. Fust held that there was no evidence that they subscribed the re-execution of the *will*; as the instrument appeared upon the face of it, they attested the alterations only.

In *Ewen* v. *Franklin*, (1855) Dea. & Sw. 7, where a will was signed by the testator and the witnesses in the margins of the first four sheets, but the fifth sheet was signed by the testator only, it was held that the attestation was insufficient, Sir J. Dodson thinking that there was nothing from which it could be inferred that the signatures of the witnesses on the four sheets were intended to attest *the signature of the testator to the whole will.*

The witnesses' subscription must be on the same sheet as the testator's signature, or on a piece of paper physically connected with that sheet at the time of execution.

The subscription by the witnesses, if not upon the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet at the time of execution. No particular mode of affixing one piece of paper to another is prescribed by law (*f*), and if the pieces of paper are attached to one another at the time of execution, it does not matter if they should afterwards become detached (*g*).

Section 6.

THE FORM OF A WILL.

A will need not be in any particular form,

The law has not made requisite to the validity of any document as a will that it should assume any particular form

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This case was followed by Sir J. Hannen in *Phipps* v. *Hale,* (1874) 3 P. & D. 166; and see *Dilkes,* (1874) 3 P. & D. 164; *Sweetland* v. *Sweetland,* (1865) 4 S. & T. 6; *ante,* p. 122, note (*e*).

In *Wilson,* (1866) 1 P. & D. 269, where the names of three persons were subscribed under a memorandum not testamentary, upon a page following the end of the will, which was signed by the testator and one witness, the Court came to the conclusion, from the position of the three names and the circumstances of the case, that they were not placed there for the purpose of attesting the will, and therefore pronounced the execution invalid.

(*f*) *Braddock,* (1876) 1 P. D. 433.

(*g*) *Lewis* v. *Lewis,* [1908] P. at p. 5. Thus in *Braddock,* (1876) 1 P. D. 433, the witnesses to the execution of a codicil signed their names on the back of a will, to which that codicil was attached by a pin. There was evidence which satisfied the Court that the will and codicil were pinned together at the time of the execution of the codicil, and that the witnesses intended by their subscription on the back of the will to attest the signature of the testatrix at the foot of the codicil. Sir J. Hannen held that the codicil was entitled to probate; and *vide ante,* p. 121, note (*a*).

On the other hand, in *Pearse,* (1867) 1 P. & D. 382, where the testatrix wrote three separate lists of legacies on three separate sheets of paper, and signed all three sheets in the presence of the witnesses, but they subscribed upon one sheet (A) only, Sir J. P. Wilde refused to grant probate of the two sheets which were unattested. "It does not appear," said the learned judge, ". . . that papers B and C were in any way attached to paper A when they were signed, nor is there anything . . . from which it can be inferred that the three formed one document." And where there were two testamentary instruments, both written on the same piece of paper, and the witnesses subscribed at the end of the first alone, Sir H. J. Fust rejected the second, on the ground that it was unattested: *Taylor,* (1851) 2 Rob. 411.

In *Hatton,* (1881) 6 P. D. 204, where an intended will was written in duplicate, one copy of which was signed only by the deceased and the other only by the attesting witnesses, it was held that neither paper was entitled to probate.

or be couched in language appropriate to its testamentary character (*h*). Any document duly executed in accordance with the requirements of the statute, however irregular in form or inartificial in expression, is entitled to operate as a will and to be admitted to probate, provided the person executing it intended that it should not take effect until after his death, and it is dependent upon his death for its vigour and effect (*i*).

provided it is intended not to take effect until death, and is dependent on the death of the maker for its vigour and effect.

If the document itself is equivocal or silent, it may be proved by extrinsic circumstances to have been intended to operate as a testamentary disposition (*k*), for evidence to show *quo intuitu* a paper was executed has always been received in the Court of Probate (*l*); and the cases clearly show that, in order to ascertain whether a paper writing was intended by the testator to take effect as his will, the Court may admit parol evidence (*m*), if the language of the paper is insufficient (*n*). The *onus probandi* that it is a will lies upon the party setting up as testamentary an instrument which upon its face has no such import (*o*).

Parol evidence of intention admissible.

The *onus probandi* is on a person who sets up as a will a paper upon the face of it not testamentary.

In numerous cases documents, not testamentary in form, have been admitted to probate on proof of due execution, there being evidence which satisfied the Court that their maker intended them to operate as his will (*p*).

Documents, not testamentary in form, admitted to probate on proof that their maker intended them to operate as his will.

(*h*) Jarman on Wills, 5th ed., p. 19.

(*i*) *Cock* v. *Cooke*, (1866) 1 P. & D. at p. 243. See *Masterman* v. *Maberly*, (1829) 2 Hagg. at p. 248; *Robertson* v. *Smith*, (1870) 2 P. & D. at p. 45; *Coles*, (1871) 2 P. & D. at p. 364.

(*k*) *King's Proctor* v. *Daines*, (1830) 3 Hagg. at p. 221.

(*l*) *Jones* v. *Nicolay*, (1850) 2 Rob. at p. 292.

(*m*) *English*, (1864) 3 S. & T. 586; *Cock* v. *Cooke*, (1866) 1 P. & D. 241.

(*n*) *Robertson* v. *Smith*, (1870) 2 P. & D. at p. 45; *Slinn*, (1890) 15 P. D. at p. 158.

(*o*) *King's Proctor* v. *Daines*, (1830) 3 Hagg. at p. 231. See *Whyte* v. *Pollok*, (1882) L. R. 7 A. C. at p. 406.

(*p*) *Orders on a savings bank, and on a banker.*—*Marsden*, (1860) 1 S. & T. 542; *Cock* v. *Cooke*, (1866) 1 P. & D. 241; *Jones* v. *Nicolay*, (1850) 2 Rob. 288.

A cheque to take effect after death.—In this case the drawer had made a subsequent will revoking all former wills and codicils, and the Court of Chancery held the gift of the cheque to have been in effect revoked: *Bartholomew* v. *Henley*, (1820) 3 Phill. 317; but see *post*, p. 166, note (*f*).

Letters.—A letter beginning "This is my will and letter to you": *Towers* v. *Hogan*, (1889) 23 L. R. Ir. 53. A letter containing

In these cases the instruments were intended by their makers to operate as wills, but it is settled law, and

"death-bed request": *Mundy,* (1860) 2 S. & T. 119. Other letters containing testamentary dispositions: *Denny* v. *Barton,* (1818) 2 Phill. 575; *Drybutter* v. *Hodges,* (1793) cited 2 Hagg. 247; see *Passmore* v. *Passmore,* (1811) 1 Phill. 216. Papers containing wishes and a dying request: *Lowrey,* (1847) 5 N. C. 619.

Promissory notes contained in a letter.—In this case the gift failed, as the notes were not properly attested: *Gough* v. *Findon,* (1851) 7 Ex. 48, 21 L. J. Ex. 58; see *Maxee* v. *Shute,* (1799) cited 2 Hagg. 247.

Receipts for stock and bills endorsed.—*Sabine* v. *Goate,* (1782) cited 2 Hagg. 247.

Bond endorsed.—*Musgrave* v. *Down,* (1784) cited 2 Hagg. 247.

Papers in the following terms were admitted to probate, there being evidence to show that they were intended to have a testamentary operation, and not to take effect as immediate gifts:—A paper containing the words "I hereby make free gift to A. of £60, the sum deposited etc.": *Robertson* v. *Smith,* (1870) 2 P. & D. 43; *Slinn,* (1890) 15 P. D. 156. A paper containing the following: "I have given all to A. and her sons," and containing directions for the payment of certain sums to persons specified, and for the division of the residue between A. and her sons: *Coles,* (1872) 2 P. & D. 362. A paper containing the following: "I wish A. to have my bank-book for her own use": *Cock* v. *Cooke,* (1866) 1 P. & D. 241.

Instructions for a will.—The following instruments, duly executed, were admitted to probate, the evidence showing that they were intended to operate as testamentary in the absence of a more formal instrument:—Instruments headed "Plan of a will": *Matthews* v. *Warner,* (1798) 4 Ves. 186, 5 Ves. 23. "Heads of a will": *Bone* v. *Spear,* (1811) 1 Phill. 345. "Sketch of my will": *Hattatt* v. *Hattatt,* (1832) 4 Hagg. 211. "Memorandum of my intended will": *Barwick* v. *Mullings,* (1829) 2 Hagg. 225. "Instructions for a will": *Fisher,* (1869) 20 L. T. 684. "Notes of an intended settlement": *Whyte* v. *Pollok,* (1882) L. R. 7 A. C. 400. But a paper merely expressing an intention of directing a solicitor to prepare a will for the purpose of leaving a certain legacy will not be admitted to probate in the absence of evidence that such paper was intended to have a testamentary operation: *Coventry* v. *Williams,* (1844) 3 Curt. 787; and see *Pascall,* (1868) 1 P. & D. 606.

Deeds.—In many cases deeds (duly executed in the form required by the statute) have been permitted to operate as wills, there having been evidence to show that they were intended by the grantor to be testamentary in their effect.

An instrument commenced as an indenture and ended as a will. By it the grantor "bargained and sold" certain lands to B. and C., on trust to sell them after his decease, and the money so raised was "given and bequeathed" to certain persons. The instrument appointed B. and C. "executors," and the grantor signed, sealed, published and declared the instrument as his will in the presence of several witnesses. Held: A good will: *Hixon* v. *Wytham,* (1675) 1 Ch. Cas. 248; S.C. Finch, 195.

An instrument entitled "Articles of Agreement," and signed, sealed, and delivered as a deed, was held to be testamentary, there being evidence which showed that the person who prepared the instrument was instructed to make a will: *Green* v. *Proude,* (1674) 1 Mod. 117; S.C. 3 Keb. 310.

And a paper which contains dispositions to be made after death, though not intended to be a will, if invalid in the form in which it is drawn, may be admitted to probate, provided it is duly executed.

several cases have decided, that if the paper contains the disposition of the property to be made after death, though it were meant to operate as a settlement, or a deed of gift, or a bond; though such paper were not intended to be a will or other testamentary instrument, but an instrument of a different shape; yet, if it cannot operate in the latter, it may nevertheless operate in the former character (*q*); provided always that the document is duly executed in accordance with the provisions of the Wills Act, 1837.

"The form of the instrument," said Sir John Nicholl in *King's Proctor* v. *Daines*(*r*), "is not conclusive against its testamentary effect; although it may not be valid in the form in which it was drawn up as a deed of gift, yet it may operate as a will. If there is any proof, either in the paper itself, or from clear evidence *dehors*, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will; and secondly, that death was the event that was to give effect to it, then, whatever be its form, it may be admitted to probate as testamentary" if executed in accordance with the provisions of the statute 1 Vict. c. 26 (*s*).

A deed poll, duly executed and attested by two witnesses, but containing no reference to the death of the grantor, was admitted to probate, evidence having been admitted which showed that it was intended by the grantor to operate as a will: *Slinn,* (1890) 15 P. D. 156.

(*q*) *Per* Sir John Nicholl in *Masterman* v. *Maberly,* (1829) 2 Hagg. at p. 247.

(*r*) (1830) 3 Hagg. at p. 221.

(*s*) See also *Milnes* v. *Foden,* (1890) 15 P. D. at p. 107. The following cases illustrate the rule:—

A., by will duly executed and attested, devised his freeholds and copyholds to certain uses, with remainder "to such uses as he by deed or instrument in writing should appoint." On the following day A. executed an instrument in the form of a deed-poll, which, after reciting the power in the will, directed the trustees to convey the estates to certain other uses. Held: That this second instrument could be considered as a codicil, sufficiently executed to pass copyhold, but not freehold. In this case Buller, J., said that the cases had established that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will: *Habergham* v. *Vincent,* (1793) 2 Ves. Jun. 204, 4 Bro. C. C. 353.

A., on the same day, made two instruments, one of which he called a deed and the other his will. By the deed he put £4,000 in the hands

But no case decides that an instrument which cannot operate in the form given to it *must* operate as a will.

But no case has gone to the length of deciding that because an instrument cannot operate in the form given to it, it *must* operate as a will; it *may* operate as a will if shown to have been written with a testamentary intention (*t*).

of B., directing him to pay an annuity to A. for life, and afterwards on A.'s death to dispose of the money as therein directed. There was a proviso for the return of the money to A. should the annuity be in arrear, in which case the capital sum was to be held jointly by A. and B. By the will B. was made executor and residuary legatee. Held: The will and the deed must be taken together as one testamentary act, and that therefore the deed must be regarded as testamentary, "though not strictly so because irrevocable": *Peacock* v. *Monk,* (1748) 1 Ves. Sen. 127, Belt's Suppl. 80; and see *Tomkyns* v. *Ladbroke,* (1755) 2 Ves. Sen. 591; *Hog* v. *Lashley,* (1789) 3 Hagg. 415, n.

The drafts of three bonds, intended to be executed by the maker in favour of his three daughters, in substitution for legacies which he had revoked, were allowed to operate as testamentary, their execution having been prevented by his death: *Masterman* v. *Maberly,* (1829) 2 Hagg. 235.

A deed-poll was executed with the formalities required for the execution of wills. Held: As it was a disposition of property to take effect after the death of the maker, it was capable of being admitted to probate: *Emley* v. *Davidson,* (1881) 45 L. T. 418.

The deceased executed three deeds of gift, conveying all his property to trustees for the benefit of his three children, but directing that the conveyances were not to take effect until after his decease. Probate was granted of the three deeds as together containing the will of the deceased: *Morgan,* (1866) 1 P. & D. 214.

Probate was granted of a will in the form of a deed, although the attesting witnesses had no precise recollection of the circumstances of its execution: *Colyer,* (1889) 14 P. D. 48.

An indenture, attested by two witnesses, and admitted to probate as a will in the Isle of Man, was admitted to probate by the Court of Probate as a foreign will without inquiry into its testamentary character: *Cosnahan,* (1866) 1 P. & D. 183.

A person abroad executed a power of attorney whereby he appointed his mother to receive the proceeds of his estate for her own use until his return to England, and, in the event of his death abroad, he assigned and delivered to her the whole claim to his lands; but her occupation was to cease upon his return from abroad. This instrument was duly executed as a will. Held: That the instrument operated, on the death of the maker abroad, as a devise of the lands to the mother: *Doe* d. *Cross* v. *Cross,* (1846) 8 Q. B. 714.

A nomination paper, executed by the nominator under s. 25 of the Industrial and Provident Societies Act, 1893, in the presence of two witnesses, who signed it in his presence, and invalid as a nomination by reason of the amount it purported to dispose of, held to be testamentary and admitted to probate as a will: *Baxter,* [1903] P. 12.

(*t*) *King's Proctor* v. *Daines,* (1830) 3 Hagg. at p. 221. The question is important with reference to liability for legacy duty. In *Att.-Gen.* v. *Jones,* (1817) 3 Price, 368, it was held that property settled by deed, which deed contained a power of revocation by the maker, and was granted for a nominal consideration, was subject to legacy duty. But this decision has

An instrument coming into operation immediately cannot operate as a will.

An instrument coming into operation immediately, especially if it involves anything in the nature of consideration, cannot operate as a will (*u*).

But *semble* if a deed is in part to take effect immediately, and partly on the death of the maker, probate might be granted of the latter part.

On the other hand, if a deed or document is in part clearly testamentary, it seems that such part may take effect as a will, though other parts are not testamentary (*x*).

Since the Wills Act, it can only be a matter of rare occurrence that any deed should be so attested as to enable it to operate as a will. The validity of the instrument will thus, in most cases, depend on the maintenance of its non-testamentary character (*y*). For if an instrument is clearly testamentary and not duly attested it will not be supported as a *donatio mortis causa* (*z*).

If an instrument is not testamentary in form or substance, and there is no evidence that it was intended to operate as a will, probate refused.

If an instrument is not testamentary either in form or substance (*i.e.*, if none of the gifts are expressed in testamentary language, and the operation of the instrument is not in terms postponed to the death of the maker), and if no extrinsic evidence is adduced which satisfies the Court that it was intended to operate as a will, probate will not be granted of the instrument (*a*).

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been universally condemned. See *Tompson* v. *Browne*, (1835) 3 My. & K. 32; *Brown* v. *Advocate-General*, (1852) 1 Macq. H. L. 78; *Majoribanks* v. *Hovenden*, (1843) 1 Dru. 11, 27, 29; *Sheldon* v. *Sheldon*, (1844) 1 Rob. at p. 83.

(*u*) See *Robinson*, (1867) 1 P. & D. 384; *Thorncroft* v. *Lashmar*, (1862) 2 S. & T. 479; *Halpin*, (1874) Ir. R. 8 Eq. 567; *Jeffries* v. v. *Alexander*, (1860) 8 H. L. C. 594; *Majoribanks* v. *Hovenden*, (1843) 1 Dru. 11.

(*x*) In *Robinson*, (1867) 1 P. & D. 384, Sir J. P. Wilde said that he had not met with a case in which such a principle had been laid down, but he "by no means said it could not be done." And see *Doe* d. *Cross* v. *Cross*, (1846) 8 Q. B. 714, where the Court was clear that there was no objection to one part of an instrument operating immediately as a deed, and another *in futuro* as a will. See also *Peacock* v. *Monk*, (1748) 1 Ves. Sen. 127; *Bagnall* v. *Downing*, (1754) 2 Lee, 3; and see *Wolfe* v. *Wolfe*, [1902] 2 Ir. R. 246.

(*y*) *Mitchell* v. *Smith*, (1864) 33 L. J. Ch. 596.

(*z*) *Re Hughes*, (1888) W. N. 163.

(*a*) A paper containing the words "I, A. B., in the presence of the two undersigned witnesses, do give all my goods and chattels to M. D.," and duly executed, rejected, the extrinsic evidence (which was conflicting) not satisfying the Court that it was intended to operate otherwise than as a present gift to M. D.: *King's Proctor* v. *Daines*, (1830) 3 Hagg. 218. See *Langley* v. *Thomas*, (1857) 26 L. J. Ch. 609; see also *Glynn* v.

A paper, clearly testamentary in form, may be refused probate, if the Court is satisfied that it was not executed *animo testandi.*

However clearly testamentary a paper may appear on the face of it, it will not be admitted to probate if the Court is satisfied by extrinsic evidence that the maker did not execute it *animo testandi* (*b*). For it is said that "the second thing required to the making of a good testament is, that he that doth make it have, at the time of making it, *animum testandi*, *i.e.*, a mind to dispose, a firm resolution and advised determination to make a testament, otherwise the testament will be void. For it is the mind, not the words, of the testator that gives life to the will; since if a man rashly, unadvisedly, incidentally, jestingly or boastingly, and not seriously, writes or says that such a one shall be his executor, or shall have all his goods, or that he will give to such a one such a thing, this is no will, nor to be regarded" (*c*). The law in this respect has not been altered by the Wills Act (*d*). But the Court will not permit a will which bears on the face of it all the appearance of a regular testamentary act to be set aside on such grounds, unless the evidence is cogent and conclusive (*e*).

The Court cannot inquire into the testator's intention as to the *effect* of the instrument.

The intention of the testator, which is to be considered, is his intention as to whether the instrument should have any testamentary operation at all; if the instrument is manifestly intended to operate as a will, the Court cannot look at its effect; it must have legal operation, without regard to the testator's intention as to its effect (*f*).

Oglander, (1829) 2 Hagg. 428; *Griffin* v. *Ferard*, (1835) 1 Curt. 97; *Shingler* v. *Pemberton*, (1832) 4 Hagg. 356; *Majoribanks* v. *Hovenden*, (1843) 1 Dru. 11, at pp. 27, 28.

(*b*) As where a will was signed by a testator in jest: *Nichols* v. *Nichols*, (1814) 2 Phill. 180; or as a mere sham and pretence, never seriously intended as a paper of testamentary operation: *Lister* v. *Smith*, (1863) 3 S. & T. 282. See *Trevelyan* v. *Trevelyan*, (1810) 1 Phill. at p. 153; *Nosworthy*, (1865) 11 Jur. (N. S.) 570. So where the wrong instrument is executed by a mistake: see *Hunt*, (1875) 3 P. & D. 250; *Meyer*, [1908] P. 353.

(*c*) 2 Shep. Touch. by Prest. 404; Swinb., Pt. I., s. 3; Bac. Abr., tit. Will (C.); Comyns Dig., tit. Devises D. 2.

(*d*) *Lister* v. *Smith*, (1863) 3 S. & T. 282.

(*e*) *Ibid.* at p. 289.

(*f*) *King's Proctor* v. *Daines*, (1830) 3 Hagg. 231; *Philipps* v. *Thornton*, (1831) 3 Hagg. 753.

If the document, although in the form of a will, bears upon the face of it a positive assertion by the person who has executed it that it is not meant to operate as a legal will, it cannot be held to be a valid testamentary instrument (*g*).

Where a document is stated on the face of it as not meant to operate as a will, the Court will refuse probate.

Where a paper is not clearly testamentary on the face of it, the burden of proof is on those who assert that the deceased intended it to operate as a testamentary paper (*h*). But a mere ambiguity occurring in the descriptive title written by the testator cannot qualify the terms or destroy the validity of the document, when the legal character and effect of the document taken by itself are not doubtful. Such an ambiguity will justify inquiry; but should the parties lead no proof, or should the proof adduced be inconclusive, the document must receive effect according to its tenor and substance (*i*).

But a mere ambiguity in the descriptive title will not destroy the validity of the document.

It will appear hereafter that several instruments, of different natures and forms, may be admitted to probate, as together constituting the last will of the deceased (*k*).

Several documents may together constitute the will of the deceased.

Section 7.

EVIDENCE OF DUE EXECUTION — PRESUMPTION *OMNIA RITE ESSE ACTA.*

Summary.

In applying the various principles and rules to which there has been occasion to refer in the preceding pages, it must always be borne in mind that it is not necessary to have positive affirmative testimony by the attesting witnesses that the requirements of the statute have strictly been complied with. For when a will complete and regular upon the face of it is placed before the Court, a presumption *omnia rite esse acta* arises—a presumption, that is to say, that all the requirements of the statute have duly been complied with, and this presumption will prevail in the absence of conclusive evidence

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(*g*) *Ferguson-Davie* v. *Ferguson-Davie*, (1890) 15 P. D. 109.

(*h*) *Thorncroft* v. *Lashmar*, (1862) 2 S. & T. at p. 484; *King's Proctor* v. *Daines*, (1830) 3 Hagg. at p. 231; *Griffin* v. *Ferard*, (1835) 1 Curt. 97; *Coventry* v. *Williams*, (1844) 3 Curt. at p. 790; *vide ante*, p. 143.

(*i*) *Whyte* v. *Pollok*, (1882) L. R. 7 A. C. 400.

(*k*) *Post*, Chap. IV., p. 164.

to the contrary. Where both attesting witnesses are dead, or the evidence of the attesting witnesses is vague, doubtful, or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with. Nay, even if both witnesses positively and circumstantially depose to some breach of the requirements of the statute, the Court may still, on consideration of other evidence (*l*) or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character (*m*), or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce for the will. The Court will not allow the defective memory of the witnesses, who are often illiterate persons examined for the first time long after the transaction, to overturn a will (*n*). It must be satisfied that the will is not duly executed; and where the negative is not established the affirmative must be held to be proved.

But where both attesting witnesses positively depose to the fact that the will was not duly executed, and there are no circumstances other than the mere *factum* of the instrument itself to justify the Court in coming to the conclusion that their recollection is at fault, or that their evidence cannot be relied on, the Court has no option; it must pronounce against the will.

Positive affirmative evidence of due execution is not absolutely necessary.

It has long been held that there is no absolute necessity for positive affirmative evidence of due execution in order to enable the Court to pronounce in favour of a will.

"Is it absolutely necessary," said Sir H. Jenner Fust in *Blake* v. *Knight* (*o*), "to have positive affirmative testimony by the subscribed witnesses, that the will was actually signed in their presence, or actually acknowledged in their presence; is it absolutely necessary under all circumstances that the

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(*l*) *Young* v. *Richards*, (1840) 2 Curt. 371.

(*m*) *Burgoyne* v. *Showler*, (1844) 1 Rob. 5.

(*n*) *Smith* v. *Smith*, (1866) 1 P. & D. 143.

(*o*) (1843) 3 Curt. 547, at p. 561.

witnesses should concur in stating that these facts took place; or is it absolutely necessary, where the witnesses will not swear positively, that the Court should pronounce against the validity of the will? I think these are not absolute requisites to the validity of a will; I think the Court must take into its consideration all the circumstances of the case, and judge from them collectively whether there was not at least an acknowledgment of a signature, clearly existing on the face of the will at the time of attestation."

The Court may take into consideration all the circumstances of the case;

What those circumstances are which the Court will weigh and consider may be gathered from the words of Dr. Lushington in *Thomson* v. *Hall* (*p*). "The character of the witnesses, the length of time which has elapsed since the transactions took place, the nature of the facts deposed to,—whether they are likely or not to have made an impression on the minds of the witnesses,—are circumstances to be taken into account; to which is to be added this consideration also, whether the case admits of the principle—the presumption—*omnia rite esse acta*." And to these may be added as circumstances which, if they exist, will assist the Court in coming to the conclusion that the will was duly executed, even in the absence of affirmative evidence on that point, the testator's desire to execute a valid will; his knowledge of what was necessary for that purpose; and the inherent improbability of his neglecting or omitting the formalities which he knew to be essential (*q*). Of course, if the converse of these circumstances be proved, that will to some extent weaken the case in favour of the will (*r*).

must weigh the character and reliability of the attesting witnesses and the clearness of their recollection; and must take into account the testator's knowledge of the requisite formalities, and desire to make a valid will.

The learned judge, it will be observed, refers to the principle —the presumption—*omnia rite esse acta*. That presumption arises whenever a will regular on the face of it, and apparently duly executed, is before the Court; and amounts to an inference, in the absence of evidence to the contrary, that the requirements of the statute with reference to the execution

When a will, regular on the face of it, and apparently duly executed, is before the Court, an inference arises that all the require-

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(*p*) (1852) 2 Rob. 426, at p. 432.

(*q*) *Cooper* v. *Bockett*, (1843) 3 Curt. 648, 4 Moo. P. C. 419; *Wright* v. *Sanderson*, (1884) 9 P. D. 149; *Lloyd* v. *Roberts*, (1858) 12 Moo. P. C. 158.

(*r*) See *Harris* v. *Knight*, (1890) 15 P. D. at p. 178.

ments of the statute have been complied with.

have duly been complied with (*s*). The presumption applies with more or less force, according to the circumstances of each case (*t*). When there is a regular attestation clause (*u*), with the names of two witnesses appended thereto, leading to the conclusion that the will was executed by a person who knew the requirements of the Wills Act, the principle applies directly (*x*); for the Court will assume that no one would have signed his name to the statement contained in such clause unless it were true (*y*). Where there is an informal attestation clause, which leads to the conclusion that the testator did not know the requirements of the Wills Act, the presumption still applies, but with less force (*z*); and even though the document be informal, and contain no attestation clause whatever, yet in the absence of evidence to the contrary the presumption will apply (*a*).

This presumption arises, though with less force, where there is an informal attestation clause, or no attestation clause whatever.

Meaning of the maxim "*omnia præsumuntur rite esse acta.*"

"The maxim '*omnia præsumuntur rite esse acta,*'" said Lindley, L.J., in *Harris* v. *Knight* (*b*), "is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance

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(*s*) *Lloyd* v. *Roberts*, (1858) 12 Moo. P. C. 158, 165; *Burgoyne* v. *Showler*, (1844) 1 Rob. 5, 10; *Smith* v. *Smith*, (1866) 1 P. & D. 143, 145.

(*t*) *Vinnicombe* v. *Butler*, (1864) 3 S. & T. 580, 582; *Harris* v. *Knight*, (1890) 15 P. D. 170, 184.

(*u*) Where the attestation clause stated that the will had been signed by the testator in the presence of the witnesses, and the affidavit of one of them showed that the signature was merely acknowledged, probate on motion was allowed: *Moore*, [1901] P. 44.

(*x*) *Vinnicombe* v. *Butler*, (1864) 3 S. & T. 580, *per* Sir J. P. Wilde, at p. 582.

(*y*) Cotton, L.J., in *Harris* v. *Knight*, (1890) 15 P. D. 170, 178; *Wright* v. *Rogers*, (1869) 38 L. J. P. 67.

(*z*) *Vinnicombe* v. *Butler*, (1864) 3 S. & T. 580; *Rees*, (1865) 34 L. J. P. 56. The maxim applies where some person signs for the testator in his presence and by his direction: *Clery* v. *Barry*, (1887) 21 L. R. Ir. 152.

(*a*) *Peverett*, [1902] P. 205.

(*b*) (1890) 15 P. D. 170, at p. 179.

is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other, but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect."

Be that as it may, the cases show that the judges who have presided over the Court of Probate have long been accustomed to give great weight to the presumption of due execution arising from the regularity *ex facie* of the testamentary paper produced, where no suspicion of fraud has occurred. And Fry, L.J., in *Wright* v. *Sanderson* (*c*) stated that in so doing they have, in his opinion, acted rightly and wisely.

Order of discussion.

It is proposed to consider the effect of the presumption :

First, where both attesting witnesses are dead, and there is no evidence apart from the appearance of the instrument itself from which the Court may draw an inference of its due execution;

Secondly, where the recollection of both attesting witnesses, or one of them, is vague and doubtful, and they are, or he is, unable affirmatively to prove due execution ;

Thirdly, where the witnesses contradict one another, or both of them state, or one of them states, facts showing that the will was not duly executed.

Application of the presumption : (1) Where both attesting witnesses are dead,

First, where both attesting witnesses are dead.

the will may be admitted to probate on proof of the handwriting of the testator and the witnesses,

Where a will which bears upon the face of it what purport to be the signatures of the testator and two witnesses and appears in other respects to have been duly executed, is produced to the Court, and it is proved that both attesting witnesses are dead, the Court, on proof that the signatures of the testator and witnesses are in their respective handwriting (*d*), will assume that the testator and the subscribing witnesses all signed in the presence of each other, so as to

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(*c*) (1884) 9 P. D. 149, 163.

(*d*) In *Harris* v. *Knight*, (1890) 15 P. D. 170, Butt, J., assumed the signature of one of the witnesses, which was not directly proved, to be genuine, *vide post*, p. 154.

for, upon the handwriting being proved, it is to be presumed that the formalities of execution were duly complied with, unless some irregularity on the face of the instrument raises a contrary presumption.

satisfy the requirements of the statute (*e*), unless some irregularity upon the face of the will remain unexplained and raise a contrary presumption (*f*).

Thus in *Harris* v. *Knight* (*g*) the presumption prevailed. The testator died in 1877, and at his funeral his widow produced a document, which she stated to be the will of the deceased. The document was subscribed with three names, one of which purported to be the name of the deceased written in his own handwriting; the other two names were those of two of his friends. Thereupon the defendant, who was the eldest son of the deceased, said that the document was no will of his father's, and that the signature was not in his handwriting. He, however, took no steps to assert his right as heir-at-law, and the widow took no steps to prove or establish the will she produced. After the death of the widow the will could not be found; and the plaintiff, who was one of the daughters of the marriage, propounded the alleged will and pleaded that, although it was lost, the Court ought to grant probate of it. Both persons whose names were subscribed to the lost document as witnesses were dead. No copy or draft of the document could be found, and it was not proved that it had borne any date or had contained any attestation clause; but its existence and contents, and the handwriting of the testator and of one of the two friends of his who had subscribed it, were proved to the satisfaction of Butt, J., who thereupon inferred that the unproved signature was genuine and that everything was regularly done, and accordingly granted probate of the will. On appeal it was held by Lindley and Lopes, L.JJ. (Cotton, L.J., dissenting), that Butt, J., was justified in presuming that the lost will was duly executed.

(*e*) *Trott* v. *Skidmore*, (1860) 2 S. & T. 12; *Burgoyne* v. *Showler*, (1844) 1 Rob. at p. 10; *Thomas*, (1859) 1 S. & T. 255. In *Peverett*, [1902] P. 205, the presumption was allowed to prevail although there was no attestation clause: and see *Vinnicombe* v. *Butler*, (1864) 3 S. & T. 580.

(*f*) *Trott* v. *Skidmore*, (1859) 2 S. & T. 12; *Swinford*, (1869) 1 P. & D. 631.

(*g*) (1890) 15 P. D. 170.

(2) Where the reçollection of the witnesses is vague or doubtful, and the will regular on the face of it, the presumption *omnia rite esse acta* will prevail.

Secondly, where the recollection of the witnesses is vague or doubtful.

The Court will not allow defective memory alone to overturn a will which is upon the face of it duly executed (*h*); if the witnesses are utterly forgetful of the facts, the presumption *omnia rite esse acta* will prevail (*i*). Thus in *Blake* v. *Blake* (*k*) Holker, L.J., said: "If the witnesses who came forward to prove the will had been in doubt, or could not remember whether they did or did not see the testatrix sign, the fact that everything appears to have been rightly done would entitle the Court to come to the conclusion that they did in fact see her sign" (*l*).

(*h*) *Thomson* v. *Hall*, (1852) 2 Rob. 426, 436.

(*i*) *Burgoyne* v. *Showler*, (1844) 1 Rob. 5, 10.

(*k*) (1882) 7 P. D. 102, 115.

(*l*) See also *per* the Earl of Selborne, L.C., in *Wright* v. *Sanderson*, (1884) 9 P. D. 149, at p. 160. Thus, in *Blake* v. *Knight*, (1843) 3 Curt. 547, where the witnesses would not swear positively that the deceased's signature was at the bottom of the will when they attested and subscribed, and would not swear negatively, and one of them swore "the testator dipped the pen into the ink and gave it to us, but whether he wrote anything himself or signed his name I cannot say," Sir H. J. Fust, from a consideration of all the circumstances of the case, came to the conclusion that the name of the testator had been signed to the paper before the witnesses subscribed, and accordingly pronounced for the will. See *Moore*, [1901] P. 44. In *Burgoyne* v. *Showler*, (1844) 1 Rob. 5, neither witness could positively affirm whether the other was present when the will was signed; they could not remember whether that was or was not the case; but both deposed that they did see the deceased sign or acknowledge his signature; Dr. Lushington held that the fair presumption was that the will was duly executed. See *Hare*, (1842) 3 Curt. 54. In *Thomson* v. *Hall*, (1852) 2 Rob. 426, and *Woodhouse* v. *Balfour*, (1887) 13 P. D. 2, where the recollection of the witnesses was almost a blank with reference to the circumstances of the execution, the Court pronounced for the will. See *Holgate*, (1859) 1 S. & T. 261; *Wright* v. *Sanderson*, (1884) 9 P. D. 149; *Whiting* v. *Turner*, (1903) 89 L. T. 71; *Vinnicombe* v. *Butler*, (1864) 3 S. & T. 580, in which case there was an incomplete attestation clause. In *Gwillim* v. *Gwillim*, (1859) 3 S. & T. 200, where the attesting witnesses to a will, duly executed upon the face of it, did not recollect having seen the testator's signature to the will when they subscribed their names as witnesses, the Court held itself at liberty to judge from the circumstances of the case whether it was probable that the testator's name was or was not on the will and visible to the witnesses at the time of the attestation, and, being of opinion that it was, pronounced for the will. See *Beckett* v. *Howe*, (1869) 2 P. & D. 1, and the remarks of Jessel, M.R., on these two cases in *Blake* v. *Blake*, (1882) 7 P. D. 102, 109 (*ante*, p. 128, note (*v*)); see also *Smith* v. *Smith*, (1866) 1 P. & D. 143.

(3) If one witness gives, or even if both give, evidence negativing due execution,

Thirdly, where the witnesses contradict one another, or where both of them state, or one of them states, facts showing that the will was not duly executed.

their evidence may be rebutted, or the Court may come to the conclusion that they are not to be credited, or that their recollection fails them.

Even if the witnesses profess to remember the transaction and state that the will was not duly executed (that the testator did not make or acknowledge his signature in their joint presence, or so forth), this negative evidence may not only be rebutted by the evidence of other witnesses (*m*), but the Court may in this case also, from a consideration of all the circumstances of the case, and of the facts and circumstances which the attesting witnesses themselves state, come to the conclusion either that they are not to be credited or that their recollection fails them (*n*); and so the will may be admitted to probate in spite of their testimony.

So where the witnesses contradict each other.

And what is true of cases in which both witnesses negative due execution, is also true where the evidence of the two attesting witnesses conflicts, as where one negatives due execution, while the other affirms or is doubtful.

Where there is any doubt about the recollection of the attesting witnesses, the Court may say that it is satisfied that the will was duly executed.

For where it is obvious that the testator meant the document to be his will, and thought he was complying with the Act of Parliament, the Court will presume that everything was right, and will not tie itself down to accept the evidence of the witnesses to the contrary. Where there is any doubt about the recollection of the attesting witnesses, where there is anything from which the Court can fairly say that the will ought to be held to be good, and that the recollection of the attesting witnesses ought not to be relied on as against the will, the Court may say that it is satisfied that the will was duly executed (*o*).

(*m*) Where one of the attesting witnesses deposed to due execution and the other negatived it, the Court allowed other witnesses who were present at the time to be examined: *Young* v. *Richards*, (1840) 2 Curt. 371.

(*n*) *Burgoyne* v. *Showler*, (1844) 1 Rob. 5, 11.

(*o*) *Per* Sir Gorell Barnes, in *Wyatt* v. *Berry*, [1893] P. 5, 9. So in *Chambers* v. *The Queen's Proctor*, (1840) 2 Curt. 415, where one witness swore that the testator signed the will in the presence of the attesting witnesses, and two others swore he did not, Sir Herbert Jenner came to the conclusion, from a consideration of the evidence, that the recollection of the two latter was at fault, and held that the will was duly executed. The remarks of the learned judge on the comparative value of affirmative and negative testimony, though too long to quote, deserve

But where the evidence of the attesting witnesses directly negatives due execution, and their evidence is not rebutted

But where the evidence of the attesting witnesses

attention: see pp. 434, 435; and see *Brenchley* v. *Still*, (1850) 2 Rob. at p. 166.

In *Cooper* v. *Bockett*, (1843) 3 Curt. 648, 4 Moo. P. C. 419, one of the attesting witnesses (the testator's porter) deposed positively and circumstantially that he saw the testator subscribe his name to the will *after* both the witnesses had signed; the other (the porter's wife), though speaking less positively, said "I cannot say that Captain Cooper's (the testator's) name was on the will when I signed it; as well as I can now remember, it was all blank where I now see Captain Cooper's signature." Sir H. Jenner Fust disregarded their evidence, saying, "Where the *res gestæ* do not confirm the impressions of the witnesses, the Court must look at the circumstances of the case, as it is always at liberty to do": 3 Curt. at p. 663. This decision was confirmed by the Queen in Council (4 Moo. P. C. 419), and their Lordships, pronouncing (as Sir H. Jenner Fust had done) for the will, said (at p. 438): "It is not to be forgotten that fraud is out of the question; that Captain Cooper certainly intended the instrument to be his will; intended it to be effectual as his will; that he knew or believed his own signature to the paper to be essential, or advisable and desirable at least; that the purpose for which, and the object with which, he summoned these two servants to his room, was merely to substantiate the instrument as his will; that if they have not attested it effectually, their presence, their signature, and the whole transaction was idle and useless, and the intended testator's design and wishes have been absolutely and irremediably frustrated. It is the duty of a Court of Justice not to allow undue weight to these considerations. It seems equally its duty not wholly to lose sight of them. Their Lordships have next to consider whether, independently of them, the supposed fact stated by the porter is or is not in its nature improbable. . . . Their Lordships find themselves unable to think it consistent with probability that Captain Cooper, on the occasion in question, could have acted or allowed the witnesses to act, or could have been capable of acting or allowing them to act, in [the] manner [deposed to]; not that it is their opinion that he was fully aware, or accurately informed, of the legal formalities or ceremonies essential to the sufficient execution or attestation of a will."

In *Lloyd* v. *Roberts*, (1858) 12 Moo. P. C. 158, the will was entirely in the handwriting of the testator, an attorney, without break or crowding, with an attestation clause in its proper place. One of the attesting witnesses was dead; the other deposed that when he signed the will, with the exception of the testator's signature and the signature of the other attesting witness, the paper was blank. From the appearance of the will, as well as the circumstance that the testator was a professional man well acquainted with the necessity of a proper execution, the Judicial Committee came to the conclusion that the witness must have been mistaken or that his memory failed him, and pronounced for the will.

In *Wright* v. *Rogers*, (1869) 1 P. & D. 678, the facts were very similar to those in the preceding case. The deceased signed his will in the presence of two witnesses, an attorney and his clerk, whose names were written at the foot of a full attestation clause. After the death of the deceased, the attorney swore an affidavit which contained a statement that the will had been duly executed. The attorney died, and after his death the clerk directly negatives due execution, and there is nothing to cast a doubt on their credibility or the reliability of their memory, the Court must accept their evidence.

either by direct or circumstantial evidence casting a doubt upon the veracity of the witnesses or the reliability of their recollection, the Court cannot presume a due execution in the teeth of such direct evidence to the contrary (*p*). As Dr. Lushington said in *Burgoyne* v. *Showler* (*q*), "If the witnesses profess to remember the transaction and state that the will was not duly executed, and this negative evidence be not rebutted by proof of circumstances showing that the witnesses are not to be credited; or that, from the facts and circumstances which they state, their recollection fails them; then, according to my apprehension, the will must be pronounced against" (*r*).

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for the first time gave information that the will was not signed in the presence of the deceased. No other witness to disprove or corroborate this statement was called. The Court, on a review of all the circumstances, declined to rely upon the recollection of the surviving witness, and decreed probate of the will as duly executed. *Gove* v. *Gawen,* (1842) 3 Curt. 151, is a similar case. Other instances of the application by the Court of the foregoing principle may be found in *Leech* v. *Bates,* (1849) 1 Rob. 714; *Owen* v. *Williams,* (1863) 4 S. & T. 202; *Moore,* [1901] P. 44; *Pilkington* v. *Gray,* [1899] A. C. 401.

(*p*) *Croft* v. *Croft,* (1865) 4 S. & T. 10.

(*q*) (1843) 1 Rob. 5, at p. 10.

(*r*) The case of *Wyatt* v. *Berry,* [1893] P. 5, well illustrates this proposition. There the evidence of both attesting witnesses directly showed that the testator acknowledged his signature first in the presence of one witness, who attested it, the other witness not being then present, this latter witness being afterwards called in and signing his name. The Court was asked to uphold the will on the ground that, as the will appeared to be in proper form and duly executed in all respects, the Court might hold that it was properly executed, notwithstanding the testimony of the attesting witnesses, if the Court did not feel certain that their memory could be relied upon. The learned judge (Sir Gorell Barnes), after agreeing with that proposition, said: "If I felt any doubt, or saw any reason to believe that the witnesses were not accurate, my view would be the other way. But, unfortunately, the recollection of those two witnesses is too good for that. It appears to me . . . that their evidence must be accepted by me. Therefore, though I do it reluctantly, I must pronounce against the will." See also *Pennant* v. *Kingscote,* (1843) 3 Curt. 642; *Croft* v. *Croft,* (1865) 4 S. & T. 10.

CHAPTER IV.

OF THE REVOCATION OF WILLS.

Revocable nature of wills.

As testamentary intention is ambulatory till death, a will is in its nature a revocable instrument (*a*); and that in all cases, so that if the testator make his will irrevocable by express words in the body of the instrument, yet he may revoke it, for his act or his words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable (*b*). "The making of a will is but the inception of it, and it doth not take any effect till the death of the devisor; then it would be against the nature of a will to be so absolute that he who makes it, being of good and perfect memory, cannot countermand it" (*c*). For this cause a man may alter or make void his will at his pleasure. "A man," saith Swinburne (*d*), "cannot renounce the power or liberty of making testaments, neither is there any cautel under heaven to prevent this liberty, which also endureth whilst any life endureth."

Contracts not to revoke a will.

"Although a will is always revocable notwithstanding a contract not to revoke it, yet such a contract is not illegal and is binding if made for good consideration and in such form as to comply with the Statute of Frauds (*e*), and damages are recoverable for the breach thereof (*f*); but a contract not to revoke a will cannot be specifically enforced. A mere representation of an intention, however, as distinguished from a contract, is not binding, although such representation may

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(*a*) *Colvin* v. *Fraser*, (1829) 2 Hagg. at p. 326.

(*b*) *Vynior's Case*, (1609) 8 Co. Rep. 82 b.

(*c*) *Forse and Hembling's Case*, (1588) 4 Co. Rep. 61 b. See as to the revocability of wills in general, reporter's note to *Hobson* v. *Blackburn*, (1822) 1 Add. at pp. 278, 279.

(*d*) Swinb., Pt. VII., s. 14.

(*e*) Wms. on Exors., p. 96, citing *Hammersley* v. *De Biel*, (1845) 12 Cl. & F. 45; *Robinson* v. *Ommaney*, (1883) 23 Ch. D. 285.

(*f*) Wms. on Exors., p. 96, citing *Re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510.

have been intended to influence the conduct and action of the contemplated beneficiary, and in fact have been acted on by him" (*g*).

A mutual will may under certain circumstances be treated as irrevocable.

It will hereafter appear that mutual wills may under certain circumstances be regarded as irrevocable in equity to this extent, that on the death of the survivor of the two testators, who has revoked his part of the mutual will after the death of the first testator, his personal representatives may be directed to hold the property in trust for the beneficiaries under the revoked will (*h*).

Testator prevented by force or threats from revoking his will.

Where a testator is prevented by force or threats from altering or revoking his will, and from executing a later will leaving his property to others, the Court may, it seems, declare that the executors of the former will are trustees for the persons who would have benefited had the later will been executed (*i*).

A testator cannot authorise a will to be destroyed after his death, but may make its validity contingent on the assent of a third person.

A testator cannot delegate his power of revoking his will by inserting a clause in it authorising another to destroy it after his death (*k*). But he may make the validity of the will contingent on the assent of a third person after his death, and, if that assent is withheld, probate of the instrument may be refused (*l*).

Provisions of the Wills Act, 1837, with reference to the revocation of wills.

Sect. 18 of the Wills Act, 1837 (*m*), provides "That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)."

Sect. 19 provides "That no will shall be revoked by any

(*g*) Wms. on Exors., p. 96, citing *Maddison* v. *Alderson,* (1883) 8 A. C. 467, disapproving *Loffus* v. *Maw,* (1862) 3 Giff. 592. See also *Humphreys* v. *Green,* (1882) 10 Q. B. D. 148.

(*h*) *Vide post,* pp. 290 *et seq.*

(*i*) *Betts* v. *Doughty,* (1879) 5 P. D. 26. *Vide ante,* p. 91; and see Swinb., Pt. VII., s. 18.

(*k*) *Stockwell* v. *Ritherdon,* (1848) 1 Rob. 661; *Smith,* (1869) 1 P. & D. at p. 719.

(*l*) *Smith,* (1869) 1 P. & D. 717.

(*m*) 1 Vict. c. 26.

presumption of an intention, on the ground of an alteration in circumstances."

Sect. 20: "That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid [*i.e.*, by marriage], or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Sect. 21: "That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

Modes of revocation.

Under the statute there are four modes in which a will or codicil may wholly or partially be revoked:

1. By marriage.
2. By another will or codicil duly executed.
3. By a writing declaring an intention to revoke, and duly executed.
4. By the burning, tearing, or otherwise destroying the will or codicil by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Additional modes of partial revocation.

There are, in addition, two modes in which a will or codicil may partially be revoked:

1. By a duly executed obliteration, interlineation, or other alteration made in the will or codicil.

2. By such an alteration in the will or codicil as renders the words or effect of the will or codicil before alteration no longer "apparent."

Section 1.

REVOCATION BY MARRIAGE.

All wills are revoked by marriage,

except wills made in exercise of powers of appointment of a particular description.

Sect. 18 of the Wills Act enacts "that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real and personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions)."

Wills executed prior to 1st Jan., 1838.

A marriage contracted after the 1st January, 1838, will not, it should seem, revoke a will executed before that date, unless it would have had that effect according to the law in operation before the Wills Act was passed (*n*).

Revocation by implication arising from change of circumstances, under the old law,

Prior to the Wills Act, 1837, the will of a woman was revoked by marriage, and that of a man by marriage and the birth of a child. There were also cases under the old law in which, apart from the concurrence of marriage, wills were held to be revoked by a change of condition in the testator (*o*).

abolished by the Wills Act, 1837, s. 19.

Sect. 19 of the Wills Act provides "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances."

Since that Act, marriage revokes all previous wills,

Since the Wills Act a valid marriage is an absolute revocation, even of a will made in contemplation of marriage (*p*).

if valid by the laws of this country.

The marriage must operate as a revocation by the law of the testator's

To revoke a will the marriage must be valid by the laws of this country (*q*), and the testator must, at the time of his marriage, be domiciled in a country where marriage has the effect of revoking a previous will. Thus where a domiciled Scotsman made a will and afterwards married in Scotland, and subsequently acquired an English domicil

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(*n*) *Shirley,* (1841) 2 Curt. 657.

(*o*) Wms. on Exors. 138.

(*p*) *Cadywold,* (1858) 1 S. & T. 34.

(*q*) *Mette* v. *Mette,* (1859) 1 S. & T. 416; *Warter* v. *Warter,* (1890) 15 P. D. 152.

which he retained until his death, it was held that the will was valid so long as he remained a domiciled Scotsman, and that it was not revoked by his subsequent change of domicil (*r*), in consequence of the provisions of 24 & 25 Vict. c. 114, s. 3 (*s*).

domicil at the time.

Reason for the exception in cases of wills made in exercise of a power.

The reason for excepting from the provision of sect. 18 of the Wills Act, 1837, wills made in exercise of the powers of appointment therein mentioned, is stated to be that a revocation of the will in a case to which the exception applies would operate only in favour of those entitled under the settlement in default of appointment, and the new family of the testator would derive no benefit whatever from such revocation (*t*).

The Court will endeavour to bring wills in exercise of a power within the exception.

The tendency of the cases decided upon the construction of the section appears to be in favour of the validity of an exercise of a power of appointment, if by any legitimate construction of the language of the section it can be brought within the terms of the exception (*u*).

Where a will exercises a power and

If a will, in addition to exercising a power of appointment of the excepted class, disposes of other property, the portion of

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(*r*) *Reid,* (1866) 1 P. & D. 74; *Westerman* v. *Schwab,* (1905) 8 F. 132, Ct. of Sess.; *vide ante,* p. 35.

(*s*) "No will . . . shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same." See also *Groos,* [1904] P. 269; and see *Loustalan* v. *Loustalan,* [1900] P. 211, as to the operation of s. 18 of the Wills Act upon wills of foreigners domiciled abroad.

(*t*) Wms. on Exors. 138, note (*a*), citing *Logan* v. *Bell,* (1845) 1 C. B. 872.

(*u*) *Russell,* (1890) 15 P. D. 111, 113; *Fenwick,* (1867) 1 P. & D. 319. Thus in *Fitzroy,* (1858) 1 S. & T. 133, the exception was held to extend to a case where the same persons as would have taken under the Statute of Distributions in the case of an intestacy, would take under the settlement creating the power, in default of appointment, and in the same proportions in both cases.

In *Fenwick,* (1867) 1 P. & D. 319, the exception was held to extend to a case in which, in the event of certain contingencies happening, the property appointed would not pass, in default of appointment, to the persons who would have taken in case of intestacy under the Statute of Distributions.

In *McVicar,* (1869) 1 P. & D. 671, the property appointed would have passed, in default of appointment, to the next of kin of the testator. But a distinction was drawn between the words "next of kin" standing alone and the words "next of kin under the Statute of Distributions." It was held that the two descriptions do not imply the same class, and on that ground the will exercising the power of appointment was held to fall within the exception: see *Worthington,* (1872) 20 W. R. 260.

also disposes of other property of the testator.

the will disposing of other property is revoked by a marriage, and administration with the will annexed, limited to the property over which the testator had power of appointment, will be granted to the appointee (*x*).

Section 2.

REVOCATION BY A SUBSEQUENT TESTAMENTARY INSTRUMENT.

Provision of the Wills Act, s. 20.

The section (*y*) provides that a will or codicil or any part thereof may be revoked "by another will or codicil executed in manner hereinbefore required."

The mere fact of executing a later will not necessarily a revocation of an earlier will.

"The mere fact of making a subsequent testamentary paper," says Sir Edward Vaughan Williams in a passage in his work on Executors (*z*), which has repeatedly and emphatically received judicial affirmation (*a*), "does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together. . . . Any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper, whether in form a will or a codicil, be partially inconsistent with one of an earlier date, then such later instrument will revoke the earlier as to those parts only where they are inconsistent."

Any number of testamentary papers may be admitted to probate as together containing the will of the deceased.

"This passage," said Sir J. P. Wilde in *Lemage* v. *Goodban* (*b*), "truly represents the result of the authorities. The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of

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(*x*) *Russell,* (1890) 15 P. D. 111; *vide post,* p. 398.

(*y*) Wills Act, 1837, s. 20; *ante,* p. 161.

(*z*) Wms. on Exors., pp. 119, 120. To guard against misapprehension, a slight alteration has been made in the concluding words of the passage.

(*a*) *E.g.*, in *Lemage* v. *Goodban,* (1865) 1 P. & D. 57, 62; *Petchell,* (1874) 3 P. & D. 153, 156; *Townsend* v. *Moore,* [1905] P. 66, 67; and see *Reeves* v. *Reeves,* [1907] 2 Ir. R. 421.

(*b*) (1865) 1 P. & D. at p. 62.

them, than similar defects if appearing on the face of a single document. . . . The intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property, and not to the form of his will. What dispositions did he intend—not which, or what number of papers did he desire or expect to be admitted to probate,—is the true question. And so this Court has been in the habit of admitting to probate such, and as many papers (all properly executed) as are necessary to effect the testator's full wishes, and of solving the question of revocation, by considering not what papers have been apparently superseded by the act of executing others, but what dispositions it can be collected from the language of all the papers that the testator designed to revoke or to retain."

The intention of the testator is the sole guide, the question being "what dispositions did he intend to revoke or to retain."

It is proposed to discuss the effect of a testamentary instrument of a later date upon an earlier will:

The order of discussion stated.

(1) When the later instrument contains words of express revocation of the earlier;

(2) Where, although the later instrument contains no words of express revocation, it can be collected from its words and dispositions that the testator intended to dispose of his property in a different way from that in which he disposed of it by the earlier instrument; or where it can be collected from the words of the later instrument that the testator intended only partially to supersede or to modify the disposition of his property contained in the earlier instrument. The discussion involves the consideration of what evidence other than the words of the instruments themselves is admissible to show the intention of the testator.

(3) It is proposed to consider cases in which the Court has to deal with documents which are proved to have been executed upon the same date and occasion, or which are undated, and as to which it is impossible to affirm that the one has any priority in time of execution over the other.

(1) The effect of a later testamentary instrument

(1) A clause of revocation, when it is in clear words, has the effect of revoking all former wills just as if they had never existed: it must be considered as leaving no operation

upon an earlier, where the former contains words of express revocation.

whatever to any former will (*c*). But even if the second instrument contains a general revocatory clause, that is not absolutely conclusive, and the Court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will (*d*).

A clause of revocation, in general, revokes all former wills, but is not absolutely conclusive,

as where the Court is satisfied that the testator did not intend to revoke a prior legacy or benefit.

Thus in *Gladstone* v. *Tempest* (*e*) Sir Herbert Jenner said: "Generally speaking, there is no doubt that by a general clause of revocation there is a revocation of all prior testamentary acts. But it has been over and over again laid down, that probate of a paper may be granted of a date prior to a will with a revocatory clause, provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit" (*f*).

(*c*) *Sotheran* v. *Dening,* (1881) 20 Ch. D. 99, 105.

(*d*) *Dempsey* v. *Lawson,* (1877) 2 P. D. 98, 107.

(*e*) (1840) 2 Curt. 650, 653.

(*f*) Thus in *Denny* v. *Barton,* (1818) 2 Phill. 575, a codicil in the form of a letter written by the testator in 1808 was held to be unrevoked by a will of 1812 which contained a clause revoking all former wills. Sir John Nicholl said: "I am clearly of opinion that it can operate, and that it was not intended to be revoked, notwithstanding the revocatory clause in the will."

In *Gladstone* v. *Tempest,* (1840) 2 Curt. 650, cheques written in 1833 by the deceased, but not intended to have effect until after his death, were admitted to probate as part of the will of the deceased, notwithstanding the execution by him in 1834 of a will which disposed of the whole of his property and contained a full clause of revocation.

In *Doe* v. *Hicks,* (1832) 8 Bing. 475, the deceased executed a codicil "revoking and making void *several* of the dispositions theretofore made by his will and codicils of all his freehold copyhold and personal estate and effects of every kind and description." The codicil concluded "hereby in all other respects but what is above mentioned confirming my said will and codicils." It was held that a devise of certain copyhold premises to the testator's wife, which was contained in the will, was not revoked. Tindal, C.J., said (at p. 480): "If a devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise. For if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand." See *Kiver* v. *Oldfield,* (1859) 4 De G. & J. 30.

In *Howard,* (1869) 1 P. & D. 636, a codicil to the last will absolutely revoked and made void all bequests and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the will. The clause appointing executors and guardians in the will was held not to be revoked, and the will, therefore, admitted to probate; but in *Cottrell* v. *Cottrell,* (1872) 2 P. & D. 397, where a subsequent will (executed in accordance with the law of Italy, where

Where the subsequent will is made under the impulse of a mistaken belief of facts, the prior bequest not revoked.

It will hereafter appear that a will destroyed by a testator under an erroneous belief is not thereby revoked (*g*). And it has been held that a subsequent will or codicil, made under the impulse of a mistaken belief of facts, will not revoke a prior one.

Thus where a testator by his will gave legacies to the grandchildren of his sister, and subsequently, by a codicil, revoked the legacies and bequests, giving as a reason that the legatees were all dead, on it appearing that the legatees were in fact alive at the death of the testator, it was held that the bequests in the will were not revoked (*h*). "There is no revocation," said Lord Loughborough, "the cause being false; whether by misinformation or mistake is perfectly indifferent" (*i*).

So in *In the Goods of Moresby* (*j*) a testator, supposing his will to be lost, made in Peru a nuncupative will with a general revocatory clause. The former will was subsequently found, but he died in ignorance of that fact. The provisions of the two wills were very similar. Sir John Nicholl said: "It appears that the deceased did not intend to revoke the

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the testator was domiciled at the time of his death) contained the following words, "I erase, revoke, and annul every other act or last will which I may have made," Lord Penzance said: "Treating it as a question of intention, to be gathered from the construction of the last will, I am of opinion that it revoked the appointment of the executor in the preceding will." And see *Henfrey* v. *Henfrey*, (1840) 2 Curt. 468, 4 Moo. P. C. 29, 36; *Griffith*, (1872) 2 P. & D. 457.

In a testamentary suit, the parties came to an arrangement under the terms of which the Court was asked to grant probate of two testamentary instruments. Sir James Hannen said: "I hesitated because I found the later will contained a clause revoking all former wills. On reflection, I think that as the parties have agreed that the two documents shall be admitted to probate, I ought to accede to their wishes. . . . I think I ought not to refuse to carry out the terms agreed upon, unless I am prepared to hold that under no possible circumstances could the first document be taken as consistent with the last. I am not prepared to say that. I think there may be circumstances in which the two would operate together": *Robinson* v. *Clarke*, (1877) 2 P. D. 269.

If a will which is conditional contains a clause revoking all former wills, the condition attaches to the whole document, and therefore, if the condition is not fulfilled, the will is inoperative to revoke a previous will: *Hugo*, (1877) 2 P. D. 73.

(*g*) *Post*, pp. 200 *et seq.*

(*h*) *Campbell* v. *French*, (1797) 3 Ves. 321.

(*i*) *Ibid.*, at p. 323.

(*j*) (1828) 1 Hagg. 378.

former will, but supposing it to be lost, and being unwilling to die intestate, he made the nuncupative will. As, however, the former has been recovered, there is no objection to probate thereof being granted" (*k*).

Distinction between cases in which testator asserts his belief, and expresses a doubt.

There appears to be a distinction between cases in which the testator, as the foundation of his wish to change his former intent, positively asserts his belief in the existence of facts which have not happened, and cases in which he merely expresses his doubt, supposition, or advice as to their existence (*l*).

Suggested application of the doctrine of dependent relative revocation to cases of revocation of an earlier by a later will.

It has been suggested that the doctrine of dependent relative revocation (*m*) may be applied to a case where a clause revoking former wills has been inserted into a later will, and the testator has not fully understood its legal effect. In *Garnett-Botfield* v. *Garnett-Botfield* (*n*) Sir F. H. Jeune said: "At one period of this case it did strike me that this might be treated as a matter of dependent relative revocation. I can conceive that, in the future, the Court may be called upon to consider very carefully whether in certain circumstances a revocation clause may be so dealt with as to make of an earlier and later will a composite document; and although this may appear very like a suggestion that a new will might be made for a testator, the true state of facts may possibly be that you cannot get at and give effect to the real wishes of a testator without putting two documents together."

(2) Where the later instrument contains no words of express revocation, the Court, in deciding whether the earlier instrument is partly or wholly revoked, is guided by the intention of the testator,

(2) Where there are two instruments, the later of which in date, purporting to be the last will, does not contain words of absolute revocation, it is the duty of the Court to examine the provisions of the documents, and, having construed their words, to come to a conclusion, aye or no, did the testator intend that the provisions of the later document should be a revocation of the dispositions contained in the first, or did he intend that the two should be read together (*o*).

(*k*) See *Doe* v. *Evans*, (1839) 10 A. & E. 228; *Kennell* v. *Abbott*, (1799) 4 Ves. 802; *Crosthwaite* v. *Dean*, (1868) L. R. 5 Eq. 245.

(*l*) Wms. on Exors., p. 129, citing *Att.-Gen.* v. *Lloyd*, (1747) 3 Atk. 551, disapproved of in *Thomas* v. *Howell*, (1874) L. R. 18 Eq. 198, 211; *Att.-Gen.* v. *Ward*, (1797) 3 Ves. 327, 331.

(*m*) *Vide post*, pp. 200 *et seq.*

(*n*) [1901] P. 335, 344.

(*o*) See *Petchell*, (1874) 3 P. & D. at p. 156; *Townsend* v. *Moore*, [1905] P. at p. 80.

Where there is something upon the face of the later instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous will, the Court is justified in having recourse to external evidence to ascertain the testator's intention. But the external evidence which is admissible is, it seems, confined to such evidence of the circumstances which surrounded the execution of the later instrument as will suffice to place the Court in the same position as the deceased was in when he sat down to execute the last will—in other words, to enable the Court to ascertain what the deceased knew at that time (*p*).

and in certain circumstances may admit extrinsic evidence of intention,

in order to place the Court in the same position as the deceased was at the time.

In deciding what instruments were to be admitted to probate as together or separately constituting the testator's last will, the Prerogative Court did in some circumstances admit parol evidence with respect to the factum of the instrument, in order to investigate *quo animo* the act was done by the testator.

The practice of the Prerogative Court and Court of Probate in admitting extrinsic evidence in such cases,

Thus in *Methuen* v. *Methuen* (*q*) the testator, having made one codicil, under which his wife and daughters took certain benefits, after the marriage of one of the daughters made a codicil in which he recited that he had made provision for this daughter, and proceeded to make dispositions in favour of the wife and daughters differing from those in the first codicil. There was nothing making it absolutely impossible that the testator meant the two sets of dispositions to be cumulative; but the property of the deceased would not have been equal to the payment of all the legacies that had been given. Sir John Nicholl said: "The question is whether the second codicil is to be considered as an addition to the first codicil, or as a substitute for and consequently revocatory of it. The first instrument remains uncancelled, and there are no revocatory words in the second. It is contended that the Court has no power to inquire any further; but the same rules do not apply in a case relating to the factum of a will which would apply if the inquiry were concerning the construction of it.

"In the Court of Probate the whole question is one of

(*p*) *Bryan*, [1907] P. 125, 130.

(*q*) (1817) 2 Phill. 416, 426.

intention: the *animus testandi* and *animus revocandi* are completely open to investigation in this Court. It is admitted that if there is doubt on the face of the instrument, the Court may admit parol evidence."

where there was a doubt on the face of the instrument.

In *Greenough* v. *Martin* (*r*), where a similar question arose for consideration, the same learned judge said: "In a Court of construction, where the factum of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate, the inquiry is not so limited; for the intentions of the deceased as to what instruments shall operate as and compose his will, are to be there collected from all the circumstances of the case taken together."

The subject of the admissibility of external evidence in such cases was very fully discussed by Sir H. Jenner in *Thorne* v. *Rooke* (*s*), and he came to the conclusion that the Court is justified in having recourse to external evidence to ascertain the testator's intentions only where there is something on the face of the instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous will. In the case before him the learned judge thought there was no such doubt or ambiguity, as there were no words in the later instrument from which the Court could infer that it was intended as a substitute; there were not the same causes expressed nor the same sum given by both instruments, nor dispositions of things *ejusdem generis*.

This practice adopted by the Probate Division.

In *Jenner* v. *Ffinch* (*t*), Sir James Hannen accepted as correct Sir H. Jenner's limitation of the power of the Court to admit parol evidence to those cases in which the instrument itself (in connection with facts known to the testator) gives rise to doubt (*u*).

(*r*) (1824) 2 Add. 239, 243.

(*s*) (1841) 2 Curt. 799.

(*t*) (1879) 5 P. D. 106.

As to what circumstances raise a suffi-

(*u*) As to what doubt arising on the face of the instrument, taken in connection with facts known to the testator, will be sufficient to justify the admission of external evidence, see *Methuen* v. *Methuen,* (1817) 2 Phill.

The nature of the extrinsic evidence which is admissible.

In *Townsend* v. *Moore* (*x*) Vaughan Williams, L.J., expressed a doubt as to whether this principle would extend to the admission of parol evidence of the intention of the testator according to the view of those who were present at the time of the execution of the testamentary document, and stated that probably the evidence in the case of *Jenner* v. *Ffinch* (*y*) was admitted only to show the intention with which some act was done by the testator. He added that, if it was admitted to show the intention with which certain words were used, he would feel a difficulty in following the decision.

In *In the Goods of Bryan* (*z*) Sir Gorell Barnes said: "In regard to the further proposition that, if a perusal of the documents themselves does not satisfy the Court, external evidence may be looked at, I doubt whether this means anything more than that the Court may put itself in the same position as the deceased was in when he sat down to execute the last will—in other words, to enable the Court to ascertain what the deceased knew at the time."

Where the later will is intended to supersede the earlier, the earlier will is revoked,

If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this although in some particulars the later will does not completely cover the whole subject-matter of the earlier (*a*).

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cient doubt to permit of explanation.

at p. 427; *Thorne* v. *Rooke*, (1841) 2 Curt. 799, 828, 829; *Jenner* v. *Ffinch*, (1879) 5 P. D. at pp. 112, 113. The following may be given as instances: The fact that the property of the testator would be wholly insufficient to meet the legacies if those given by the last instrument were to be considered cumulative to those given by the first; the fact that the same property is given to the same person in both instruments, etc.: see *Jenner* v. *Ffinch*, loc. cit.; *Bryan*, [1907] P. at p. 128; *Wainewright* v. *Wainewright*, (1894) 71 L. T. 265. Bequests are, *primâ facie*, to be taken cumulatively when they are on separate papers, unless they are revocatory of each other: *Bartholomew* v. *Henley*, (1820) 3 Phill. at p. 319; *Townsend* v. *Moore*, [1905] P. at pp. 81, 82.

Bequests are *primâ facie* cumulative if on separate papers.

(*x*) [1905] P. at p. 80.

(*y*) (1879) 5 P. D. 106.

(*z*) [1907] P. at p. 130.

(*a*) *Dempsey* v. *Lawson*, (1877) 2 P. D. at p. 105; see *Thorn* v. *Dickins*, [1906] W. N. 54, where a will in the following terms, "All for mother," was held to revoke all previous wills.

Thus in *Dempsey* v. *Lawson* (*b*) the deceased executed a will in 1858 in which she disposed of the whole of her property. In 1860 she executed another will, which varied and repeated various bequests given in the first will, appointed the same executors for England as in that document, but contained no residuary nor revocatory clauses. It was held that from the whole tenor of the last will it was clear that the testatrix did not intend the first will to remain in force, and that it therefore was revoked. Sir J. Hannen said: "I am of opinion that the intention of the testatrix, to be collected from the dispositions of the two wills, is that the second should stand alone, and be in complete substitution for the first, and that it contains all the testamentary dispositions which she intended at that time to constitute her last will and testament, and consequently that it does by implication revoke the whole of the will of 1858."

even though the later will does not dispose of the whole of the testator's property.

And in *In the Goods of Bryan* (*c*) Sir Gorell Barnes held that a later will revoked an earlier, although the earlier document disposed of all the estate of the deceased, and although the later document contained no express clause of revocation and left the residue undisposed of (*d*).

(*b*) (1877) 2 P. D. 98.

(*c*) [1907] P. 125.

(*d*) In *Plenty* v. *West*, (1845) 1 Rob. 264, the Court held, upon all the facts before it, that it was the intention of the testator that the later paper should stand alone, although it disposed of a part only of his personal estate, and therefore that in effect, although not in terms, it revoked the earlier will. In that case stress was laid upon the fact that the later paper was described as "the last will"; and to this extent the authority of *Plenty* v. *West* has been overruled, but that fact was only one circumstance in conjunction with others on which the Court founded its decision. See *Cutto* v. *Gilbert*, (1854) 9 Moo. P. C. 131, at p. 146; *Dempsey* v. *Lawson*, (1877) 2 P. D. at p. 106.

In *Henfrey* v. *Henfrey*, (1840) 2 Curt. 468, 4 Moo. P. C. 29, it was decided that a second will disposing of the whole estate revoked a former disposition *in toto*. See *Methuen* v. *Methuen*, (1817) 2 Phill. 416; *ante*, p. 169.

In *Chichester* v. *Quatrefrages*, [1895] P. 186, where two codicils were propounded, the Court held that the testator, in executing the second codicil, intended to revoke the first and substitute for it the second. See also *Jenner* v. *Ffinch*, (1879) 5 P. D. 106; *Wainewright* v. *Wainewright*, (1894) 71 L. T. 265.

The mere fact that the later document contains a clause disposing of the residue is not conclusive as to an intention to revoke the earlier: see

The intention of the testator is to be gathered from the substance—not the form—of the instrument.

In investigating the intention of the testator, the Court is necessarily called upon to put a construction upon the language of the instrument in question. But in seeking for the true meaning of the testator, the substance and not the form of the instrument must be regarded (*e*). The true test of an intention to revoke the earlier will is the inconsistent character of the dispositions in the two instruments, and the mere fact that the later paper is described as the testator's "last will and testament" is not in itself conclusive or even presumptive evidence of an intention that all previous instruments should be revoked. For it is obvious that a man may sign a paper in which that language is used without any such intention (*f*).

The fact that the later will is described as "the last will,"

It was at one time suggested that the fact that the later instrument appointed executors, constituted a revocation of previous instruments (*g*). But it is clear that an appointment of executors in the later will cannot alone suffice to show that the testator intended a previous will to be revoked (*h*).

or appoints executors, is not conclusive of an intention to revoke.

Lemage v. *Goodban*, (1865) 1 P. & D. 57; *Petchell*, (1874) 3 P. & D. 153; *Townsend* v. *Moore*, [1905] P. 66; and *post*, p. 175.

A perfect and complete will, inconsistent with a former, is a revocation, though the devisee under the latter is prevented by personal incapacity from taking, and therefore derives no benefit from it: *Ilchester*, (1803) 7 Ves. at p. 379.

(*e*) *Dempsey* v. *Lawson*, (1877) 2 P. D. at p. 105.

(*f*) The case of *Plenty* v. *West*, (1848) 1 Rob. 264, so far as it supports the doctrine that the use of the words "last will" in a testamentary paper necessarily imports a revocation of all previous instruments, was overruled by *Cutto* v. *Gilbert*, (1854) 9 Moo. P. C. 142, and *Stoddart* v. *Grant*, (1851) 1 Macq. H. L. at p. 171. See *Lemage* v. *Goodban*, (1865) 1 P. & D. at p. 61. Documents headed "the last will and testament" were admitted to probate as an addition to a former will in *Luffman*, (1847) 5 N. C. 183; *Langhorn*, (1847) 5 N. C. 512; *Summers*, (1901) 84 L. T. 271. See also *Freeman* v. *Freeman*, (1854) 5 De G. M. & G. 704; *Holt*, (1848) 6 N. C. 93, 96; *Birks* v. *Birks*, (1865) 4 S. & T. 23, 30; *Saussaye*, (1873) 3 P. & D. 42; *Dempsey* v. *Lawson*, (1877) 2 P. D. 98. In *Simpson* v. *Foxon*, [1907] P. 54, the words "this is the last and only will" were held not to constitute a revocation of former wills, since the Court was satisfied that the will in question was not intended to be a complete disposition of the testator's property.

(*g*) *Plenty* v. *West*, (1845) 1 Rob. 264; *Whitehead* v. *Jennings*, (1714) cited 1 Phill. at p. 412; *Burt* v. *Burt*, (1718) cited 1 Phill. at p. 412; see *Cutto* v. *Gilbert*, (1854) 9 Moo. P. C. at p. 145.

(*h*) *Stoddart* v. *Grant*, (1851) 1 Macq. H. L. at p. 173; *Birks* v. *Birks*, (1865) 4 S. & T. at p. 39. A later will, disposing of all the testator's property, but containing no revocation of a prior one, and appointing no executors, may revoke the prior will *in toto*, including the appointment of executors contained in the prior will: *Henfrey* v. *Henfrey*, (1842) 4 Moo.

No particular form of words is an universal test of revocation.

In *Birks* v. *Birks* (*i*) Sir J. P. Wilde said: "For my own part I repudiate the notion that there are any particular words, or any particular forms of expression, on which one's finger can be put as an universal test of revocation."

Where the earlier and later wills are only partly inconsistent, both will be admitted to probate.

When there are two testamentary documents, and the Court is able to gather that one was not intended wholly to revoke the other, but that both were intended to be effective, at any rate to some extent, both documents will be admitted to probate as together constituing the last will of the deceased, so that effect may be given to them, so far at any rate as circumstances will permit. How far that can be done is, to a great extent, for a Court of construction to determine (*k*).

Where there are two documents, the Court will endeavour so to construe them as to support their admissibility to probate,

Primâ facie, every document purporting to be testamentary, signed and witnessed in accordance with the provisions of the Wills Act, ought to be admitted to probate (*l*); and it has been said (*m*) that where there are two properly executed testamentary instruments, and it is contended that both ought to be admitted to probate, the principle applied by the Court has been that, in construing the documents, it will endeavour so to read the words as to support the admissibility of both documents to probate; and that the Court ought not readily to conclude that the testator intended to revoke a properly

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P. C. 29. But see *Leese*, (1862) 2 S. & T. 442, and cases cited below; see also *supra*, p. 166, note (*f*); *post*, p. 262.

Probate may be granted to all the executors named in several papers.

When probate is granted of two or more testamentary papers, as together containing the last will of the deceased, it is the practice of the Court to make the grant to all the executors named in the several papers: *Leese*, (1862) 2 S. & T. 442; *Budd*, (1862) 3 S. & T. 196; *Geaves* v. *Price*, (1863) 3 S. & T. 71, where the executor of the later will was described as "sole executor of this my will": *Nickalls*, (1865) 4 S. & 7. 40; *Morgan*, (1867) 1 P. & D. 323; *Strahan*, [1907] 2 Ir. R. 484; but see *Baily*, (1869) 1 P. & D. 628.

(*i*) (1865) 4 S. & T. at p. 30.

(*k*) *Townsend* v. *Moore*, [1905] P. at p. 84. See *Coward* v. *Marshall*, Cro. Eliz. 721, quoted 3 Mod. 201, 3 Wils. K. B. 507; *Phipps* v. *Anglesey*, (1751) 7 Bro. P. C. 443, 453; *Sandford* v. *Vaughan*, (1809) 1 Phill. 39, 128; *Harley* v. *Bagshaw*, (1812) 2 Phill. 48; *Nickalls*, (1865) 4 S. & T. 40.

Two independent wills, disposing of property in England and abroad.

If two independent wills are made, one disposing of the testator's property in England and the other disposing of his property abroad, the former alone should be admitted to probate in England. But if the wills are not independent—*i.e.*, if one refers to the other in such a way as to incorporate it by reference—both wills should be admitted to probate: *Murray*, [1896] P. 65; and *vide ante*, p. 13.

(*l*) *Townsend* v. *Moore*, [1905] P. at p. 80.

(*m*) *Ibid.*, at p. 81.

executed testamentary document in the absence of express words of revocation, when the inference of revocation can arise only from the construction of the testamentary instrument in question (*n*).

and will not readily conclude that the earlier is revoked,

Thus in *Lemage* v. *Goodban* (*o*) there were two instruments, each purporting to be the last will and testament of the deceased. In each there was a residuary clause, but in the latter it was unintelligible, and it was impossible to give effect to it. The Court came to the conclusion that the testator did not, by executing the later will, intend to revoke the residuary clause in the earlier instrument, and, as effect could only be given to that disposition by granting probate of the earlier and later papers as together constituting the will, pronounced for the two documents.

even though the later instrument contains a clause disposing of the residue.

In *In the Goods of Petchell* (*p*) the deceased executed a will, in which, after disposing in legacies of a small part of her property, she left the rest to her daughter absolutely, and appointed her daughter executrix. The deceased subsequently executed another instrument, which purported to be her last will, but had no revocatory clause. By it she gave the whole property to her daughter for life and made her sole executrix. On the death of the daughter, legacies were given of a larger amount than in the first will, but the residue was not disposed of. Sir J. Hannen held that the testatrix did not intend to revoke

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(*n*) Thus in *Stoddart* v. *Grant*, (1851) 1 Macq. H. L. at p. 175, Lord Truro said: "These documents . . . are *primâ facie* to be regarded as one will. They may be altered. They may be partially revoked. They may be partially inconsistent with one another. And yet the latter of them may not operate as an entire revocation of the former.

"The circumstance of a partial inconsistency as it is called, that is to say, the circumstance of there being dispositions in two documents, both of which cannot be fulfilled, is held by the Courts to operate as a revocation only *pro tanto*; bearing upon the particular legacy, but not necessarily affecting the testamentary character of the document.

"The general rule is, that the onus is upon those who impeach . . . I think it would tend very much to diminish the power of testators over their property, if you were to hold that slight or equivocal expressions found in a subsequent instrument would justify the conclusion that previous documents, otherwise entitled to probate, were to be regarded as revoked. In my apprehension, if you can execute the whole of the papers as one testament, you are bound to do so."

(*o*) (1865) 1 P. & D. 57.

(*p*) (1874) 3 P. & D. 153.

the residuary clause contained in the earlier paper, and admitted both documents to probate as together containing the will of the deceased (*q*).

(3) Where there are two inconsistent wills of the same date, or of unascertained dates (*i.e.* where their sequence is unknown), neither can be admitted to probate,

for the Court cannot ascertain which was intended to revoke the other.

(3) Where there are two testamentary documents, both of which are proved to have been executed upon the same date and occasion or which are undated, and it is impossible to affirm that one has any priority of time over the other, then, if the documents are so inconsistent that they cannot stand together, neither document can be admitted to probate. For it is obvious that if there are two testamentary documents, and it is to be gathered that one was intended to revoke the other altogether, but it cannot be ascertained which was intended to be revoked, neither of them can be proved (*r*).

Secus where the wills are not inconsistent.

But when the provisions of two testamentary documents, the priority of which is uncertain, and in neither of which are express words of revocation, are apparently inconsistent, the Court will endeavour so to construe the words that, if possible, the two documents may stand together, and may both be admitted to probate as expressing together the whole testamentary intention of the testator (*s*).

Revocation of an earlier will by a will of later date, when the latter is not forthcoming.

The execution of a second will, which expressly revokes or is entirely inconsistent with the first, revokes the first, even though the second will is not forthcoming at the death of the testator (*t*).

(*q*) See also *Saussaye*, (1873) 3 P. & D. 42, and cases cited *ante*, p. 174, note (*k*). In *Birks* v. *Birks*, (1865) 4 S. & T. 23, a testator, having erased a clause in his will after its execution, asked a friend to make a fresh copy of the will, omitting the erased clause. The copy was made; but the person who made it by mistake omitted several other clauses. The copy was duly executed, the omission passing unnoticed. The two wills were not inconsistent with each other, and the latter contained no express clause of revocation. Upon parol evidence of the circumstances under which they were drawn up and executed, probate was granted of both documents as together containing the last will of the deceased.

(*r*) *Townsend* v. *Moore*, [1905] P. at pp. 77, 84. Two inconsistent wills of the same date, neither of which can be proved to be last executed, are void for uncertainty so far as they are inconsistent: *Phipps* v. *Anglesey*, (1751) 7 Bro. P. C. at p. 452. See *Nosworthy*, (1865) 4 S. & T. 44, where one of the two inconsistent documents was executed by mistake.

(*s*) *Townsend* v. *Moore*, [1905] P. 66.

(*t*) *Helyar* v. *Helyar*, (1754) 1 Lee, 472, at p. 511, and cases there cited; *Brown* v. *Brown*, (1858) 8 E. & B. 876, 886; *Wood* v. *Wood*, (1867) 1 P. & D. 309.

To effect a revocation, there must be clear proof of the provisions of the missing will,

But where the revocation of an existing will is sought to be established by proof of a subsequent will which is not forthcoming, and the execution of such subsequent will is to be proved by oral evidence only, such evidence, in order to satisfy the Court, must be clear, stringent and conclusive (*u*).

and that they were inconsistent with those of the earlier will.

It is not sufficient to prove the mere execution of a subsequent will; there must be proof that the later will expressly revoked the earlier, or contained provisions of such a nature as to revoke the earlier by implication (*x*).

The rule illustrated.

Thus in *Hellier* v. *Hellier* (*y*) a testator made a will in 1864, appointing his wife sole executrix. He duly executed another document in 1877. There was no evidence of the contents of the second document, except that after its execution the testator said "I have made a will altering my affairs; I have taken care of Ellen" (his wife), "and there will be something for Roby" (his nephew), and except a memorandum at the foot of the will: "This will is now useless, a new will having been made in 1877, upon my wife telling me she was sorry that she had ever seen me." Butt, J., held that in the absence of proof of an alteration of executrix (*z*), or of a revocatory clause or disposition wholly inconsistent with the first will, that will was not revoked, and was therefore entitled to probate. The learned judge doubted whether the memorandum could be received in evidence, but stated that it showed no more than that there was some, but not a total alteration of the dispositions.

Whether, on the revocation of a later will, a former revoked will shall revive.

In the Common Law Courts it was formerly held that on

(*u*) *Cutto* v. *Gilbert,* (1854) 9 Moo. P. C. at p. 140.

(*x*) So if the later will is not forthcoming, and there is no evidence as to its contents, the earlier will is not revoked: *Hitchins* v. *Basset*, (1689) 3 Mod. 203. And where a subsequent will, which was not forthcoming, was found by the jury to have contained a different disposition from the earlier, but in what particulars was unknown, the earlier will was pronounced for: *Goodright* v. *Harwood,* (1774) 3 Wils. 497, 2 W. Black. 937, 7 Bro. P. C. 489. See *Cutto* v. *Gilbert,* (1854) 9 Moo. P. C. at pp. 143 *et seq.*, and cases there cited.

(*y*) (1884) 9 P. D. 237.

(*z*) *Sed quære* whether mere proof of a change of executors would suffice. The doctrine was based on the old civil law doctrine that an executor was universal heir, and is no longer adhered to; *vide ante*, p. 173.

Decisions of the Common Law Courts not followed in the Ecclesiastical Courts.

the revocation of a later will a former uncancelled will should revive, and that excluding all questions of intention (*a*).

The doctrine applied by the Ecclesiastical Courts was different, and it was held that the presumption was against the revival of the earlier will, and that the onus was upon the party setting it up to rebut that presumption (*b*).

And since the Wills Act, 1837,

Sect. 22 of the Wills Act provides that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the Act, and showing an intention to revive the same; and since the statute there can be no revival of a will, revoked by the execution of another will, except by one of the modes indicated in that section. It follows that the destruction of a second will, which revoked a will of earlier date, cannot, since the statute, revive or reinstate the earlier document, or any part thereof which has been duly revoked (*c*). Thus in *In the Goods of Hodgkinson* (*d*), a testator by his will gave all his property to A., and appointed her sole executrix. Afterwards he made a second will, devising his real estate to his sister B., and appointed her sole executrix; but he did not expressly revoke the first will. He subsequently cancelled the second will. It was held by the Court of Appeal that the first will was partially revoked by the second, and that the parts of the first will so revoked were not revived by the cancellation of the second; therefore, that probate must be granted of the first will limited to such part of the testator's property as was not comprised in the second will, and that as to such part as was comprised in the second will there was an intestacy (*e*).

the destruction of a second will, which revoked a will of earlier date, cannot revive the earlier will, or any part thereof which has been revoked.

The exercise of a power of appointment in the earlier will is revoked if the later will

If a special or general power of appointment has been exercised by will, and a subsequent will is made which, in addition to containing a clause revoking all previous wills, purports

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(*a*) *Goodright* v. *Glazier*, (1770) 4 Burr. 2512.

(*b*) *Moore* v. *Moore*, (1817) 1 Phill. at pp. 412 *et seq.*, and cases cited

(*c*) *Cutto* v. *Gilbert*, (1854) 9 Moo. P. C. at p. 143; *Brown*, (1858) 1 S. & T. 32; *Dickinson* v. *Swatman*, (1860) 30 L. J. P. 84; *Brown* v. *Brown*, (1858) 8 E. & B. 876; *vide post*, pp. 241, 250.

(*d*) [1893] P. 339.

(*e*) But *vide post*, pp. 206 *et seq.*

to exercise the particular power, or expressly refers to it, the exercise of the power of appointment in the earlier will is clearly revoked (*f*).

revokes the earlier *and* exercises the power.

If the later will contains a clause revoking all former wills, but does not purport to exercise the particular power or expressly refer to it, there is some doubt as to how far the clause of revocation is conclusive as to the intention of the testator to revoke the appointment under the earlier will. The result of the authorities appears to be that a clause revoking all former wills is a revocation of every provision in a former will, including the exercise of a power of appointment; and that the Court will adhere to the words of the testator, and not attempt to speculate upon an intention not expressed by the words (*g*).

Whether a clause of revocation in a later will revoked the exercise of a power in an earlier will, was at one time doubted. But recent authorities support the view that the exercise of the power *is* revoked.

(*f*) *Richardson* v. *Barry*, (1830) 3 Hagg. 249; *Eustace*, (1874) 3 P. & D. 183.

(*g*) The opinion of the Delegates in the case of *Hughes* v. *Turner*, (1831) 4 Hagg. 30, would appear to be that a clause of revocation *per se* does not revoke the portion of an earlier will which has executed a power. A similar opinion was expressed by Sir Cresswell Cresswell in *Merritt*, (1858) 1 S. & T. 112; *Meredith*, (1860) 29 L. J. P. 155; and *Joys*, (1860) 4 S. & T. 214. The principle upon which the learned judge acted in these cases appears to be that if there is a testamentary appointment, and afterwards a will which does not affect to exercise the particular power, or refer to it, but deals with other property, then the will, although it contains an express revocation of all prior wills, must be held not to have revoked the testamentary appointment.

Some doubt was cast upon the authority of these cases in *Sotheran* v. *Dening*, (1881) 20 Ch. D. 99, but whether the Court of Appeal overruled those authorities remained doubtful, as weight was given to the consideration, which arose in that case, that by s. 27 of the Wills Act a general bequest operated on the subject-matter of the general power of appointment, and so strengthened the evidence in favour of an intention to revoke its previous execution. Baggallay, L.J., said: "It has been decided that a general revocation of wills does not necessarily revoke an appointment by will. That view is adopted by Sir C. Cresswell in the two cases referred to. But it must be shown that it is entirely unreasonable that it should have that effect, otherwise it will be a revocation."

But in *Kingdon*, (1886) 32 Ch. D. 604, the question of revocation by a general revocatory clause arose *simpliciter*, there being no subsequent provision relating to the subject-matter of the special power in question, and Kay, J., held that he was justified by the decision in *Sotheran* v. *Dening* (*supra*) in holding that a will executing a power was revoked *in toto* by general words of revocation in a subsequent will. And in *Cadell* v. *Wilcocks*, [1898] P. at p. 26, Sir Francis Jeune said: "The effect of his decision is, I venture to think, that on this point of law common sense has at last prevailed. I cannot understand why express words, Effect of later will, which contains no clause of revocation, on earlier will exercising power.

If the later will contains no words of express revocation, the earlier testamentary appointment is not revoked (*h*), unless the testator has by his later will dealt with the subject-matter of the power in a way clearly intended to supersede the exercise of the power by the earlier will (*i*).

The duty of the Court in such cases.

It is the duty of the Court of Probate to decide, according to its ordinary rules, whether a will by which a power of appointment is exercised has or has not been revoked by a later will, and to decree or refuse probate of the earlier instrument accordingly in the ordinary course (*k*).

Revocation of a will by republication of an earlier will.

The republication of a will may operate to revoke another will, executed after the original execution, but before the republication of the will so republished (*l*).

Section 3.

REVOCATION BY A WRITING DECLARING AN INTENTION TO REVOKE.

Revocation by a writing declaring an intention to revoke.

A will or codicil, or any part thereof (*m*), may, in accordance with the provisions of sect. 20 of the Wills Act, be revoked by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed.

What shall be a sufficient declaration of intention to revoke.

The intention to revoke must be expressly declared. Although the words "I do declare that I intend to revoke my will" need not be used, there must be some words which amount to that (*o*).

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revoking all previous wills, should be supposed to spare an execution of a power contained in one or more of them from the fate inflicted on all the rest of their contents."

(*h*) *Graham*, (1863) 3 S. & T. 69; *Budd*, (1862) 3 S. & T. 196.

(*i*) *Sotheran* v. *Dening*, (1881) 20 Ch. D. 99; *Kent* v. *Kent*, [1902] P. 108.

(*k*) *Hughes* v. *Turner*, (1831) 4 Hagg. 31; *Brenchley* v. *Lynn*, (1852) 2 Rob. 441.

(*l*) See *post*, p. 247.

(*m*) As to partial revocation by memorandum, *vide post*, p. 217.

(*o*) *Ford* v. *De Pontes*, (1861) 30 Beav. 572, 594. In that case, a testatrix by her will devised real estates, and, by a subsequent deed, attested by two witnesses, she conveyed them on other trusts. It was held that the deed (assuming it to be void as *turpis contractus*) was not such a

Whether such a writing is entitled to be admitted to probate.

It was at one time held that a writing expressing an intention to revoke former wills, and duly executed, was entitled to probate, although it contained no disposition of the testator's property and appointed no executor (*p*).

But it has since been decided that a writing declaring an intention to revoke, by which the deceased in no way disposes of any property, is neither will nor codicil, and cannot be admitted to probate (*q*).

Section 4.

REVOCATION BY BURNING, TEARING, OR OTHERWISE DESTROYING THE WILL.

Provisions of the Wills Act, s. 20.

The provisions of sect. 20 of the Wills Act, so far as they relate to this mode of revocation, are as follows: "No will or codicil or any part thereof shall be revoked otherwise than . . . by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Wills executed before the 1st day of January, 1838, are subject to the provisions of the Statute 1 Vict. c. 26 with respect to any act done to them subsequently to that day (*r*).

"writing declaring an intention to revoke" the will as is required by s. 20 of the Wills Act.

As to what is a sufficient declaration of intention to revoke, see *Brenchley* v. *Still*, (1850) 2 Rob. 162; *Hicks*, (1869) 1 P. & D. 683; *Fraser*, (1869) 2 P. & D. 40; *Durance*, (1872) 2 P. & D. 406, where a letter, signed by the testator and duly attested, directing his brother to obtain his will and burn it unread, was held sufficient; S.P., *Eyre*, [1905] 2 Ir. R. 540; *Gosling*, (1886) 11 P. D. 79, where a testator obliterated the whole of a codicil by thick black marks, and wrote at the foot "We are witnesses of the erasure of the above," these words being signed by the testator and attested by two witnesses; *Toomer* v. *Sobinska*, [1907] P. 106.

(*p*) *Brenchley* v. *Still*, (1850) 2 Rob. 162; *Hubbard*, (1865) 1 P. & D. 53; followed *dubitante* by Lord Penzance in *Hicks*, (1869) 1 P. & D. 683.

(*q*) *Fraser*, (1869) 2 P. & D. 40; *Eyre*, [1905] 2 Ir. R. 540; *secus* when the writing is also of a testamentary character, *Durance*, (1872) 2 P. & D. 406. The practice is to make a grant as upon intestacy without annexing the writing, but with a note that the grant is so made in consequence of the execution of the document revoking the earlier will: *Toomer* v. *Sobinska*, [1907] P. 106.

(*r*) *Hobbs* v. *Knight*, (1838) 1 Curt. 768, 776; *Croker* v. *Lord Hertford*, (1844) 4 Moo. P. C. 339, 356.

SUB-SECTION 1.—*The Act of Destruction.*

Provisions of the Wills Act, s. 20, distinguished from those of the Statute of Frauds.

The section provides that the will shall be burnt, torn, or otherwise destroyed.

Under the Statute of Frauds a devise of lands might be revoked, *inter alia*, "by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent" (*s*).

It will be noticed that the section of the Wills Act adopts two of the modes of revocation prescribed by the Statute of Frauds, viz., "burning" and "tearing"; the words "cancelling" and "obliterating" are omitted from the later enactment, and the words "or otherwise destroying" are substituted.

Cases on the construction of the Statute of Frauds applicable to construction of the same words in the Wills Act.

There appears to be no reason why cases decided upon the construction of the words "burning" and "tearing" in the Statute of Frauds should not be applied to the construction of the same words in the Wills Act (*t*).

"Burning or tearing."

Not necessary that the will should be totally destroyed.

In order effectually to revoke a will by burning or tearing, it is not necessary that the instrument be totally destroyed or consumed, burnt, or torn in pieces (*u*). If the will be burnt or torn in the slightest manner, this, joined with the declared intent, will be a good revocation (*x*).

The will need not be torn into more pieces than it originally consisted of,

The will need not be torn into more pieces than it originally consisted of; although no sheet of paper is completely divided, the tearing may be sufficient to revoke, if done with that intention (*y*). But there must be an actual, not a symbolical, burning or tearing (*z*) of the paper upon which the will itself

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(*s*) 29 Car. 2, c. 3, s. 6. This section did not apply to wills of personalty, with respect to which s. 22 merely provides that they shall not be repealed, altered, or changed by "any words."

(*t*) *Clarke* v. *Scripps*, (1852) 2 Rob. at p. 568.

(*u*) *Bibb* v. *Thomas*, (1775) 2 W. Black. at p. 1045.

(*x*) Thus where a testator, intending to revoke his will, gave it "something of a rip with his hands," and so tore it as almost to tear a bit off, then rumpled it together, and threw it on the fire, but it fell off and was only slightly singed, it was held that there was a tearing and a burning sufficient within the statute: *Bibb* v. *Thomas*, (1775) 2 W. Black. 1043.

(*y*) *Elms* v. *Elms*, (1858) 1 S. & T. at p. 157.

(*z*) *Cheese* v. *Lovejoy*, (1877) 2 P. D. at p. 253.

is written (*a*). There must be such an injury with intent to revoke as destroys the entirety of the will, so that it may be said that the instrument no longer exists as it was (*b*).

but the burning or tearing must be actual, so as to destroy the entirety of the will.

Further, the act of destruction, in order to be effectual, must not be inchoate and incomplete; the testator must have intended that which he actually did to the will to have the effect of revocation without more (*c*). Thus where a will has been torn by a testator, and he has been interrupted in the act of tearing, and has desisted, the question arises: When he ceased tearing, had he done all that he contemplated doing for the purpose of revocation? If he had, the revocation was complete, and he could not recall his act; he could only recall the will by some of the means prescribed by the 22nd section of the Wills Act (*d*): but if the Court is satisfied that it was the intention of the testator, if he had not been stopped, to have done more in order to carry his purpose into effect, then the act not having been completed will not be sufficient to destroy the validity of the will (*e*).

The act of destruction must not be inchoate or incomplete.

The testator must have done all he intended to do for the purpose of revocation,

otherwise the will is not revoked.

(*a*) *Doe* v. *Harris,* (1837) 6 A. & E. 209, 216.

(*b*) *Doe* v. *Harris,* (1837) 6 A. & E. 209, 217, *per* Coleridge, J.; and see *Hobbs* v. *Knight,* (1838) 1 Curt. at p. 778; *The Glenlivet,* [1893] P. at p. 171; *Clarke* v. *Scripps,* (1852) 2 Rob. at p. 569. The will, which was in a cover or envelope, was thrown by the testator on the fire, but a devisee under the will snatched it off, against the wish of the testator, and took it away; no part of the will was affected by the fire, but a corner of the envelope alone was burnt. It was held that the mere singeing of the corner of the envelope was insufficient. To hold that it was sufficient would be saying that a strong intention to burn was a burning. There must be an actual burning of the paper on which the will itself was written: *Doe* v. *Harris,* (1837) 6 A. & E. 209. The same will was held to be revoked as to copyholds: 8 A. & E. 1.

(*c*) *Elms* v. *Elms,* (1858) 1 S. & T. at p. 157.

(*d*) *Ibid.*

(*e*) *Doe* v. *Perkes,* (1820) 3 B. & A. at p. 491. The testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of revoking it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose, his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him; he then proceeded no further, and, having fitted the pieces together and found that no material word had been obliterated, he said "It is well it is no worse." It was held that on these facts the case was properly left to the jury to say whether the testator had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the Court of King's Bench held that the

"Otherwise destroying." The term implies some mode of destruction *ejusdem generis* as burning or tearing. Wherefore cancellation of the will is insufficient,

The section, after referring to "burning and tearing" a will, continues "or otherwise destroying the same." It has been held that these words must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary sense of the word (*f*). Accordingly it has been held that cancelling a will by striking it through with a pen is not a destruction of the will within the meaning of the section (*g*). Cutting a will with the intention of revoking it, is a mode of destroying as effectual as tearing, and is sufficient to effect a revocation of the will

verdict of the jury was right, and supported the will: *Doe* v. *Perkes,* (1820) 3 B. & A. 489. Bayley, J., said: "Suppose a person having an intention to cancel his will by burning it were to throw it on the fire, and upon a sudden change of purpose were to take it off again, it could not be contended that it was a cancellation. So, here, there was evidence from which a change of purpose before the completion of the act might properly be inferred": *ibid.*, p. 491; and see Mr. Justice Holroyd's charge to the jury in the same case, Gow. N. P. 186.

In *Colberg,* (1841) 2 Curt. 832, the testator, in a moment of irritation, tore his will into four pieces, but, afterwards repenting of what he had done, said he did not mean to destroy the will. Sir Herbert Jenner said that the deceased having torn the will into four pieces, it must be presumed *primâ facie* that he intended to revoke it; that if the paper were propounded he should probably be of opinion that it was not revoked, as in *Doe* v. *Perkes;* but he refused to decree probate upon an *ex parte* motion without the consent of the next of kin.

The testator, having previously expressed his intention of making a new will, sent for his will and tore it almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before making another. He let the will fall on the ground, but presently picked it up and refused to burn it. The Court was not satisfied that the testator did all that the statute made necessary to work a revocation, viz., that he tore the will, meaning by that act without more to revoke it, and pronounced for the will. Sir C. Cresswell said: "In one sense it may be said that he tore the will with the intention to revoke it, for no doubt he had that intention when he began to tear, and as soon as he had torn it a quarter of an inch he had torn it with the intention to revoke; but he did not intend to revoke it by that tearing only, he intended to tear it further": *Elms* v. *Elms,* (1858) 1 S. & T. 155, 157.

(*f*) *Stephens* v. *Taprell,* (1840) 2 Curt. at p. 465.

(*g*) *Stephens* v. *Taprell,* (1840) 2 Curt. 458; such a cancellation, *animo revocandi,* was a mode of revocation under the old law (*ibid.* 463), but not under s. 20 of the Wills Act, though the striking through be done *animo revocandi*: *Rose,* (1845) 4 N. C. 101; *Brewster,* (1859) 20 L. J. P. 69. A testator drew his pen through the lines of various parts of his will, wrote on the back of it "This is revoked," and threw it among a heap of waste papers in his sitting-room. The will was found uninjured at his death, having been saved from destruction by the act of a servant. No question as to the sufficiency of the cancellation by the pen was under the section (*h*); and it has been suggested that if a will be written in pencil, and the words are removed by means of an indian rubber, that would be a sufficient revocation (*i*). For in order to bring the act within the meaning of the words "otherwise destroying" it is sufficient that the essence of the instrument (not the material) is destroyed (*k*). So that if the operative signature of the testator is removed from the will by burning, tearing, or cutting it away, the entirety of the will is destroyed, and if the act is performed by the testator *animo revocandi* the will is revoked (*l*). And further, if the signature of the testator, which is essential to the will, be so obliterated that it can no longer be made out, it has been held that, having regard to the provisions of sect. 21 of the Act, a will may be revoked in that way as well as any other, provided the signature is obliterated *animo revocandi* (*m*). The same reasoning applies to the obliteration of the signatures of the attesting witnesses, and if these are completely erased by the testator *animo revocandi*, that would be, it seems, a sufficient

but cutting the will shall suffice,

and *semble* erasure with an indian rubber,

if the essence of the instrument is destroyed.

So where the operative signature to the will is cut or torn away,

or obliterated so as to be no longer "apparent,"

or the signatures of the attesting witnesses are destroyed,.

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raised; but it was suggested that the section was satisfied by throwing the will away with an intention that it should perish. It was held by the Court of Appeal that the will was not revoked: *Cheese* v. *Lovejoy*, (1877) 2 P. D. 251.

(*h*) *Hobbs* v. *Knight*, (1838) 1 Curt. at p. 779; approved *Clarke* v. *Scripps*, (1852) 2 Rob. at p. 570.

(*i*) *Hobbs* v. *Knight*, (1838) 1 Curt. at p. 779; see *Morton*, (1887) 12 P. D. at p. 142.

(*k*) *Hobbs* v. *Knight*, (1838) 1 Curt. at p. 779.

(*l*) *Hobbs* v. *Knight*, (1838) 1 Curt. 768; *Clarke* v. *Scripps*, (1852) 2 Rob. at p. 570. A will in which the part which contained the signature of the testator, the attestation clause, and the signatures of the attesting witnesses, was torn off and could not be found, held to be revoked: *Lewis*, (1858) 1 S. & T. 31. See *North* v. *North*, (1909) 25 T. L. R. 322; but see *Christmas* v. *Whinyates*, (1863) 3 S. & T. 81; and *post*, p. 188.

(*m*) *Hobbs* v. *Knight*, (1838) 1 Curt. at p. 780; *Clarke* v. *Scripps*, (1852) 2 Rob. at p. 571. The signatures of the testator and of the attesting witnesses were scratched out with a knife. It was held that, although the paper was not pierced, yet the fact that the signatures were scratched away might be regarded as a lateral cutting out, and that the will was revoked: *Morton*, (1887) 12 P. D. 141.

But scratching out with a knife, which is a lateral cutting, unless carried by the testator to the extent of rendering his signature illegible, does not amount to a revocation within the terms of s. 20: *Godfrey*, (1893) 69 L. T. 22.

And complete erasure of the testator's signature will not effect a revocation of the will, unless the Court is satisfied that it was so erased by the testator *animo revocandi*: *King*, (1851) 2 Rob. 403.

the will is revoked, provided these acts were done with that intention.

revocation of the will (*n*). In such a case, however, there would be greater difficulty in proving that the names of the witnesses were erased *animo revocandi* (*o*).

And tearing off a seal may in certain circumstances effect a revocation of the will,

Although a seal is not a necessary part of a will, yet where the testator has made it so by words in the testimonium clause, *e.g.*, "In witness whereof I have set my hand and seal," and the seal is subsequently torn off by the testator with the intention of revoking the will, the will is revoked (*p*).

as may the tearing off by the testator of his signature to the earlier pages of the will.

Where a will was written upon several sheets of paper, and each of the sheets was signed by the deceased and *the testimonium clause referred to that fact*, it was held that the circumstance that the deceased had torn off his signature from every sheet except the last amounted to a revocation of the whole will (*q*); for it was said (*r*) that the deceased, having expressly noticed, in the testimonium clause, the circumstance of his having signed all the preceding pages of his will, made those signatures a part of the will, and therefore that their destruction amounted to a tearing of the will within the meaning of sect. 20 of the Act.

Presumption when the last page of a will is not forthcoming.

Where a will consists of several sheets, each of which has been signed by the testator and the attesting witnesses, and the last sheet, which alone contains the operative and essential signatures, is not forthcoming at his death, it will be presumed to have been destroyed by the testator *animo revocandi*, and the whole will regarded as revoked (*s*).

(*n*) *Hobbs* v. *Knight*, (1838) 1 Curt. at p. 781; see *Margary* v. *Robinson*, (1886) 12 P. D. at p. 12; *Coleman*, (1861) 2 S. & T. 314; *vide post*, p. 216, note (*k*).

(*o*) See *Playne* v. *Scriven*, (1849) 7 N. C. 122, where the name of one of the attesting witnesses was struck through but remained visible: *Coleman*, (1861) 2 S. & T. 314; *Eeles*, (1862) 2 S. & T. 600; *Greenwood*, [1892] P. 7.

(*p*) *Price* v. *Price*, (1858) 27 L. J. Ex. 409. "As the will purported to be executed under seal, and was published and attested as a sealed instrument, when the seal was torn off it ceased to be the instrument which the testator proposed to execute and to publish": *ibid.*, *per curiam*, approved *Williams* v. *Tyley*, (1858) Johns. at p. 533. See *Hare* v. *Nasmyth*, (1815) 2 Add. 25, n.; *Lambell* v. *Lambell*, (1831) 3 Hagg. 568; *Scruby* v. *Fordham*, (1822) 1 Add. at p. 78.

(*q*) *Williams* v. *Tyley*, (1858) Johns. 531; *Harris*, (1864) 3 S. & T. 485; but see *Clarke* v. *Scripps*, (1852) 2 Rob. 563; and *post*, p. 188.

(*r*) *Williams* v. *Tyley*, (1858) Johns. at p. 534.

(*s*) *Gullan*, (1858) 1 S. & T. 23.

Consequences of the destruction of some one or more of the several sheets of paper on which the will is written and the substitution of others.

Where a testator, after duly executing his will, which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses, took out three sheets and substituted three new ones, which he signed, but which were not attested, it was held that the will was not entitled to probate (*t*). And in *Leonard* v. *Leonard* (*u*), where a will originally consisted of five sheets, each of which had been signed by the deceased and the two attesting witnesses, the testator at a later date removed the first two sheets, and presumably destroyed them, substituting two other sheets, each of which was signed by him and attested by the persons who had witnessed the original will. There was no evidence as to the contents of the two missing sheets. It was held that the destruction of the two original sheets by the testator revoked the whole original will, as the Court came to the conclusion that he did not intend the last three pages to be his operative will without doing something more, *i.e.*, adding the two later sheets to them; and, further, that the two later sheets, although signed and attested, were only so signed and attested for the purpose of identification, and to make them valid if the will was valid at the end, and that therefore the whole must be pronounced against (*x*).

Such a course may result in a complete intestacy.

The act of destruction may be done by some person in the testator's presence and by his direction.

The act of destruction must be done by the testator, "or by some person in his presence and by his direction." Therefore, though the instrument be destroyed by the testator's direction with intent to revoke, if the destruction did not take place in his presence, it is ineffectual to revoke the instrument (*y*). And if the will is destroyed in the presence of the testator, but without his consent and authority, there can be no revocation, even though the testator subsequently acquiesce in the state

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(*t*) *Treloar* v. *Lean*, (1889) 14 P. D. 49.

(*u*) [1902] P. 243.

(*x*) But see *post*, p. 189, note (*e*), for cases in which a will has been held only partially revoked in consequence of the destruction of the earlier portion; and as to the effect of the interpolation of fresh pages after execution, see *post*, p. 218.

(*y*) *Dadds*, (1857) Dea. & Sw. 290. Presumably the cases on the construction of the words "in his presence and by his direction" in s. 9 would be applicable to the construction of the present section: *vide ante*, p. 117.

A testator cannot ratify an informal destruction, or delegate his power of revoking his will.

of things brought about by the destruction and refuse to make a new will (*z*).

A testator cannot delegate his power of revoking the will by inserting in it a clause conferring on another authority to destroy it after his death (*a*).

Partial revocation by burning, etc.

The intention of the testator determines whether the will is revoked wholly, or only in part.

Although, as has been seen, the destruction of part of the will may, under certain circumstances, operate as a revocation of the entire instrument, yet it is clear, from the wording of the section, that a part only of the will may be revoked in the manner described (*b*). The intention of the testator must govern the extent and measure of the operation to be attributed to the act of destruction, and determine whether the act shall effect the revocation of the whole instrument, or only of some, and what portion thereof (*c*).

That intention may be proved

"The intention of the testator to revoke wholly or in part," said Sir John Dodson in *Clarke* v. *Scripps* (*d*), "may be proved:

by evidence of the testator's expressed declaration,

"1. By evidence of the expressed declaration of the testator, especially if such declaration was contemporaneous with the act. . . .

or inferred from the nature and extent of the act,

"2. The intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by a testator; *i.e.*, it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself it may be inferred either that he did intend to destroy it altogether, or that he did not.

and from extrinsic circumstances.

"3. The intention may, in some degree at least, be inferred from extrinsic circumstances. There may have been declarations, not direct as to the revocation, but such as

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(*z*) *Mills* v. *Millward*, (1889) 15 P. D. 20. A testator cannot subsequently ratify the destruction of a will which has been destroyed without his authority so as to render the revocation effectual within the terms of the section: *Gill* v. *Gill*, [1909] P. 157.

(*a*) *Stockwell* v. *Ritherdon*, (1848) 1 Rob. 661. See *Durance*, (1872) 2 P. & D. 407; *vide ante*, p. 160.

(*b*) *Clarke* v. *Scripps*, (1852) 2 Rob. at p. 567; *Lambert*, (1841) 1 N. C. 131.

(*c*) *Clarke* v. *Scripps*, (1852) 2 Rob. at p. 567; *Scruby* v. *Fordham*, (1822) 1 Add. at p. 78.

(*d*) (1852) 2 Rob. at p. 568.

would lead to the inference whether he did intend to revoke the will or did not" (*e*).

Destruction of one part of a will in duplicate.

If a will has been executed in duplicate, and one part is destroyed by the testator with the intention of revoking the whole will, such destruction will operate as a revocation of

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(*e*) After the death of the testator the will was found with certain parts of the first sheet cut away, and the latter part of that sheet affixed to the top of it by a wafer. The Court held that the testator intended to revoke the part removed, and that it was his own act; that the paper was revoked *pro tanto* and good for the other parts: *Lambert*, (1841) 1 N. C. 131.

A will consisted of seven sheets, each signed and attested. On the death of the testator it was found in his repositories torn and mutilated. The signature of the testator was cut away from each of the sheets except the last. Parts of the third sheet were cut off and were not forthcoming; and part of the margin on the sixth page had been torn off. On the seventh and last sheet, the signatures and attestation clause remained undamaged, but the lower part of the sheet had been torn off. The will was altered in pencil and ink in several places. The Court, in the absence of extrinsic evidence, found that the testator intended the instrument to be the draft of a new will, but to remain in operation until converted into a more formal instrument, and came to the conclusion from the state of the document, and particularly from the preservation of the operative signature at the end, that he intended to revoke the will in part only. Accordingly the will as it stood was pronounced for, except the unattested alterations: *Clarke* v. *Scripps*, (1852) 2 Rob. 563; cf. *Williams* v. *Tyley*, (1858) Johns. 530; *ante*, p. 186.

A will was executed upon two sheets of paper, and a codicil upon the second side of the second sheet. On the death of the testator, part of the top of the second sheet was found to have been cut off, including the testator's signature at the end of the will, the names of the attesting witnesses being untouched. Held: That the will and codicil formed one testament which had been mutilated by cutting off a portion, and the presumption was that it had been so mutilated after the execution of the codicil; but that, having regard to the manner in which it was cut, the preservation of the rest of the will and codicil, and other circumstances, no presumption of total revocation arose from the destruction of the signature, and that the testator only intended to revoke so much of the will as was cut off: *Christmas* v. *Whinyates*, (1863) 3 S. & T. 81; cf. *Scruby* v. *Fordham*, (1822) 1 Add. at p. 78.

The first seven or eight lines of the will had been cut and torn off. Held: That it could not be inferred from that fact alone that the deceased intended to revoke the whole will, and the rest of the instrument was therefore admitted to probate. The force of the argument, that tearing off the beginning of a will is to destroy the statement that it is the last will and testament of the deceased, depends upon the consideration whether there was anything else in that part of the will destroyed which the testator might have wished to revoke: *Woodward*, (1871) 2 P. & D. 206.

See also *Maley*, (1887) 12 P. D. 134, where a clause appointing executors was cut away, and the will held to be revoked *pro tanto*; *Cooke*, (1847) 5 N. C. 390; *Roberts* v. *Round*, (1830) 3 Hagg. 548; *post*, p. 190, note (*g*).

Primâ facie, destruction of one part of a will executed in duplicate revokes the other part,

the other part; and the *primâ facie* presumption is that the testator, by the destruction of the one part, did intend to revoke the other (*f*).

but an intent to the contrary may be shown.

The reason of this rule is obvious; for why should a person destroy the duplicate of his will, if he meant the other part to operate? It may indeed be shown that it was done *diverso intuitu*, or by accident, or while of unsound mind, or for the sake of peace and to deceive and to impose upon persons who were importuning him; but *primâ facie* the destruction of the one part infers the revocation of the duplicate (*g*).

(*f*) *Colvin* v. *Fraser*, (1829) 2 Hagg. at p. 329. It was so decided in *Sir Edward Seymour's Case*, quoted 2 Comyns, 453; see *Onions* v. *Tyrer*, (1716) 1 P. Wms. at p. 345; and is expressly laid down in *Burtenshaw* v. *Gilbert*, (1774) 1 Cowp. at p. 54; and in *Pemberton* v. *Pemberton*, (1807) 13 Ves. at p. 308; *Welsh* v. *Gowland*, (1804) Prerog. Mich. Term, cit. 2 Hagg. at p. 330; *Boughey* v. *Moreton*, (1758) 2 Lee, at p. 533; *Rickards* v. *Mumford*, (1812) 2 Phill. at p. 24.

(*g*) *Colvin* v. *Fraser*, (1829) 2 Hagg. at p. 330; see *Atkinson* v. *Morris*, [1897] P. 40, where it was held that declarations of the testator were not admissible to prove that a will was executed in duplicate. Four cases may arise according as the part destroyed is or is not the part in the possession of the testator:—

(1) Where one part is in the possession of the testator and the other in the hands of another, and the testator destroys the part in his own custody: the legal presumption is that the duplicate in the possession of another is not to prevail: *Pemberton* v. *Pemberton*, (1807) 13 Ves. at p. 310; *Welsh* v. *Gowland*, (1804) quoted 2 Hagg. at p. 330.

(2) Both parts are in the possession of the testator, he cancels one and preserves the other: the presumption holds, though weaker: *Pemberton* v. *Pemberton*, (1807) 13 Ves. at p. 310; *Burtenshaw* v. *Gilbert*, (1774) 1 Cowp. at p. 54, *per* Aston, J.

(3) Both parts are in the possession of the testator, he alters one, and then destroys that which he has altered: there is the same presumption, but weaker still: *Pemberton* v. *Pemberton*, (1807) 13 Ves. 310.

(4) One part is in the possession of the testator and the other in the hands of his solicitor; he destroys the part in the hands of his solicitor, but preserves that in his own possession: the presumption still exists, but in a lesser degree: *Payne* v. *Trappes*, (1847) 1 Rob. at p. 591.

But these presumptions, like all other legal presumptions, may be repelled by evidence that the destruction of the one part was not intended to revoke the other: *Burtenshaw* v. *Gilbert*, (1774) 1 Cowp. 49; *Rickards* v. *Mumford*, (1812) 2 Phill. at p. 24.

If both parts are in the testator's possession, and one is mutilated in such a way as would under ordinary circumstances operate as a partial revocation, but the other is preserved entire, the presumption is that by the preservation of one duplicate entire the testator did not intend to revoke the clauses mutilated in the other part, for otherwise he would have mutilated both parts: *Roberts* v. *Round*, (1830) 3 Hagg. at p. 553.

So destruction of a codicil was held to revoke an interlineation in a will.

Similar reasoning has been applied to a case in which the testator, intending to alter his will, interlined a fresh provision in that document, and also executed a codicil having the same effect as the interlineation. On proof of the destruction *animo revocandi* of the codicil by the testator, the Court held that the interlineation was likewise revoked (*h*).

Whether destruction of a will revokes a codicil thereto.

It remains to consider the effect of the revocation of a will upon duly executed testamentary papers expressed to be codicils to the will so revoked.

Destruction of the will cannot—since the Wills Act, 1837—operate to revoke a codicil thereto,

Since the passing of the Wills Act the mere fact of the revocation of a will cannot, it should seem, operate to revoke a codicil (*i*). The 20th section of the Wills Act expressly provides that no will or codicil or any part thereof shall be revoked otherwise than in manner there prescribed, and it has been held that, having regard to the provisions of this section, it is no longer competent for the Court to hold that a properly executed testamentary paper, whether will or codicil, can be revoked in any other manner than by the methods stated therein (*k*).

(*h*) *Utterson* v. *Utterson*, (1814) 3 V. & B. 122.

(*i*) *Savage*, (1870) 2 P. & D. 78.

(*k*) *Turner*, (1872) 2 P. & D. 405. Cases decided before the Wills Act came into operation established the general proposition, with regard to codicils, that a codicil stands or falls with the will to which it belongs. The revocation of the will thus, *primâ facie*, operated as an implied revocation of the codicil. But it was said to be a question of intention in each case, and if the Court were satisfied that the testator intended the codicil to operate as a substantive testamentary instrument independently of the will, then, though the will were revoked, the codicil might be admitted to probate: *Barrow* v. *Barrow*, (1756) 2 Lee, 335; *Medlycott* v. *Assheton*, (1824) 2 Add. 229; *Tagart* v. *Hooper*, (1836) 1 Curt. 289; *Coppin* v. *Dillon*, (1833) 4 Hagg. at p. 369.

In some early cases decided since the statute the same principle was upheld, and the revocation of the will said to operate as an implied revocation of the codicil unless the Court was satisfied that the intention of the deceased was that the codicil should operate separately from the will: *Halliwell*, (1846) 4 N. C. 400; *Clogstoun* v. *Walcott*, (1847) 5 N. C. 623; *Grimwood* v. *Cozens*, (1860) 2 S. & T. at p. 368; *Dutton*, (1863) 3 S. & T. 66; *Greig*, (1866) 1 P. & D. 72.

But in *Black* v. *Jobling*, (1869) 1 P. & D. 685; in *Savage*, (1870) 2 P. & D. 78; and in *Turner*, (1872) 2 P. & D. 403, Lord Penzance held that in these decisions the effect of the statute had not been fully considered by the Court. "The words of the statute," he said, "are decisive; and if on some speculation as to the testator's intention or supposed unless both will and codicil were written upon the same sheet of paper.

But where both will and codicil were executed upon the same sheet of paper, and the testator cut off his signature to the will, upon proof that he thereby intended to revoke both will and codicil, it was held that the codicil as well as the will was revoked (*l*).

A codicil may be admitted to probate, notwithstanding the destruction of the will.

A codicil which has not been revoked by any of the methods described in sect. 20 will therefore be admitted to probate, and that even though, by reason of the will having been destroyed, the codicil in great part is unintelligible (*m*).

Burden of proving revocation.

When a will is once proved to have been duly executed, the party who alleges that some act amounting to a revocation has been done by the testator must prove his allegation, and in the absence of proof the revocation falls to the ground (*n*).

intention in reference to a connection between the will and the codicil, I were to hold that the codicil is revoked by some method not in accordance with the statute, I should be acting directly contrary to its provisions": *Turner,* (1872) 2 P. & D. at p. 405.

In *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. at p. 206, Sir J. Hannen, on demurrer, held a plea that "the codicils were intended by the deceased to be dependent upon, and operate in conjunction with the will, and to have no force or effect apart therefrom; and together with such will to form one complete testamentary instrument and disposition; and the said deceased duly revoked the said codicils by destroying the said will with the intention of revoking the said complete testamentary instrument and disposition," to be a good plea in law. The learned judge had already found the plea to be not true in fact, and therefore nothing turned upon his finding.

The reasoning of Lord Penzance in the three cases cited above was adopted by Butt, J., in *Gardiner* v. *Courthope,* (1886) 12 P. D. 14, and the learned judge considered himself bound by those decisions.

In *Beardsley* v. *Lacey,* (1898) 78 L. T. 25, at p. 27, Sir F. H. Jeune, referring to the question as to whether the destruction of a will revoked a codicil thereto, said: "About this no question can now arise. *Gardiner* v. *Courthope* (*ubi supra*) is to be treated as the binding authority on the subject."

Sir Edward Vaughan Williams, in his work on Executors (p. 115), doubts whether the view taken by Lord Penzance is not too widely expressed, and suggests that the destruction of a will may still operate as an implied revocation of a codicil, if by destroying the will the testator intended to revoke the codicil as well. Having regard to the authorities cited above, it is submitted that the contrary view must now be held well established.

(*l*) *Bleckley,* (1883) 8 P. D. 169. See *Gardiner* v. *Courthope,* (1886) 12 P. D. at p. 16; *Christmas* v. *Whinyates,* (1863) 3 S. & T. 81.

(*m*) *Turner,* (1872) 2 P. & D. at p. 406; *Gardiner* v. *Courthope,* (1886) 12 P. D. 14.

(*n*) *Benson* v. *Benson,* (1870) 2 P. & D. at p. 176.

Generally upon those who allege that the instrument is revoked.

This proposition is subject to certain exceptions in cases where a will which has been in the custody of the testator is not forthcoming, or is forthcoming in a torn or mutilated condition at the time of his death.

Presumption with regard to mutilated wills.

If a will which has been in the custody of the testator during his lifetime is found in his repository after his death in a torn or mutilated condition, the *primâ facie* presumption is that the document was so torn or mutilated by the testator, and that he intended by his act to revoke the will. In such a case the onus is upon the person who propounds the will to show either that the act was not done by the testator, or that he did not intend by such tearing or mutilation to revoke the will (*o*).

Presumption with regard to missing wills.

Where a will has been in the custody of the testator during his lifetime, and is not found at his death, the presumption arises that the will has been destroyed by the testator, with the intention of revoking it, and that presumption will prevail unless there is sufficient evidence to repel it (*p*). In such a case the onus of proving that the will was not

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(*o*) *Davies* v. *Davies,* (1753) 1 Lee, 444; *Boughey* v. *Moreton,* (1758) 2 Lee, at p. 533; *Lambell* v. *Lambell,* (1831) 3 Hagg. at p. 569; *Bell* v. *Fothergill,* (1870) 2 P. & D. at p. 150. In *Hare* v. *Nasmyth,* (1821) 1 Shaw App. at p. 73, S.C. 2 Add. 25, n., 3 Hagg. 192, n., before the House of Lords, Lord Chancellor Eldon said: "According to all principle, if a paper, cancelled and the seal cut off or the name erased, is found in a fast-locked place of the testator, the *primâ facie* inference from that is, not that the testator meant it should continue to be his will, but that the testator was the person that did that act himself, which is found to be evidenced by the state of the paper found in his fast-locked closet."

But see *Hitchings* v. *Wood,* (1838—41) 2 Moo. P. C. 355, where a codicil which had been sent anonymously by the post to one of the legatees named therein, though partially burnt and torn, was admitted to proof; the Court being satisfied that it was a genuine instrument. Held, also, that, under the circumstances of the case, the onus of proving that the cancellation was the act of the testator, and with what intention it was done, lay on the parties opposing the proof; and see *Mackenzie,* [1909] P. 305.

(*p*) *Rickards* v. *Mumford,* (1812) 2 Phill. at p. 24; *Colvin* v. *Fraser,* (1829) 2 Hagg. at pp. 325—328; *Lillie* v. *Lillie,* (1829) 3 Hagg. at p. 189; *Welch* v. *Phillips,* (1836) 1 Moo. P. C. at p. 302; *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. at p. 217; *Mitcheson,* (1863) 32 L. J. P. 202; *Drake* v. *Sykes,* (1907) 23 T. L. R. 747. The presumption is usually said to arise "when the will is shown to have been in the custody of the testator": *Sugden* v. *Lord St. Leonards* (*ubi supra* at p. 217), or "when the will is traced to the possession of the deceased and last seen there":

destroyed by the testator *animo revocandi* is upon the person propounding its contents (*q*).

The reason for these presumptions.

"The presumption," said Parke, B., in *Welch* v. *Phillips* (*r*), "is founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved by a person of ordinary caution in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable that the deceased himself has purposely destroyed it" (*s*). It cannot be presumed that the destruction has taken place without his knowledge or authority, for that would be presuming a crime (*t*).

The presumptions may be rebutted by evidence which raises a higher degree of probability to the contrary.

The presumption of intentional destruction by the testator which arises in cases where a will is not forthcoming, or is forthcoming in a torn and mutilated condition at his death, may, like every presumption of fact, be rebutted by evidence which raises a higher degree of probability to the contrary (*u*).

Circumstances which tend to rebut the presumptions.

The person who propounds the will may show that the testator had no opportunity, or was incapable of destroying the will, or may establish a strong combination of circumstances

Welch v. *Phillips* (*ubi supra* at p. 302); but the language of Sir John Nicholl in *Wargent* v. *Hollings*, (1832) 4 Hagg. at p. 249, suggests that the onus of proving that the testator had no opportunity of destroying the will is upon those who propound it. He said: "In case the will was in the custody or power of the testator, or rather, *unless it appears that it was not in his custody or power*, the presumption of law is that the destruction was his own act; and that presumption must be repelled by the party setting up the copy; he must show negatively that the deceased had no opportunity or that he was incapable of destroying it," etc. But see *Hitchings* v. *Wood*, (1838) 2 Moo. P. C. at p. 447. If the will is traced out of the deceased's possession and custody, it rests with the other party either to show by some sort of evidence that it came again into his possession or custody, or that it was destroyed by his direction or with his privity and consent: *Lillie* v. *Lillie*, (1829) 3 Hagg. 184, 185, n.; *Colvin* v. *Fraser*, (1829) 2 Hagg. at p. 327.

(*q*) *Colvin* v. *Fraser*, (1829) 2 Hagg. 266, 325; *Lillie* v. *Lillie*, (1829) 3 Hagg. 184, 189; *Welch* v. *Phillips*, (1836) 1 Moo. P. C. at p. 302.

(*r*) (1836) 1 Moo. P. C. at p. 302.

(*s*) And see Sir John Nicholl's remarks in *Colvin* v. *Fraser*, (1829) 2 Hagg. at p. 326.

(*t*) *Rickards* v. *Mumford*, (1812) 2 Phill. at p. 24.

(*u*) *Welch* v. *Phillips*, (1836) 1 Moo. P. C. at p. 302.

leading to a moral conviction that the testator did not himself destroy it; or he may show positively that the instrument was in existence since the testator's death, or that the testator destroyed it when of unsound mind, or by error, or under force *sine animo revocandi*, or that it was destroyed in his lifetime by some person without his privity or approbation (*x*).

The presumption additionally strong where an individual is charged with the guilt of fraudulent spoliation.

Such circumstances as these, if proved, will suffice to rebut the presumption of intentional destruction by the testator; but an additional presumption is brought to bear against the paper if any individual is charged with the guilt of a fraudulent spoliation. In such a case the charge must be clearly established, and if the proof remains doubtful the presumption of innocence must turn the scale (*y*).

Evidence in rebuttal need not amount to positive certainty.

The evidence which is offered to repel the presumption need not amount to positive certainty; it is sufficient if it reasonably produces moral conviction (*z*). The acts, declarations, and conduct of the deceased may raise such an extremely strong improbability of his having himself destroyed the will *animo revocandi* as to rebut the *primâ facie* legal presumption (*a*).

The contents of the will itself may afford strong evidence against the presumption.

The contents of the will itself and declarations of unchanged affection and intention made by the testator are all circumstances which may assist the Court in coming to the conclusion that the will was not intentionally destroyed by the deceased (*b*). In *Saunders* v. *Saunders* (*c*) Sir H. Jenner Fust said: "The strongest proof of adherence to the will, and of the improbability of its destruction, arises from the contents of the will itself" (*d*).

(*x*) *Wargent* v. *Hollings,* (1832) 4 Hagg. at p. 249; *Colvin* v. *Fraser,* (1829) 2 Hagg. at pp. 325, 326.

(*y*) *Wargent* v. *Hollings,* (1832) 4 Hagg. at pp. 249, 259; *Colvin* v. *Fraser,* (1829) 2 Hagg. at p. 326; *Allan* v. *Morrison,* [1900] A. C. 604. See *post,* p. 197.

(*z*) *Davis* v. *Davis,* (1824) 2 Add. at p. 226; *Colvin* v. *Fraser,* (1829) 2 Hagg. at p. 325; but see *Eckersley* v. *Platt,* (1866) 1 P. & D. 281.

(*a*) *James* v. *James,* (1829) 3 Hagg. 185, n.; *Patten* v. *Poulton,* (1858) 1 S. & T. 55.

(*b*) *Patten* v. *Poulton,* (1858) 1 S. & T. at p. 61; see *Mackenzie,* [1909] P. 305.

(*c*) (1848) 6 N. C. at p. 522.

(*d*) And see *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. at pp. 176, 195. The character and habits of the deceased may be taken into consideration: *ibid.* at p. 219.

Those who propound the will need not show how the instrument was destroyed or lost.

It is no part of the burden of proof cast upon the persons propounding a missing will that they should show how the original instrument was in fact destroyed or lost (*e*).

Evidence of declarations made by the testator admissible to rebut or to strengthen the presumption.

Evidence of declarations made by the testator showing an intention to adhere to the will is admissible in order to rebut the presumption of intentional destruction; and evidence of declarations of an intention not to adhere to the will is admissible to confirm it (*f*). But declarations alone, unsupported by circumstances strongly marking their sincerity and confirming their probability, are of themselves insufficient to repel the presumption (*g*). "Few declarations," said Lord Eldon in *Pemberton* v. *Pemberton* (*h*), "deserve less credit than those of men as to what they have done by their wills. The wish to silence importunity, to elude questions from persons who take upon themselves to judge of their own claims, must be taken into consideration." "Such declarations are generally intended to mislead" (*i*).

But declarations of the testator are not always to be relied on,

though they may be in certain cases.

But declarations coupled and consistent with conduct and acts are of weight in proof of intention; so are those not depending on the precise words of a particular expression, but on the tenor of an extended conversation, especially if not liable to the suspicion of insincerity; still more if repeatedly made in confidential communications (*k*).

The presumptions do not arise unless the Court is satisfied that the will was not in existence at the testator's death.

Before any presumption arises on either side the Court must be satisfied that the will was not in existence when the testator died, *i.e.*, that it was not found at his death in his depositories or elsewhere. In most cases the solution of this question presents no difficulty, for the depositories of the deceased are

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(*e*) *Patten* v. *Poulton*, (1858) 1 S. & T. 55.

(*f*) *Keen* v. *Keen*, (1873) 3 P. & D. 105; *Bell* v. *Fothergill*, (1870) 2 P. & D. 148; *North* v. *North*, (1909) 25 T. L. R. 322. A letter written by the testator after the execution of the will stating that he had cancelled it is not evidence of an effective revocation, but it is admissible in evidence as showing the state of mind and intention of the testator: *Drake* v. *Sykes*, (1907) 23 T. L. R. 747, C. A.

(*g*) *Colvin* v. *Fraser*, (1829) 2 Hagg. at pp. 345—347.

(*h*) (1807) 13 Ves. at p. 301.

(*i*) Lord Eldon in *Pye*, (1811) 18 Ves. at p. 148, quoting Lord Thurlow; but see *Sugden* v. *Lord St. Leonards*, (1876) 1 P. D. at p. 225, where Cockburn, C.J., expressed the diametrically opposite opinion.

(*k*) *Colvin* v. *Fraser*, (1829) 2 Hagg. at p. 361.

In coming to a conclusion on this point the Court will have regard to the possibility of a fraudulent abstraction.

duly searched by those whose good faith is not impugned, who vouch for the fact one way or another (*l*). But where the depositories of the deceased, before they could be searched by an independent person, were clearly accessible to and are proved in evidence to have been investigated by the only person who was interested in destroying the will, the Court may refuse to presume that the missing will was destroyed by the testator *animo revocandi*, unless satisfied by the evidence produced that it was not in existence at the death of the testator (*m*). For though there is a presumption against the fraudulent abstraction of a missing will either before or after the death of the testator, circumstances which render such abstraction possible must be taken into account in arriving at the result of the evidence (*n*).

Testator of unsound mind.

A will destroyed by the testator while he is of unsound mind is not revoked (*o*).

No presumption of destruction *animo revocandi* arises where the testator became insane after the will was executed.

The presumption that a will which was in the testator's custody during his lifetime and cannot be found at his death was destroyed by him *animo revocandi*, does not apply to a case where the testator became insane after the execution of the will. In such a case the burden of showing that the will was destroyed whilst the testator was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of the destruction the contents of the will are entitled to probate (*p*).

Similarly, if a will has been in the custody of the testator at times when he was of unsound mind, as well as at times when he was of sound mind, and is found to have been torn or mutilated by him, the burden of proving that the mutilation was not done after he became insane, but at a time when he

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(*l*) *Podmore* v. *Whatton*, (1864) 3 S. & T. at p. 451.

(*m*) *Podmore* v. *Whatton*, (1864) 3 S. & T. 449; *Finch* v. *Finch*, (1867) 1 P. & D. 371, 373, 374; but see *per* Buckley, L.J., in *Drake* v. *Sykes*, (1907) 23 T. L. R. 747, at p. 749.

(*n*) *Allan* v. *Morrison*, [1900] A. C. 604. "The presumption will be more or less strong according to the character of the custody which the testator had over the will": *Sugden* v. *Lord St. Leonards*, (1876) 1 P. D. at p. 217.

(*o*) *Vide post*, p. 198.

(*p*) *Sprigge* v. *Sprigge*, (1868) 1 P. & D. 608; *Crandon*, (1901) 84 L. T. 330.

was of sound mind, is cast upon the person who sets up the revocation of the instrument (q).

Presumption as to time of mutilation, where there is a codicil.

Where a will, to which a codicil has been executed, is found at the death of the testator in a mutilated state, and there is no evidence as to the date of the mutilation, the presumption is that the will was mutilated after the execution of the codicil (r).

Cases are seldom decided upon the mere presumption.

It seldom happens that cases which set out upon legal presumptions require to be decided upon the mere presumption; the general circumstances of the case usually lead to a tolerably satisfactory conclusion of the real fact, either by confirming or by repelling the legal presumption (s).

SUB-SECTION 2.—*The Intention to Revoke.*

The destruction must be accompanied by an "intention to revoke,"

The "burning, tearing, or otherwise destroying" the instrument must be done "with the intention of revoking the same" (t). It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means which will satisfy the requisites of the law: the act must be accompanied with the intention of revoking; there must be the *animus* as well as the act; both must concur in order to constitute a legal revocation (u). "All the destroying in the world without intention," said James, L.J., in *Cheese* v. *Lovejoy* (x), "will not revoke a will, nor all the intention in the world without destroying: there must be the two."

in the absence of which no destruction can operate to revoke the will.

A will destroyed by a testator while of unsound mind is not revoked.

It follows that if the testator was of unsound mind when he destroyed the will, the will is not revoked (y). For if the deceased was insane, or in a state of mental excitement and not master of his actions, he cannot be considered responsible for his act as if it had been the act of a competent person; and consequently the destruction of the instrument by a person in such a state of mind has no effect (*z*).

(q) *Harris* v. *Berrall*, (1858) 1 S. & T. 153; *Benson* v. *Benson*, (1870) 2 P. & D. at p. 176.

(r) *Christmas* v. *Whinyates*, (1863) 3 S. & T. 81.

(s) *Colvin* v. *Fraser*, (1829) 2 Hagg. at p. 327.

(t) Wills Act, 1837, s. 20; see *Clarke* v. *Scripps*, (1852) 2 Rob. at p. 567. The law was the same under the Statute of Frauds: *Bibb* v. *Thomas*, (1775) 2 W. Black. at p. 1044.

(u) *Clarke* v. *Scripps*, (1852) 2 Rob. at p. 567.

(x) (1877) 2 P. D. at p. 253. If the destruction were not performed *animo revocandi* at the time, it seems that no subsequent ratification can render the revocation effectual: *Mills* v. *Millward*, (1889) 15 P. D. 21; *Gill* v. *Gill*, [1909] P. 157.

(y) *Brunt* v. *Brunt*, (1873) 3 P. & D. at p. 38.

Will destroyed by accident or in mistake.

All questions of revocation are questions, to some degree, of intention (*a*); but this is particularly the case in questions of revocation by destruction. For all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal (*b*); and although the ordinary inference, deducible from every act of destruction by the testator, is that he intended to revoke the instrument (*c*), that presumption may always be rebutted by evidence which satisfies the Court that the destruction was referable to accident or mistake.

An act of destruction cannot operate to revoke a will where it is referable to accident or mistake,

"With respect to the revocation of a will by the act of cancelling," said Lord Mansfield in *Burtenshaw* v. *Gilbert* (*d*), "it is in itself an equivocal act; and in order to make it a revocation, it must be shown *quo animo* it was cancelled, for, unless that appears, it will be no revocation. If a man were to throw the ink upon his will, instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling; or suppose a man, having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the last will;

as where a man throws ink upon his will instead of the sand, or destroys one instrument in mistake for another.

(*z*) *Borlase* v. *Borlase*, (1845) 4 N. C. 106, 139. A will destroyed by a testator while under the influence of drink and not responsible for his actions is not revoked: *Brassington*, [1902] P. 1. In *Scruby* v. *Fordham*, (1822) 1 Add. 74, a will partially defaced by a testator whilst of unsound mind was pronounced for in its integral state. Sir John Nicholl said that in the absence of evidence as to the sanity of a testator (whose general sanity is impeached) at the time of the destruction, he is to be inferred rational or the contrary from the character, broadly taken, of his act: *ibid.*, p. 90. See also *Brand*, (1831) 3 Hagg. 754; *Brunt* v. *Brunt*, (1873) 3 P. & D. 37, where a will torn in pieces by the testator while suffering under an attack of *delirium tremens*, was held not revoked; *Borlase* v. *Borlase*, (1845) 4 N. C. 106. And see as to the onus of proof when a will of a lunatic testator is not forthcoming at his death, *ante*, p. 197.

The state of mind of the testator to be inferred from the nature of his act.

(*a*) *Smith* v. *Cunningham*, (1823) 1 Add. at p. 455.

(*b*) *Burtenshaw* v. *Gilbert*, (1774) 1 Cowp. at p. 52; *Thynne* v. *Stanhope*, (1822) 1 Add. at p. 53; *Giles* v. *Warren*, (1872) 2 P. & D. at p. 402; *Perrott* v. *Perrott*, (1811) 14 East, at p. 439.

(*c*) *Thynne* v. *Stanhope*, (1822) 1 Add. at p. 54; *Lewis*, (1858) 27 L. J. P. 31.

(*d*) (1774) 1 Cowp. at p. 52.

or suppose a man having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention, therefore, which must govern in such cases" (*e*).

If the destruction of a will is referable to a mistake, whether of fact or of law, the will is not revoked.

In the instances given, the destruction has been brought about by accident, or by a mistake as to the identity of the document. But if it can clearly be shown, in any case, that the destruction were solely referable to a mistake, then, whether the mistake were one of fact or of law (*f*), whether it be a mistake as to the legal validity of the document destroyed or as to the legal effect of its destruction, the document destroyed under an erroneous belief is not revoked.

The doctrine of "dependent relative revocation,"

Cases have also arisen in which the act of destruction was referable wholly and solely to the intention of setting up some other testamentary paper in the place of the one destroyed. The result of these decisions has been to establish the doctrine of "dependent relative revocation," according to which an act of destruction, wholly and solely referable to the intention of setting up some other testamentary paper, is or is not a revocation, according as the relative act is efficacious or invalid (*g*).

"The doctrine of dependent relative revocation," said Sir J. P. Wilde in *Powell* v. *Powell* (*h*), "is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is therefore necessary in each case to study the act done by the light of the circumstances under

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(*e*) See *Onions* v. *Tyrer*, (1716) 1 P. Wms. 343 ; 2 Vern. 741 ; *Perrott* v. *Perrott*, (1811) 14 East, at p. 439 ; *Thynne* v. *Stanhope*, (1822) 1 Add. at p. 53 ; *Giles* v. *Warren*, (1872) 2 P. & D. at p. 402. If the whole or any part of the will is destroyed or rendered illegible by natural causes, as by fire, fading of ink, and the like, there can be no doubt that its contents may be proved by extrinsic evidence ; thus, in the case cited by Toller, p. 70, where a will was found gnawed by rats and in part illegible, on proof of the substance of the will by joining the pieces, and by the memory of the witnesses, probate was granted : see *Wright*, (1908) 44 Ir. L. T. 137. The practice in such a case, where satisfactory oral evidence is before the Court showing what the missing words were, is not to insert such words in the probate, but to allow a document showing the words as proved, to be annexed to the probate : *Gill* v. *Gill*, [1909] P. 157.

(*f*) *Perrott* v. *Perrott*, (1811) 14 East, at pp. 439, 440.

(*g*) See Wms. on Exors., p. 110.

(*h*) (1866) 1 P. & D. at p. 212.

which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done *animo revocandi* it is no revocation. What then if the act of destruction be done with the sole intention of setting up and establishing some other testamentary paper, for which the destruction of the paper in question was only designed to make way? It is clear that in such case the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted. The act is referable, not to an abstract intention to revoke, but to an intention to validate the other paper; and if the sole condition upon which revocation was intended is not fulfilled, the *animus revocandi* is not present. In the above observations it has been assumed that the act of destruction was referable, wholly and solely, to the intention of setting up some other testamentary paper. Cases may and probably will arise in which the intention is either mixed or ambiguous, and such are for future consideration" (*i*).

whereby it is laid down that an act of destruction, referable solely to the intention of setting up another testamentary paper, operates to revoke the will destroyed only if the other instrument is in fact validly executed.

But the intention must be clear.

It is proposed to consider the application of these principles to the varying circumstances of the cases in which they have been applied.

(*i*) So in *Ilchester*, (1803) 7 Ves. at p. 372, Lord Alvanley said: "It has been held that where a disposition is made, so as to have legal effect, and afterwards another, by which the former would be revoked but the other substituted, and it is evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition; though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation." See also *per* the Master of the Rolls, *ibid.*, at p. 379. In *Winsor* v. *Pratt*, (1821) 2 Brod. & Bing. at p. 655, Dallas, C.J., said: "I take the rule to be that where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking. And again, the effect of cancelling depends upon the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, the cancelling of the first being dependent thereon, ought to be looked upon as null and inoperative." See also, generally, upon the subject of dependent relative revocation, the note to *Duppa* v. *Mayo*, (1670) 1 Wms. Saund. 278; *Dancer* v. *Crabb*, (1873) 3 P. & D. at p. 104; *Cossey* v. *Cossey*, (1900) 82 L. T. 203.

A will destroyed under the erroneous belief that it is invalid is not revoked.

And first, as to cases in which the act of destruction is referable to a mistake as to the validity of the instrument which is destroyed.

If a testator destroys his will under the erroneous belief that it is not a valid testamentary disposition, such destruction will not amount to a revocation (*k*).

In *Giles* v. *Warren* (*l*) Lord Penzance said: "There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will. Revocation is a term applicable to the case of a person cancelling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it" (*m*).

Secondly, as to cases where the testator destroys the instrument under an erroneous belief as to the legal consequences which will result from his act.

A codicil, whereby a revoked will has been revived, subsequently destroyed under the erroneous belief that its destruction left the revived will in full force and operation, is not revoked.

In *James* v. *Shrimpton* (*n*) a testator, having duly executed his will, subsequently married, whereby his will was revoked. On the day of his marriage, after the ceremony, he executed a codicil, in which he made provision for his wife; the codicil contained a clause to this effect: "in all other respects I revive, ratify, and confirm my said will." Afterwards circumstances occurred by reason of which the provisions of the codicil failed, and probably the testator then destroyed it. Sir J. Hannen said: "I am of opinion that it was not the intention of the testator to leave the will inoperative, but his idea was, that the will, having been brought into existence again, remained valid notwithstanding the destruction of the codicil. . . . I have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will,

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(*k*) *Giles* v. *Warren*, (1872) 2 P. & D. 401; *Thornton*, (1889) 14 P. D. 82.

(*l*) (1872) 2 P. & D. at p. 402.

(*m*) See also the remarks of Sir C. Cresswell in *Clarkson* v. *Clarkson*, (1862) 2 S. & T. 497. In *Thynne* v. *Stanhope*, (1822) 1 Add. 52, an allegation that a testatrix destroyed her will *sine animo revocandi*, under an erroneous impression that the law did not permit her, as a minor, to dispose of her property by will, was rejected on the ground that the allegation, if proved, furnished no proof that the paper ever existed as a finished will, nor that it was cancelled *sine animo revocandi*.

(*n*) (1876) 1 P. D. 431.

and that the Court should give no more effect to the act than it would do if the testator had destroyed the paper under a misapprehension as to the instrument he was destroying. It was done under a misconception of the effect of the act; it was not done *animo revocandi*, and I therefore decree probate of the will and codicil."

A will destroyed under the erroneous belief that the result desired by the testator will in fact be effected by another instrument then in existence, is not revoked.

In *Stamford* v. *White* (*o*) a testator, on the execution of a will in 1895, caused a will of 1882 to be cancelled under the erroneous belief that funds comprised in a settlement of 1855 would, in the absence of certain provisions in the will of 1882, be divided equally amongst the children of his first marriage. Sir F. H. Jeune said: "The will of 1895 does not in terms revoke the will of 1882, and the cutting off the signature was done under an erroneous belief. If the testator thought that the settlement would, by its own force, give the property to the children of the first marriage, and that, therefore, the will of 1882 was useless, under those circumstances would the revocation in 1895 have been absolute? It would have been made under the erroneous impression of the effect of the settlement, and, therefore, under an erroneous impression as to the document of 1882." The will of 1882 was admitted to probate (*p*).

Thirdly, as to cases in which the act of destruction was referable wholly and solely to the intention of setting up some other testamentary paper.

1. Where the testamentary paper intended to be set up by the destruction of the will in question is a later will already in existence at the time when the earlier will is destroyed.

A will destroyed in the belief that a later will has been duly executed and supersedes it, is not revoked if in fact the later instrument is invalid.

If a testator destroys an earlier will in the belief that he has validly executed a later will which supersedes it, and that the earlier will is therefore useless, and the later will, owing to some defect in its execution, subsequently turns out to be inoperative, the act of destruction cannot operate to revoke the instrument destroyed in that erroneous belief.

In *Hyde* v. *Hyde* (*q*) a man, having made and duly executed

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(*o*) [1901] P. 46.

(*p*) Cf. *Beardsley* v. *Lacey*, (1898) 78 L. T. 25.

(*q*) (1700) 1 Eq. Cas. Abr. 409.

a will of his real and personal estate, had a mind to change a trustee and make some little alterations. "Whereupon," the report proceeds, "he sends for a scrivener, and gives directions to prepare a draft of instructions for another will, which the scrivener does accordingly, which the testator reads over and approves very well, and sets his hand to it; and being at a tavern, thinking he has now made a new will, he pulls out of his pocket the first will, and tears off the seals from the first eight sheets, which the scrivener seeing, asked him what he was doing. 'Why,' says he, 'I am cancelling my first will.' 'Pray,' says the scrivener, 'hold your hand, the other will is not perfected, it will not pass your real estate for want of being executed pursuant to the Statute of Frauds and Perjuries.' 'I am sorry for that,' says he, and immediately desisted from tearing off any more of the seals, and in some short time after dies, without having done anything further to perfect the second will, or cancelling the first."

The Lord Chancellor held that the subsequent will could be no revocation as to the real estate, not being executed according to the Statute of Frauds; and that as to the tearing off the seals from the first eight sheets, that not being done *animo cancellandi* unless the second will was good (*r*), was no revocation.

This principle laid down in the case of *Onions* v. *Tyrer*,

In *Onions* v. *Tyrer* (*s*) the testator, having made a will, which was properly attested as by law was then required for passing freehold lands, and having afterwards made a second will containing a fresh devise of his lands, but so attested as to be ineffectual for passing them, by this latter will purported to revoke all former wills. It was contended that the second will was sufficiently attested for the purpose of working a revocation of the former although it was not sufficiently attested to pass the lands. There was also some evidence that the first will was torn in the presence of the testator by his order, after the execution of the later will.

The Lord Chancellor said: "If the first will had been cancelled by the testator's directions upon a presumption that

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(*r*) See *Limbery* v. *Mason*, (1710) 2 Comyns, at p. 455.

(*s*) (1716) 1 P. Wms. 343, 2 Vern. 742.

the second devisee was to take the premises by the second will, such a cancelling should not have profited the heir, because it would have been a cancelling proceeding from a mistake: it is no more than if the testator, being sick, and having his two wills under his pillow, should, by mistake, give his last will to be cancelled, or order one to cancel his first, who by mistake cancels his last.

"Though the first will was ordered by the testator to be cancelled, and the same was cancelled accordingly, yet all this being upon a presumption that the latter will was good, and duly executed, it is properly relievable under the head of accident.

"It is plain that the testator did not mean to revoke his former will by cancelling but by substituting another perfect will in lieu thereof, and not otherwise, and therefore the cancelling thereof (if any) was but a circumstance showing that he thought he had made a good disposition by the second will, and in confidence thereof it was done with no other intent but that the second will should thereby most surely take place. . . . If the testator did order [the former will] to be cancelled, the effect of such cancelling depended on the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, as the testator thought it was, and without which he would not have cancelled the first, the cancelling the first will, depending thereon, ought to be looked upon as null also, and therefore the first will as to the said lands is still subsisting and unrevoked" (*t*).

and followed by later cases

These cases were followed in *Scott* v. *Scott* (*u*), *Clarkson* v. *Clarkson* (*x*), and *In the Goods of Middleton* (*y*), in each of which cases the testator, having executed a later will, destroyed an earlier will on the assumption that the later will had been validly substituted for it. On it appearing that the later will was in fact not duly executed, the earlier will was held to be unrevoked and was admitted to probate.

(*t*) 1 P. Wms. at p. 346, n. 2.

(*u*) (1859) 1 S. & T. 258.

(*x*) (1862) 2 S. & T. 497.

(*y*) (1864) 3 S. & T. 583.

In *Dancer* v. *Crabb* (*z*) the testatrix, having dictated to a friend some alterations which she wished to make in her will, tore off and burnt so much of her will as had been covered by the memorandum written at her dictation. This memorandum was never duly executed, but on proof that the testatrix believed that this paper, together with the remainder of her will, constituted a new and valid testamentary disposition, the Court held that no part of the original will had been revoked. Sir James Hannen said: "If a testator's act can be interpreted thus: 'Whatever else I may do, I intend to cancel this as my will from this time forth,' the will is revoked; but if his meaning is 'As I have made a fresh will my old one may now be destroyed,' the old will is not revoked if the new one be not in fact made. I think that the latter form of words correctly expresses the state of the testatrix's mind at the time when she tore her will" (*a*).

The principle does not apply where the second will is in fact duly executed, but some matter *dehors* the will renders its provisions ineffectual.

Where, however, the second will is duly executed, and valid as a testamentary instrument, but the disability of some of the legatees to take, or some matter *dehors* or subsequent to the will renders its provisions to some extent ineffectual, then the destruction of an earlier will, although dependent upon the validity of the later instrument, will, it seems, operate as a revocation. It is very difficult to make a satisfactory distinction between such cases as *Onions* v. *Tyrer* (*b*) and cases in which a gift fails for want of capacity in the legatee to take, but the distinction has been drawn in cases of revocation by a subsequent will, and would, it should seem, apply to cases of revocation by destruction also (*c*).

2. Where the testamentary paper intended to be set up by the destruction of the will in question is an earlier will, already in existence, but revoked by the instrument which is destroyed.

If a testator, having executed a later will by which a will of

(*z*) (1873) 3 P. & D. 98.

(*a*) See *Irvin*, (1908) 25 T. L. R. 41.

(*b*) *Vide ante*, p. 204.

(*c*) *French's Case*, Rolle's Abridgment, Devise O. 4; *Ilchester*, (1803) 7 Ves. at p. 373; *Tupper* v. *Tupper*, (1855) 1 K. & J. 665; *Quinn* v. *Butler*, (1868) L. R. 6 Eq. 225.

earlier date was revoked, destroys the later will under the erroneous belief that the earlier will is thereby revived, the act of destruction will not operate to revoke the later will.

A will destroyed under the erroneous impression that an earlier revoked will is thereby revived, is not revoked.

In *Powell* v. *Powell* (*d*) a testator, having executed a will in 1864 revoking all former wills, in 1865 destroyed that will, with an intention, expressed at the time, that he wished to substitute for it a will of 1862, which he held in his hand. It was held that the will of 1864 was not revoked.

Sir J. P. Wilde said: "What does it matter whether a testator were to say 'I tear this will because I have this day executed another designed to replace it' or 'I tear this will because I desire and expect that the effect of my so doing will be to set up my old will'? In either case the revocatory act is based on a condition which the testator imagines is fulfilled. In both cases the act is referable not to any abstract intention to revoke, but to an intention to validate another paper; and as in neither case is the sole condition upon which revocation was intended fulfilled, in neither is the *animus revocandi* present" (*e*).

3. Where the testamentary paper intended to be substituted for the document destroyed is a will which the testator intends to make in the future, and which is not in existence at the time of the destruction.

A will destroyed with the intention that it shall be revoked conditionally on the execution of a fresh will, is not revoked if the fresh will is in fact never executed, or is invalidly executed.

If the testator destroys his will with the intention that the will should be revoked conditionally on his executing a fresh will, then, if the fresh will is in fact never executed, or is invalidly executed, the will destroyed by the testator is not revoked.

In *Dixon* v. *The Solicitor to the Treasury* (*f*) the testator, a few days before his death, gave instructions to a solicitor for a new will, and, after sending for his existing will, there and then

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(*d*) (1866) 1 P. & D. 209.

(*e*) This case was followed in *Cossey* v. *Cossey*, (1900) 82 L. T. 203. See, however, *Gentry*, (1873) 3 P. & D. 80, where a revocation of a will was held to be absolute, and not dependent on the incorporation of certain documents in the papers admitted to probate.

The case of *Dickinson* v. *Swatman*, (1860) 4 S. & T. 205, in so far as it conflicts with the principles laid down in *Powell* v. *Powell*, (1866) 1 P. & D. 209, must be regarded as overruled.

(*f*) [1905] P. 42.

cut off his signature, stating that he meant to cancel the will as he was going to make a new one. He was alleged to have said that he understood that the cutting out of the signature from the old will was a necessary preliminary to making a new will. The testator died without having executed a fresh will. Sir Gorell Barnes said: "If the testator cut out his signature because he thought he had to cut it out before he could start operations on the fresh will, then he was doing that act as part of the operation of bringing a new will into force; and, if this were so, it follows that he would not have cut out his signature if he had thought that it would have the effect of making him die intestate." The jury found as a fact that the testator cut his signature off the will with the intention that the will should be revoked conditionally on his executing a fresh will, and the will was accordingly pronounced for (*g*).

Application of the principle of dependent relative revocation to obliterations of bequests in a will.

The doctrine of dependent relative revocation is applicable to cases in which a bequest or appointment in the will is obliterated by the testator, with the intention of substituting another bequest or appointment in its place. If the substituted bequest or appointment is not effectually made, the original bequest or appointment remains unrevoked (*h*).

The evidence establishing a case of dependent relative revocation must not be doubtful or vague.

Where the only evidence to establish a case of dependent relative revocation was given by a witness who was interested in setting up the earlier will, and whose conduct threw doubts upon his credibility, the Court refused to act upon his evidence, though uncontradicted (*i*).

(*g*) See *Appelbee,* (1828) 1 Hagg. 143; *Cockayne,* (1856) Dea. & Sw. 177, where the doctrine of dependent relative revocation was extended to a case of an intention to execute a fresh document: *Eeles,* (1862) 2 S. & T. 600; *De Bode,* (1847) 5 N. C. 189; *Mitcheson,* (1863) 32 L. J. P. 202.

(*h*) See *Short* v. *Smith,* (1803) 4 East, at p. 429; *Winsor* v. *Pratt,* (1821) 2 Brod. & Bing. at p. 657; *Kirke* v. *Kirke,* (1828) 4 Russ. 435; *Locke* v. *James,* (1843) 11 M. & W. 901; and *post,* p. 215, where this matter is more fully dealt with.

(*i*) *Eckersley* v. *Platt,* (1866) 1 P. & D. 281; *Weston,* (1869) 1 P. & D. 633.

Section 5.

OBLITERATIONS, INTERLINEATIONS AND ALTERATIONS IN A WILL.

Provisions of the Wills Act, s. 21,

The 21st section of the Wills Act, 1837, provides that "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will" (*j*).

apply to wills altered after 1st January, 1838.

Obliterations, interlineations, and other alterations made after the 1st of January, 1838, in a will of previous date are within the provisions of the Wills Act, and to be effectual must be executed with the solemnities required by this section (*k*). For it has been held that wills executed before the 1st of January, 1838, are subject to the provisions of the Wills Act, 1837, with respect to any act done to them after that day (*l*).

Presumption as to alterations appearing in wills executed before 1st January, 1838.

Unexecuted alterations appearing in a will executed before the Wills Act came into operation, will, in the absence of any evidence as to their date, be presumed to have been made before the 1st of January, 1838, and will, therefore, be included in the probate (*m*). But this presumption has far less weight when applied to the revocation than when applied to the

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(*j*) As to partial revocation by cancellation or obliteration before the Wills Act came into operation, see *Swinton* v. *Bailey*, (1878), L. R. 4 A. C. 70.

(*k*) *Brooke* v. *Kent*, (1840) 3 Moo. P. C. 334; *Croker* v. *Lord Hertford*, (1844) 4 Moo. P. C. 339.

(*l*) *Hobbs* v. *Knight*, (1838) 1 Curt. 768, at p. 775.

(*m*) *Pechell* v. *Jenkinson*, (1839) 2 Curt. 273; *Pennington*, (1842) 1 N. C. 399; *Streaker*, (1859) 4 S. & T. 192; *Tweedale*, (1874) 3 P. & D. at p. 206. Alterations appearing in a will, which was signed by the testator whilst as a soldier he was employed in actual military service, will, in the absence of any evidence as to their date, be presumed to have been made during the continuance of such military service: *Tweedale* (*ubi supra*).

getting up of a document. Therefore, where a will executed before the passing of the Wills Act was found after the testator's death in 1870, with the testator's signature crossed out, in the absence of evidence as to the date when the act of crossing out was done, the Court refused to presume that it was before 1838, and pronounced for the will (*n*).

Wills executed after 1st January, 1838.

Unattested alterations presumed to have been made *after* the execution of the will, and therefore excluded from the probate.

Where unattested alterations (*o*) occur in a will, the presumption of law is that such alterations were made after the execution of the will, and in the absence of evidence rebutting the presumption, probate will be granted of the will in its original state, omitting the alterations (*p*). The rule is somewhat differently expressed by Wood, V.-C., in *Williams* v. *Ashton* (*q*). He said: "I do not think it is quite a correct mode of stating the rule of law to say that alterations in a will are presumed to have been made at one time or at another. The correct view is that the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed" (*r*).

(*n*) *Benson* v. *Benson,* (1870) 2 P. & D. 172.

(*o*) A will altered without the testator's concurrence may be pronounced for in its unaltered state: *Parker* v. *Hickmott,* (1828) 1 Hagg. 211.

(*p*) *Cooper* v. *Bockett,* (1844—6) 4 Moo. P. C. 419; *Gann* v. *Gregory,* (1854) 3 De G. M. & G. at p. 780; *Simmons* v. *Rudall,* (1851) 1 Sim. (N. S.) at p. 137; *Greville* v. *Tylee,* (1851) 7 Moo. P. C. at p. 328; *James,* (1858) 1 S. & T. at p. 238; *Sykes,* (1873) 3 P. & D. at p. 27; *Adamson,* (1875) 3 P. & D. at p. 255.

(*q*) (1860) 1 J. & H. 115, at p. 118.

(*r*) See *Doe* v. *Palmer,* (1851) 16 Q. B. 747, at p. 755; *Sykes,* (1873) 3 P. & D. at p. 27. The mere circumstance that the amount of a legacy or the name of a legatee is inserted in a different handwriting and in different ink will not constitute an obliteration, interlineation or other alteration. Blanks may be supplied, and in a different ink, because the will may very probably be brought with blanks to the testator, and then filled up; no presumption could arise in such a case against the will having been executed as it appears: *Greville* v. *Tylee,* (1851) 7 Moo. P. C. at p. 327. The mere fact that words which interrupt the grammatical structure of a paragraph occur in a will, is not, it should seem, sufficient to raise a presumption that they have been introduced after its execution. It is no part of the duty of the Court to raise obstacles, and make the Wills Act more difficult of compliance than it is: *Swindin,* (1850) 2 Rob. 192. There is a marked distinction between interlineations and alterations. Interlineations are generally used merely to complete an imperfect sentence, whilst an alteration is a change in the original disposition. So where a will contained several unattested interlineations, most of them of single

Stated, however, as the rule generally is, that there is a presumption that unattested alterations on the face of a will were made after its execution, this presumption may be rebutted by proof or internal evidence to the contrary (*s*).

The presumption may be rebutted:

The Court may come to the conclusion that the alterations were in the will at the time of its execution upon any reasonable evidence, without insisting upon the oath of the attesting witnesses, or any other particular species of evidence (*t*).

by proof or internal evidence to the contrary;

The evidence of an expert in handwriting is entitled to some consideration (*u*), so are the facts that the testator was a person who well knew the formalities required for making a will, and that the alterations appear to have been written with the same pen and ink as the rest of the will (*x*). The inspection of the document itself and the character of the alterations may suffice to satisfy the Court that they were made before execution (*y*). But the mere fact that dates prior to that of the will have been placed against the alterations by the testator will not in itself justify their inclusion in the probate (*z*).

by inferences drawn from the condition of the will;

The presumption may be rebutted by evidence of declarations made by the testator before the execution of the will, showing an intention on his part which appears to have been carried into effect by the will as altered, and not as it originally stood. But evidence of declarations made by the testator after the execution of the will is not, it should seem, admissible for the purpose of proving that alterations were made before the will was executed (*a*).

and by evidence of declarations made by the testator *before* the execution of the will; *secus*, declarations made after.

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words, each of which was required to complete the sentence to which it belonged, the Court held that it was not bound to presume that they were made after execution, and included them in the probate: *Cadge*, (1868) 1 P. & D. 543; and see *Birch* v. *Birch*, (1848) 1 Rob. 675.

(*s*) *Adamson*, (1875) 3 P. & D. at p. 255.

(*t*) *Hindmarch*, (1866) 1 P. & D. at p. 308; *Greville* v. *Tylee*, (1851) 7 Moo. P. C. at p. 329.

(*u*) *Hindmarch*, (1866) 1 P. & D. at p. 308.

(*x*) *Ibid.*

(*y*) *Birch* v. *Birch*, (1848) 1 Rob. 675; *Swindin*, (1850) 2 Rob. 192; *Cadge*, (1868) 1 P. & D. 543; *Tonge*, (1892) 66 L. T. 60.

(*z*) *Adamson*, (1875) 3 P. & D. 253.

(*a*) In *Doe* v. *Palmer*, (1851) 16 Q. B. 747, at p. 756, Lord Campbell, C.J., said: "If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that before the

Unattested alterations made after the execution, are rejected.

Unattested alterations made in a will after its execution are rejected, and the will in its original and unaltered state will was executed, the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ . . . from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? . . . Declarations of the testator *after* the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires; and *for the same reason, a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible.* But the previous declarations of the testator as to his testamentary intentions do not seem to be liable to the same objections. They demonstrate that the alteration is not an afterthought; they cannot have been uttered with any view of evading the law respecting the execution of wills; and they still leave upon the devisee the burthen of proving by reasonable evidence that this law has been complied with." This principle that the presumption may be rebutted by evidence of declarations made before, but not after the execution was recognised in the following cases: *Williams* v. *Ashton,* (1860) 1 J. & H. 115; *Sykes,* (1873) 3 P. & D. 26; *Adamson,* (1875) 3 P. & D. at p. 256.

In *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. 154, it was held that declarations made by a testator both before and after the execution of the will, are admissible as evidence of its contents when the execution is not in question. But this case, it is submitted, left the authority of *Doe* v. *Palmer* unimpaired. Cockburn, C.J., referring to that case, said: "Lord Campbell said, 'Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested . . .' a proposition in which . . . I fully concur. He then goes on to say: 'And for the same reason a declaration by the testator after the will was executed, that the alteration had been made previously, would be inadmissible.' This may be more doubtful. . . . The question in *Doe* v. *Palmer* turned on the efficacy or inefficacy of the execution, which, if made after the interlineations, would be valid, but if made before they were inserted, would be inoperative to cover them. What it comes to is, that the declarations of a testator cannot be used to prove that the execution of the will was such as to give effect to it": *Sugden* v. *Lord St. Leonards,* at p. 228—229. Earlier in his judgment (at p. 225), Cockburn, C.J., recognised the principle that declarations of a deceased testator made *before* the execution of a will are admissible to rebut the presumption arising from alterations appearing on the face of it.

In *Dench* v. *Dench,* (1877) 2 P. D. 60, declarations made by the testator subsequent to the execution of the will were tendered as evidence that an alteration appearing on the face of it was made before execution. *Sugden* v. *Lord St. Leonards* (*ubi supra*) was cited, but the Court decided that it would not act upon that evidence. Evidence of declarations made before the execution by the testator was, on the authority of *Doe* v. *Palmer,* admitted and acted upon. But see *Gould* v. *Lakes,* (1880) 6 P. D. 1.

A mere general statement by the testator that he has made some alteraadmitted to probate. For the section enacts that such alterations shall be ineffectual so far as the words or effect of the will before alteration shall be 'apparent.' The section, however, contains an exception in cases where the words or effect of the will before alteration shall not be 'apparent.' If therefore the words are completely obliterated, so that it cannot be made out what they originally were, the obliteration is effectual, and probate must then be granted as if there were blanks in the will (*b*).

Where words originally in the will are completely obliterated, so as to be no longer "apparent," they are omitted from the probate.

Several cases have been decided, which, dealing with erasures and alterations made of or over words in a testamentary document, show in what cases words so obscured are considered to be 'apparent' and by what means they may be made so 'apparent.' The result of these authorities appears to be that the words beneath obliterations, erasures, or alterations on a testamentary document are 'apparent' within the meaning of the section, if experts, using magnifying glasses when necessary, can decipher them and satisfy the Court that they have done so; but that it is not allowable to resort to any physical interference with the document, so as to render clearer what may have been written upon it (*c*).

Obliterated words are "apparent" if decipherable by experts, using magnifying glasses if necessary.

But no physical interference with the document is permissible.

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tions in his will is not sufficient to give validity to any alterations found in the instrument after his death: *Williams* v. *Ashton,* (1860) 1 J. & H. 115.

(*b*) Wms. on Exors. 107.

(*c*) *Per* Sir F. H. Jeune in *Ffinch* v. *Combe,* [1894] P. at p. 201. In *Ibbetson,* (1839) 2 Curt. 337, Sir H. J. Fust said: "The obliterations and erasures should be carefully examined by persons accustomed to inspect writings, in order to ascertain how the will originally stood. Possibly with the use of glasses that may be discovered; but I am quite unable to make it out." In that case, as it turned out, it could not be discovered what the parts obscured originally were.

In *Beaven,* (1840) 2 Curt. 370, a word had been altered, but in such a way that the original word remained, beyond question, apparent. In that case probate was granted with the original word: see also *Greenwood,* [1892] P. 7.

In *Lushington* v. *Onslow,* (1848) 6 N. C. 183, erased words were allowed to form part of the probate, although nothing but the assistance of a very skilful expert using a powerful magnifying glass could possibly have discovered what the original words were (see the remarks of Sir F. H. Jeune on this case in *Ffinch* v. *Combe,* [1894] P. at p. 200).

In *James,* (1858) 1 S. & T. 238, probate was granted of the will with the parts erased in blank, the original words not being discernible on the face of the paper.

In *Brasier,* [1899] P. 36, words beneath alterations were admitted to

When words are obliterated so as to be no longer "apparent," extrinsic evidence is inadmissible to prove their purport.

When words in a will are so completely effaced or obliterated as not to be apparent on the face of the instrument itself, no extrinsic evidence can be admitted to show what they originally were.

Sir H. Jenner Fust in *Townley* v. *Watson* (*d*) said: "What then is the interpretation to be put upon this section, when either words in a will or the effect of words are so completely effaced or obliterated as not to be apparent? Now, I think the *primâ facie* construction must be '*apparent on the face of*

probate upon proof that they could be deciphered by an expert in writing using a magnifying glass.

The Court will not, in the first instance, take upon itself to decide whether the words obliterated can or cannot be made out, but will refer such a matter to proof, and pronounce its judgment according to the evidence which may be offered: *Townley* v. *Watson,* (1844) 3 Curt. 761.

In *McCabe,* (1873) 3 P. & D. at p. 96, Sir J. Hannen said: "It is stated by [expert witnesses] that they can, with the assistance of magnifying glasses, read the words beneath those which are substituted. I have myself carefully examined the will with the aid of a powerful glass, but am unable to discover what these gentlemen say they see. If this were a case of simple obliteration, I should not be able to act upon the evidence of these experts." In *Ffinch* v. *Combe,* [1894] P. at p. 200, Sir F. H. Jeune, referring to this case, said: "I think Sir J. Hannen did not intend to say that the aid of experts and magnifying glasses might not be resorted to in order to determine if words were apparent, but only that in that particular case he was not satisfied with the opinion of the experts that the words could in fact be read by any means." What methods may be resorted to in deciphering the words altered or erased, may be gathered from the directions to the expert in handwriting in *Ffinch* v. *Combe,* [1894] P. at pp. 192—194. Magnifying glasses may be used: *Ibbetson,* (1839) 2 Curt. 338; *Horsford,* (1874) 3 P. & D. at p. 215; *Ffinch* v. *Combe,* [1894] P. at p. 201; *Brasier,* [1899] P. 36.

Chemical agents must not be used on the document, or the document itself affected in any way: *Horsford,* (1874) 3 P. & D. at p. 215; *Ffinch* v. *Combe,* [1894] P. at p. 193.

The effacement of the original writing by the testator by pasting a piece of paper over it, is an obliteration within the meaning of the section, and the Court will not order the paper so pasted upon the will to be removed for the purpose of ascertaining what is written underneath: *Horsford,* (1874) 3 P. & D. 211; *Ffinch* v. *Combe,* [1894] P. 191.

But if the words written beneath the superimposed paper can be read by an expert in handwriting, on placing a piece of brown paper around them, and holding the document against a window-pane, the words are "apparent" within the meaning of the section: *Ffinch* v. *Combe,* [1894] P. 191.

Where words had been written upon the back of a codicil, and a piece of blank paper pasted over them, the Court ordered the paper to be removed in order to ascertain whether the words so written amounted to a revocation of the codicil: *Gilbert,* [1893] P. 183.

(*d*) (1844) 3 Curt. at p. 768.

the instrument itself' and not that suggested in argument, namely '*capable of being made apparent by extrinsic evidence.*' What is an obliteration? Is it not by some means covering over words originally written, so as to render them no longer legible? I cannot understand, if the legislature really intended that extrinsic evidence should be admitted, why a few more words were not added, which would have freed the section from all doubt; for instance, why was it not thus penned, 'unless the words shall be capable of being made apparent'? . . . I think it is impossible to read the words, and not say, it was the intention of the legislature, that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament" (*e*).

Words completely obliterated are to be regarded as revoked.

An important corollary has been engrafted upon this doctrine that a complete obliteration by the testator of words in his will constitutes a valid revocation of the words so obliterated.

The doctrine of dependent relative revocation applied to cases where the testator completely erases a bequest, with the intention of revoking it only if he has effectually substituted another bequest in its place.

It is clear from the words of sect. 20 of the Wills Act, which applies to the revocation of a will or codicil, or any part thereof, that an intention to revoke is absolutely necessary to effect a revocation by burning, tearing, or otherwise destroying (*f*). And it has been held on the construction of sect. 21, that an obliteration, in order to constitute a revocation of the words obliterated, must in like manner be made by the testator with an intention to revoke (*g*).

Where, therefore, a testator entirely erases or obliterates the original words, with the intention of revoking that portion of the will *only in the event of his having effectually substituted another bequest in its place*, the doctrine of dependent relative

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(*e*) See *Stephens* v. *Taprell,* (1840) 2 Curt. at p. 467; and see *McCabe,* (1873) 3 P. & D. at p. 96; *Horsford,* (1874) 3 P. & D. at p. 216; *Ffinch* v. *Combe,* [1894] P. at p. 198.

(*f*) *Brooke* v. *Kent,* (1840) 3 Moo. P. C. at p. 348.

(*g*) *Brooke* v. *Kent,* (1840) 3 Moo. P. C. at p. 349; *Townley* v. *Watson,* (1844) 3 Curt. at p. 769.

In such cases extrinsic evidence is admissible to show what the original words were.

revocation (*h*) becomes applicable (*i*); and if the substituted bequest is not effectually given, the original bequest is not revoked. In such a case, extrinsic evidence is admissible to show what the original words were (*k*).

Alterations may be included in the probate if executed in the same manner as a will in the margin, or at the foot or end of a memorandum referring to them.

Attestation of alterations.—Alterations made in a will after its execution are to be executed in the same manner as a will (*l*), but the signature of the testator and the subscription of the witnesses may be made in the margin (*m*) or on some other part of the will opposite or near to the alteration, or at the foot or end of or opposite to a memorandum referring to the alteration (*n*), and written at the end or some other part of the will.

(*h*) See *ante*, pp. 200 *et seq.*

(*i*) *Horsford*, (1874) 3 P. & D. at p. 216.

(*k*) *Vide ante*, p. 208. In the following cases where a legacy was given, the amount afterwards obliterated by the testator, and another sum written by him over the obliteration, by way of substitution, but without the attestation required by the Act, the Court, acting upon this doctrine, admitted extrinsic evidence as to the words obliterated, and included them in the probate although they were not "apparent" upon the face of the will: *Brooke* v. *Kent*, (1840) 3 Moo. P. C. 334; *Soar* v. *Dolman*, (1842) 3 Curt. 121; *Horsford*, (1874) 3 P. & D. 211.

The principle applies in a case where the name of an executor has been erased and another name substituted by the testator, such obliteration and substitution being unattested. The Court will direct the original name to be restored in the probate if satisfied by evidence *aliunde* what the original name was: *Harris*, (1860) 1 S. & T. 536; *Parr*, (1859) 29 L. J. P. 70; *Greenwood*, [1892] P. 7.

The principle also applies to a case where the testator has so entirely erased the name of a legatee that it is no longer apparent, and has substituted another name for it. The Court will receive evidence to show what the original name was, and restore it to the probate if satisfied that the testator only revoked the first bequest on the supposition that he had effectually substituted a new legatee: *McCabe*, (1873) 3 P. & D. 94.

Cases have occurred where the name of an attesting witness has been erased by the testator; were this done with the intention of revoking the will, a question might arise as to whether that would be a sufficient "destruction" within the meaning of the statute: see *Margary* v. *Robinson*, (1886) 12 P. D. at p. 12; *Hobbs* v. *Knight*, (1838) 1 Curt. 768, 781; *Morton*, (1887) 12 P. D. 141; *vide ante*, p. 186. In the cases referred to the name so erased was restored in the probate, as the Court was satisfied that the testator did not intend to revoke the will; and see *Playne* v. *Scriven*, (1849) 7 N. C. 122; *Coleman*, (1861) 2 S. & T. 314; *Greenwood*, [1892] P. 7; *Godfrey*, (1893) 69 L. T. 22.

(*l*) The initials of the testatrix and the attesting witnesses in the margin opposite alterations are sufficient: *Blewitt*, (1880) 5 P. D. 116; but not the initials of the witnesses alone if the testator merely traced over his signature at the end of the will with a dry pen: *Cunningham*, (1860) 4 S. & T. 194.

(*m*) See *Wilkinson*, (1881) 6 P. D. 100.

(*n*) See *Treeby*, (1875) 3 P. & D. 242.

Unattested alterations made in a will after its execution may be included in the probate if made before the execution of a codicil.

A codicil duly executed will give effect and operation to unattested alterations in a will (*o*), and that, it should seem, whether the codicil be or be not expressly confirmatory of the will to which it refers (*p*). For a codicil is a republication of a will (*q*) and validates the dispositions of the will as they stand at the time of the execution of the codicil (*r*).

Unattested alterations in will presumed to have been made *after* execution of codicil.

It will generally be presumed, in the absence of evidence to the contrary, that alterations appearing on the face of the will were made not only after the execution of the will, but also after the execution of the codicil (*s*).

How the presumption may be rebutted.

Declarations by a testator made before the execution of a codicil, which republishes the will, may be admitted to show that the alterations in the will were made before the execution of the codicil (*t*).

A testator, after the execution of his will, made various alterations in it. Among the interlineations, which were unattested, was a legacy of "£1,000 to each of my executors." In the body of the will he gave a legacy of £10,000 to one of his executors. In a codicil the testator recited that he had given a legacy of £11,000 to this executor. It was held that this reference showed that the interlineation had been made prior to the execution of the codicil, and that it was therefore incorporated by it (*u*).

Before the Wills Act came into operation it formed a frequent subject of discussion whether, as regards certain words or

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(*o*) *Skinner* v. *Ogle*, (1845) 4 N. C. at p. 79; *Neate* v. *Pickard*, (1843) 2 N. C. 406; *Wyatt*, (1862) 2 S. & T. 494.

(*p*) This was the rule of law before the Wills Act came into operation; s. 22 of the Wills Act is confined to wills, etc., "which shall be in any manner revoked"; it would therefore seem that a duly executed codicil will still amount to a republication of the will, as under the old law, unless it appears on the face of the codicil that it was not the intention of the testator to republish the will; or unless the will has been in any manner revoked, in which case the statute further requires that the codicil should show an intention to revive the will: see *post*, p. 241.

(*q*) *Sykes*, (1873) 3 P. & D. at p. 27.

(*r*) *Hall*, (1871) 2 P. & D. at p. 257; *Tyler* v. *Merchant Taylors' Co.*, (1890) 15 P. D. 216.

(*s*) *Lushington* v. *Onslow*, (1848) 6 N. C. 183; *Sykes*, (1873) 3 P. & D. at p. 27; *Bradley*, (1847) 5 N. C. 186; *Christmas* v. *Whinyates*, (1863) 3 S. & T. at p. 89.

(*t*) *Sykes*, (1873) 3 P. & D. at p. 28.

(*u*) *Heath*, [1892] P. 253.

Deliberative alterations in a will,

figures in a testamentary paper, the testator intended the bequest therein contained to be final or merely deliberative. If, under all the circumstances, the Court considered that such words had not been written as a fixed testamentary disposition, but merely deliberatively, in order that the testator, on further consideration, should determine whether or not they should ultimately be carried out, it rejected the words as forming no part of the will (*x*).

Analogous principles have been applied in considering alterations made in a will before the execution of a codicil.

are not included in the confirmation by the codicil.

Thus where a testator, after the execution of his will, struck through with a pencil several paragraphs thereof, placed a query opposite other paragraphs, and subsequently executed a codicil which confirmed in so far as it did not alter his will, it was held that the alterations so made were deliberative and not final, and not included in the confirmation by the codicil; they were therefore omitted from the probate (*y*).

A sheet interpolated in the will after its execution, must be executed as required by the Act.

Where a will consists of several sheets, and one of the sheets is proved to have been interpolated amongst the others after the execution of the will, the contents of the paper so interpolated will not be admitted to probate unless it has been executed in accordance with the provisions of the Act (*z*).

Where a will consists of several sheets, the *primâ facie* presumption is that all such sheets formed part of the will at the time of its execution.

Where, however, several sheets of paper, constituting a connected disposal of the property, are found together after the death of the testator, the last sheet being duly executed, the presumption, in the absence of direct proof, is that

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(*x*) *Hall*, (1871) 2 P. & D. at p. 258. In *Adams*, (1872) 2 P. & D. 367, the testatrix executed a printed form of a will. The blanks were filled up by the deceased in her own handwriting, partly in ink and partly in pencil. Some portion of the writing in ink extended over that in pencil, and some words of the latter were rubbed out and obliterated. The words in ink were sensible as read with the printed part of the will. The attesting witnesses did not see the writing when they attested the will. It was held that the words in pencil were deliberative only, and probate was granted without them. See also *Hawkes* v. *Hawkes*, (1828) 1 Hagg. 321, where it was laid down that the general presumption and probability is that where alterations are made in pencil only, they are deliberate; where in ink, they are final and absolute; and that when they are of both sorts, the presumption as to each is stronger. See also *Calamy* v. *Hyde*, (1731) 1 Lee, 423 n.

(*y*) *Hall*, (1871) 2 P. & D. 256; *Wyatt*, (1862) 2 S. & T. 494. See *Kerr* v. *Stinnear*, [1904] 1 Ch. 317.

(*z*) *Treloar* v. *Lean*, (1889) 14 P. D. 49.

they all formed part of the will of the deceased at the time of its execution (*a*).

This presumption is not rebutted merely by the circumstance that the several sheets are not in all points consistent.

This presumption, it should seem, is not rebutted by the mere circumstance that the several sheets do not constitute in all points a consistent disposal of the property (*b*). For, if direct proof is wanting, and any theory consistent with the validity of the will can be suggested, which appears to the Court to be as probable as the theory on which the argument for its invalidity is based, the will as found must be maintained (*c*).

Declarations by the testator admissible to show what were the constituent parts of the will at the time of execution.

In considering the question whether several sheets of paper did or did not constitute the will at the time of its execution, statements of the testator, whether made before or after the execution of the will, are admissible in evidence to show what were the constituent parts of the will at that time (*d*).

Words written beneath the testator's signature regarded as interlineations.

In certain cases, words written below the signature of the testator before the execution of the will, and referred to in the body of the will, have been regarded as interlineations and admitted to probate (*e*).

Probate in *facsimile.*

In a case where the construction of the will may be affected by the appearance of the original paper, the Court will order the probate to pass in *facsimile* (*f*).

(*a*) *Gregory* v. *The Queen's Proctor,* (1846) 4 N. C. 620; *Marsh* v. *Marsh,* (1860) 1 S. & T. 528; *Rees* v. *Rees,* (1873) 3 P. & D. 84.

(*b*) *Marsh* v. *Marsh,* (1860) 1 S. & T. 528, 531.

(*c*) *Rees* v. *Rees,* (1873) 3 P. & D. at p. 86.

(*d*) *Gould* v. *Lakes,* (1880) 6 P. D. 1; *Hutchinson,* (1902) 18 T. L. R. 706.

(*e*) *Birt,* (1871) 2 P. & D. 214; *Greenwood,* [1892] P. 7; *ante,* p. 125.

(*f*) *Raine,* (1865) 34 L. J. P. 125; *Smith,* (1854) 3 S. & T. 589.

CHAPTER V.

INCORPORATION OF DOCUMENTS BY REFERENCE.

Unattested papers may in certain circumstances be regarded as incorporated in a will.

Notwitstanding the provision of sect. 9 of the Wills Act that no will shall be valid unless executed with the formalities required by that section, a written paper, though unattested, may under certain circumstances be admitted to probate as forming part of the will of the deceased. For a paper imperfect in itself may be so referred to and identified in an instrument validly executed, that it may be considered part of it in the same manner as if repeated *totidem verbis* in the will itself (*a*). In such a case the paper is said to be incorporated by reference in the will of the deceased (*b*).

The principle of incorporation by reference was applied to wills executed in accordance with the provisions of the Statute of Frauds.

The principle of incorporation by reference, which received judicial recognition at a period long anterior to the passing of the Wills Act, was based upon and justified by the following considerations.

By the Statute of Frauds, devises of lands were to be in writing, signed and attested; this was the security which that law provided for the authenticity of such instruments. Any attempt to devise lands with less security was considered, *pro tanto*, a defeazance of the statute; but it was permitted to a testator to render operative as part of his will duly attested, a written paper already in existence; and for this reason—because the paper being clearly identified by a will duly attested, the security intended by the statute would not be diminished (*c*).

The law on this subject unaffected by the Wills Act.

The Wills Act, 1837, left untouched the law upon this subject. The ceremonies necessary to authenticate a testamentary instrument were altered, but no alteration was made

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(*a*) *Ferraris* v. *Lord Hertford,* (1843) 3 Curt. at pp. 492, 493; S.C. *nom. Croker* v. *Lord Hertford,* (1844) 4 Moo. P. C. at p. 365.

(*b*) *Croker* v. *Lord Hertford,* (1844) 4 Moo. P. C. at p. 365.

(*c*) *Ibid.*

in the effect to be given to words used in it. It should seem that a paper which would have been incorporated in a will executed according to the Statute of Frauds must now be incorporated in a will executed according to the Wills Act, 1837; and that the principles as to incorporation by reference laid down in cases anterior to the Wills Act must still be regarded as applicable to wills executed since that Act (*d*).

The principle of incorporation by reference may be stated thus:—

The principle of incorporation by reference.

Where a testator in a duly executed will or codicil refers to an unattested written paper (whether of a testamentary form or character or not), as a written paper then in existence in such terms that it may be ascertained, the paper so referred to becomes part of his will, in other words, is incorporated therein; provided always that the paper referred to is actually in existence at the time of the execution of the will or codicil (*e*).

Three conditions must be satisfied.

It will be seen from the statement of the principle in this form, that three conditions must be satisfied before an unexecuted document can be regarded as incorporated in a duly executed testamentary instrument.

First.—The unexecuted document must be in existence at the time of the execution of the testamentary instrument into which it is to be incorporated.

Second.—There must be a reference in the duly executed testamentary instrument to the informal document as an existing and not as a future document.

Third.—The unexecuted document must be so described as to leave no doubt in the mind of the judge, in the circumstances as they actually existed and are proved before him, that the document referred to is the document propounded.

(*d*) *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 455. The cases decided under the Statute of Frauds are summarised and commented upon in *Ferraris* v. *Lord Hertford*, (1843) 3 Curt. at pp. 492 *et seq.*; S.C. *nom.* *Croker* v. *Lord Hertford*, (1844) 4 Moo. P. C. at pp. 365 *et seq.*; *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at pp. 444—453.

(*e*) This statement of the general principle is collected from the following cases: *Ferraris* v. *Hertford*, (1843) 3 Curt. at p. 492; *Allen* v. *Maddock*, (1858) 11 Moo. P. C. 427; *Watkins*, (1865) 1 P. & D. at p. 20; *Singleton* v. *Tomlinson*, (1878) L. R. 3 A. C. 404; *Kehoe*, (1884) 13 L. R. Ir. 13; *Smart*, [1902] P. at p. 240; *University College* v. *Taylor*, [1907] P. at p. 236.

Burden of proof.

The burden of proving the existence of these three conditions is upon the person who contends for the incorporation of the particular document (*f*).

Admissibility of extrinsic evidence to identify the document referred to in the will.

Before dealing in detail with these essential conditions, it is desirable here to consider how far extrinsic evidence is admissible to prove the existence of all or any of them.

A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities clearly establish that where there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for that purpose (*g*).

When a question arises as to the incorporation of unattested documents by reference in a will, the Court of Probate becomes, to a certain extent, a court of construction; it has to determine what is the meaning of the reference made by the testator in his will, and whether any, and if any, what document found at his death is thereby referred to. This question is one of fact which obviously must be explained, and can only be explained by parol evidence. Parol evidence must necessarily be received to prove whether there is or is not in existence at the testator's death any such document as is referred to in the will. For this purpose inquiry must be made and evidence must be offered to show what documents there were at the date of the will, which could answer the description contained in it; and the Court, having by these means placed itself in the situation of the testator, and acquired as far as possible all the knowledge which the testator possessed, must say, upon a consideration of those extrinsic circumstances, whether the particular document is identified or not (*h*).

Extrinsic evidence of this character is admissible on the ground that every claimant under a will has a right to require

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(*f*) *Singleton* v. *Tomlinson*, (1878) L. R. 3 A. C. 404.

(*g*) *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 454.

(*h*) *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at pp. 441, 442.

that a court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose language it is called upon to declare (*i*).

Direct evidence of the testator's intention is inadmissible.

A distinction exists between evidence of surrounding circumstances, and direct evidence of intention, such as declarations of the testator by word or in writing and other testimony of a similar character. As a general rule, no such evidence can be received in order to explain the expressions which he has used (*k*).

Unless two or more documents equally fulfil the description in the will.

"There is but one case," said Lord Abinger in *Doe* v. *Hiscocks* (*l*), "in which this sort of evidence of intention can properly be admitted and that is, . . . where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of two or more persons (each answering the words in the will), the testator intended to express."

Accordingly, it has been held that direct evidence of intention is admissible to explain a reference in the will to an unexecuted paper only in cases where two or more papers equally fulfil the description found in the will (*m*).

If the parol evidence sufficiently proves that there is no doubt as to the document referred to, it is no objection that circumstances might have existed in which the instrument could not be identified.

The foregoing rules as to the admissibility of parol evidence when the Court has to deal with the incorporation of documents by reference, were laid down in the leading case of *Allen* v. *Maddock* (*n*); where, after an exhaustive review of the cases, Sir T. Pemberton Leigh said (*o*): "Where there is a reference in a duly executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence; and when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the

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(*i*) Wigram on Evidence, Prop. V., par. 96, quoted in *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 441.

(*k*) *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 440.

(*l*) (1839) 5 M. & W. 368.

(*m*) *Paton* v. *Ormerod*, [1892] P. 252.

(*n*) (1858) 11 Moo. P. C. 427.

(*o*) At p. 461.

instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified" (*p*).

(1) The unexecuted document must be in existence at the time of the execution of the will or codicil.

1. The unexecuted document must be in existence at the time of the execution of the testamentary instrument into which it is to be incorporated.

The 9th section of the Wills Act provides that no will or codicil shall be valid unless it shall be executed in the manner prescribed by that section; that provision was made not for the benefit of individuals, but for the greater protection and security of the public, and that security the testator cannot dispense with at his option. It is therefore not competent to a testator to reserve to himself a power of disposing of his property by any paper executed in any other manner than is required by this section of the Act (*q*). It has accordingly been decided, and there is no doubt that an unexecuted paper made afterwards can never be part of a will (*r*). Where, therefore, an unexecuted document is put forward as incorporated by reference in a will, the onus is clearly thrown on those who contend for the incorporation of the particular document to prove, by parol extrinsic evidence, that it was in existence at the date of the will (*s*).

It is not competent for a testator to reserve to himself a power of disposing of his property by a future unexecuted paper.

Wherefore an unexecuted paper made afterwards can never be part of a will.

(2) The unexecuted document must be described as an existing, and not as a future document.

2. There must be a reference in the duly executed testamentary instrument to the informal document as an existing, and not as a future document.

Thus, in *In the goods of Sunderland* (*t*), a testatrix by her will bequeathed the residue of her property, save and except

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(*p*) Further, as to the admissibility of extrinsic evidence in such cases, see *Greves,* (1858) 1 S. & T. 250; *Almosnino,* (1859) 1 S. & T. at p. 510; *Paton* v. *Ormerod,* [1892] P. at p 250.

(*q*) *Ferraris* v. *Hertford,* (1843) 3 Curt. at p. 498, see also at pp. 499—511, and cases there cited; S.C. *nom. Cooper* v. *Lord Hertford,* (1844) 4 Moo. P. C. at p. 365; *Briggs* v. *Penny,* (1849) 3 De G. & S. at p. 547; *Johnson* v. *Ball,* (1851) 5 De G. & S. 85, 91; *Boyes* v. *Carritt,* (1884) 26 Ch. D. 531.

(*r*) *Wilkinson* v. *Adam,* (1812) 1 V. & B. at p. 445.

(*s*) *Singleton* v. *Tomlinson,* (1878) L. R. 3 A. C. at p. 414; see *Habergham* v. *Vincent,* (1793) 2 Ves. 204; *Smart* v. *Prujean,* (1801) 6 Ves. at p. 565 (and see this case commented upon, 3 Curt. at p. 504, 11 Moo. P. C. at p. 444); *Ferraris* v. *Cooper,* (1843) 3 Curt. 468, at pp. 492—511; *Kehoe,* (1884) 13 L. R. Ir. 13; and cases cited, *supra,* note (*q*).

(*t*) (1866) 1 P. & D. 198.

such furniture, etc., "as shall be ticketed or described in a paper in my own handwriting." It appeared that at the time when the will was executed two lists answering the description in the will had already been written by the testatrix and were in existence. Sir J. P. Wilde stated that there was abundant parol evidence to satisfy the Court that the testatrix did intend those lists to form part of her will, but held that the Court was not at liberty to enter into that question, or to receive that evidence. He said: "The Court cannot properly go further in that direction than the limit fixed by the Judicial Committee of the Privy Council in *Allen* v. *Maddock* (*u*). That limit seems to be fixed by one sentence in the judgment: 'A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that where there is a reference to any written document *described as then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it.' There must be a reference to a written document described as then existing. . . . I think that these papers are not so described, and I therefore grant probate of the will and codicils alone" (*x*).

(3) The unexecuted document must be identified with certainty.

3. The unexecuted document must be so described as to leave no doubt in the mind of the judge, in the circumstances as they actually existed and are proved before him, that the document referred to is the document propounded (*y*).

(*u*) (1858) 11 Moo. P. C. at p. 454.

(*x*) See *Van Straubenzee* v. *Monck*, (1862) 3 S. & T. 6; *Reid*, (1868) 38 L. J. P. 1; *Truro*, (1866) 1 P. & D. 201; *Smart*, [1902] P. at p. 241; *University College* v. *Taylor*, [1907] P. 228, where the words of reference were to "such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me." This reference was held to incorporate a memorandum in existence at the time when the will was executed, although the words "are contained" might be construed in a future sense if the facts rendered it necessary so to do. See, further, *Stewart*, (1863) 3 S. & T. 192. It seems that the will need not state *in express terms* that the document sought to be incorporated was then already in existence, so long as the reference is not of a kind that can only be applied to a future document: *Smart*, [1902] P. 238; *Singleton* v. *Tomlinson*, (1878) L. R. 3 A. C. at p. 414; *University College* v. *Taylor*, [1907] P. 228.

(*y*) *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 444.

No doubt must exist as to the identity of document to be incorporated.

"Certainty and identification," said Dr. Lushington in *Croker* v. *Lord Hertford* (z), "is the very essence of incorporation. If any doubt can exist as to the instrument to be incorporated, then the principle of incorporation by relation would fail." Again, in *Smart* v. *Prujean* (a), Lord Eldon said: "An instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated; in such a way that the Court can be under no mistake" (b).

As to the certainty of the reference required by the law in the incorporating instrument, it is necessary, and it is sufficient, that the description should be such as to enable the Court, when the evidence is produced, to say what is the document intended (c).

Where the words of reference are so vague as to be incapable of being applied to any document in particular, parol evidence to show that a particular document was intended is inadmissible; but if the reference is in such terms that the document is capable of being ascertained, parol evidence is admissible to ascertain it.

The words of reference may be so vague as to be incapable of being applied to any document in particular, and in such a case, it seems, parol evidence is inadmissible to show that the testator intended a particular document to be incorporated in his will (d). But the authorities seem clearly to establish that where there is a reference to any written document described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, whether the evidence is sufficient for the purpose (e). When the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the document, it is no objection to it that, by possibility, circumstances might have existed in which the document referred to might not have been identified (f).

In illustration of these propositions, reference may be made, on the one hand, to cases where the document propounded as incorporated has been held to be sufficiently identified by the reference in the will, and, on the other hand, to cases where the identification has been held to be insufficient.

(z) (1844) 4 Moo. P. C. at p. 366.

(a) (1801) 6 Ves. at p. 565.

(b) See also *Habergham* v. *Vincent*, (1793) 2 Ves. at p. 228; *Ferraris* v. *Hertford*, (1843) 3 Curt. at p. 499.

(c) *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 452.

(d) *Ibid.* at p. 454, and cases there cited.

(e) *Ibid.* at p. 454; *vide ante*, pp. 222 *et seq.*

(f) *Ibid.* at p. 461.

Cases in which the document referred to has been held to be sufficiently identified.

A testatrix produced a sealed envelope on which was written "I confirm the contents written in the enclosed document in the presence of," etc. This was signed by her and attested by two witnesses. On her death, two days afterwards, the envelope, still sealed with the same seal, was found on her table; on being opened it was found to contain a testamentary disposition in the form of a letter. Sir Cresswell Cresswell said: "Here the fact to be proved is the identity of the instrument now produced with the document referred to in the memorandum. . . . The parol evidence shows that the envelope was sealed in a particular manner, and that it was found so sealed after the testatrix's death, without any appearance of the seal having been broken. The memorandum refers to only one paper, and only one was found in the envelope when opened. I have no doubt that the document referred to by the deceased was the paper found in the envelope after her death, and shall decree probate as prayed" (*g*).

Again, in *University College of North Wales* v. *Taylor* (*h*), a testator on the 12th March, 1905, wrote out a document in the form of a letter to his executors containing observations as to bequests he had previously made to the University College of North Wales. On the 9th June, 1905, he executed a will in which no reference was made to this document. On the 27th June, 1905, he executed a will in which he bequeathed the sum of 10,000*l.* to the University College of North Wales "upon trust to invest the same and apply the income in founding . . . new scholarships and prizes . . . to be held upon such terms and conditions and subject to such rules and regulations *as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto*." The document of the 12th March, 1905, was shown to the solicitor who prepared the will of the 27th June; and evidence was given to the effect

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(*g*) *Almosnino*, (1859) 1 S. & T. 508; contrast *Van Straubenzee* v. *Monck*, (1862) 3 S. & T. 6; *post*, p. 228.

(*h*) [1907] P. 228.

that the last will was prepared on the footing that the document of the 12th March was in fact the memorandum specified. It was argued that the reference was so vague that parol evidence was not admissible. Sir Gorell Barnes, after stating the principles on which the doctrine of incorporation is founded, said: "In my opinion the document is incorporated. It appears to be a document which was undoubtedly in existence at the time the will was made; it was a subject of discussion before the will was made; and it fulfils in every respect the description to be found in the words of the will" (*i*).

Cases in which the document referred to has been held insufficiently identified.

On the other hand, in *Van Straubenzee* v. *Monck* (*k*) a testatrix executed a paper with these words on it: "It is my wish for my dear husband to administer the moneys; the smaller bequests L. will be so kind as to attend to." She then, in the presence of the attesting witnesses, enclosed in it two papers which she had written, and folded and sealed the first paper. At her death, within the envelope were found two unexecuted sheets of paper containing bequests. When found, the envelope appeared to have been opened and resealed; there was no evidence that the papers found in it were those originally enclosed, or that they were in existence when the envelope was executed. Sir C. Cresswell said: "Identity may be ascertained by the aid of evidence of the surrounding facts; . . . such evidence, however, can only be used to aid the construction of what a testator has written. . . . The reference in A (the envelope) is not distinctly to any paper then existing. One may conjecture that the deceased was referring to something written or to be written, but it is mere conjecture; and certainly there is no such reference to any instrument as will enable the Court to ascertain it. . . . Nor is there any legal evidence to satisfy the Court when the papers were written." On these grounds

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(*i*) The following are some of the principal cases where the proof of identity was held to be sufficient: *Smith,* (1841) 2 Curt. 796; *Claringbull,* (1844) 3 N. C. 1; *Ingoldby* v. *Ingoldby,* (1846) 4 N. C. 493; *Allen* v. *Maddock,* (1858) 11 Moo. P. C. 427; *Daniell,* (1882) 8 P. D. 14; *Heathcote,* (1881) 6 P. D. 30; *University College* v. *Taylor,* [1907] P. 228.

(*k*) (1862) 3 S. & T. 6.

the learned judge refused probate of all three papers propounded (*l*).

In *In the Goods of Garnett* (*m*) a testator duly executed a document in the following terms: "The enclosed papers No. 1, 2, 3, 4, 5, 6 were signed by the testator in the joint presence of us," etc. The witnesses who attested this document saw no papers except the one they signed, but the testator said to them, "I have made certain alterations in my will; the will is in that drawer." At his death the executed paper, together with six others of a testamentary character, all signed by the testator and numbered respectively 1, 2, 3, 4, 5, 6, were found in a closed envelope, on which was written "My last will." All six documents bore dates anterior to that of the executed paper. Some other papers of a testamentary character were found among the deceased's effects. Sir Gorell Barnes said: "I have come to the conclusion that the six papers are not shown to be incorporated, so as to exclude the possibility of mistake, and are not shown to be clearly identified with the description given of them in the [executed] paper."

In *In the Goods of Pascall* (*n*) a testator in his will desired that instructions previously given by him to an attorney's clerk should be carried out. The instructions were verbal, but the clerk had at the time made short notes of them in the presence of the testator. It was held that there was not a reference to an existing document in terms which distinctly identified it.

Effect on an unexecuted testamentary paper of the execution of a document expressed to

When a testamentary paper, intended to operate as a will or codicil, has never been validly executed, very important

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(*l*) Contrast the case of *Almosnino*, (1859) 1 S. & T. 508; *ante*, p. 227.

(*m*) [1894] P. 90.

(*n*) (1868) 1 P. & D. 606. The following are some of the principal cases in which the proof of identity was held to be insufficient: *Smart* v. *Prujean*, (1801) 6 Ves. 560 (see this case commented upon 3 Curt. 504—507, 11 Moo. P. C. 444); *Sotheron*, (1841) 2 Curt. 831; *Ferraris* v. *Cooper*, (1843) 3 Curt. 468, 4 Moo. P. C. 339; *Phelps*, (1849) 6 N. C. 695; *Haynes* v. *Hill*, (1849) 7 N. C. 256; *Greves*, (1858) 1 S. & T. 250; *Drummond*, (1860) 2 S. & T. 8; *Van Straubenzee* v. *Monck*, (1862) 3 S. & T. 6; *Allnutt*, (1863) 3 S. & T. 167; *Brewis*, (1864) 3 S. & T. 473; *Singleton* v. *Tomlinson*, (1878) L. R. 3 A. C. 404; *Watkins*, (1865) 1 P. & D. 19; *Dallow*, (1866) 1 P. & D. 189; *Gill*, (1869) 2 P. & D. 6; *Paton* v. *Ormerod*, [1892] P. 247; *Garnett*, [1894] P. 90; *Eyre* v. *Eyre*, [1903] P. 131.

be a "codicil to my last will."

questions frequently arise as to the effect of the execution of a testamentary instrument, expressed to be "a codicil to my last will."

Distinction between republication and incorporation by reference.

It is important in this connection to distinguish between republication and incorporation. Before the passing of the Wills Act, 1837, it was common to republish a will or a codicil for the purpose of rendering it operative from the date of republication (*o*). It was held that a codicil would operate as a republication of a will, and that the republication of a will would amount to a republication of whatever antecedent papers might answer the description of codicils, leaving it to be ascertained by parol evidence what might be the particular papers answering the description of either will or codicil (*p*).

It will be remembered that before the Wills Act, 1837, came into operation no formalities of any kind were necessary in the execution of a will or codicil as to personal estate, but that a devise of lands must be attested by three witnesses. When, therefore, an informally executed will purported to deal with real estate, and was followed by a codicil attested by three witnesses, it was an important question whether the will was rendered operative to pass real estate by reason of the execution of the codicil. It was held that it was, provided the codicil expressly referred to the will. This was not, properly speaking, a republication, which, as the term imports, implies a previous valid execution of the paper sought to be republished, but an incorporation by reference of an unexecuted paper. Accordingly in all cases of incorporation under the Statute of Frauds there was an express reference to a paper in writing described with certainty (*q*).

It is important to remember this distinction between cases on incorporation before the Wills Act, 1837, and subsequent cases: that before the statute a testamentary paper not executed so as to affect real estate was valid as to personalty, was really a will or codicil, and might, therefore, strictly answer

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(*o*) *Croker* v. *Lord Hertford*, (1844) 4 Moo. P. C. at p. 365. A will of personalty might be republished by parol declarations: see *post*, p. 239.

(*p*) *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 452.

(*q*) *Croker* v. *Lord Hertford*, (1844) 4 Moo. P. C. at pp. 365, 366.

that description in a subsequent reference to it by that name; whereas since the Wills Act came into operation no paper not duly executed and attested can, in strictness, properly be described as a will or codicil (*r*).

A testamentary instrument, not duly executed, may be rendered operative by a subsequent codicil, duly executed, which expressly refers to it.

Where a testamentary instrument, intended to operate as a will, is not executed according to the requirements of the statute, a subsequent codicil, duly executed and expressed to be "a codicil to my last will and testament," may incorporate and thus render operative the unduly executed instrument (*s*).

But a duly executed codicil will not incorporate and validate an unexecuted testamentary instrument, whether will or codicil, unless it expressly refer to the latter (*t*).

A reference in the duly executed codicil to the will, will not incorporate an intermediate informal codicil.

Thus in *In the Goods of Phelps* (*u*) the testator made his will, duly executed, and afterwards made a first codicil on the same sheet of paper, attested by only one witness. He then executed a second codicil, duly attested, by which he referred to and confirmed the will, but took no notice of the first codicil. Sir Herbert Jenner Fust held that the first "codicil" was not established by the second, for the instrument in question was not a codicil, and therefore the confirmation of the will did not amount to a confirmation of the codicil (*x*).

(*r*) *Allen* v. *Maddock*, (1858) 11 Moo. P. C. at p. 440.

(*s*) Thus in *Allen* v. *Maddock*, (1858) 11 Moo. P. C. 427, a testatrix in 1851 made a testamentary instrument which she intended to operate as her will, but which was not attested according to the requirements of the Wills Act. In 1856 she duly executed a codicil, which was headed "This is a codicil to my last will and testament." This codicil contained no reference to the paper of 1851, which was, however, found at the testatrix's death in an envelope indorsed "Mrs. Anne Foote's [the testatrix's] will." No other will or testamentary paper was found. Held:

First, that as there was a distinct reference in the codicil to a "last will and testament," and no other will had been found, the testamentary paper of 1851 was, by parol evidence, sufficiently identified as the "last will" referred to by the codicil of 1856.

Secondly, that, though informally executed, the paper of 1851 was incorporated with and made valid by the duly executed codicil of 1856. See *Heathcote*, (1881) 6 P. D. 30.

(*t*) *Doe* v. *Evans*, (1832) 1 Cr. & M. 42; *Utterton* v. *Robins*, (1834) 1 A. & E. 423; *Smith*, (1890) 45 Ch. D. 632. As to the effect of a codicil which confirms a will without reference to intermediate duly executed codicils, *vide infra*, pp. 248, 249.

(*u*) (1849) 6 N. C. 695.

(*x*) See *Haynes* v. *Hill*, (1849) 7 N. C. 256, where a testator made a will and several codicils, the last only of which was attested. The last codicil confirmed the will, but said nothing of the codicils. Sir H. J.

But where there is first a will, then an informal codicil, and subsequently a duly executed codicil expressed to be a "*second* codicil to my will," the informal codicil is rendered operative.

But in *In the Goods of Smith* (*y*) a testator in 1838 made a codicil to his will, signed but not attested. In 1840 he made a further codicil, signed and duly attested. This was written upon the second side of the paper on which the former codicil was written, and was expressed to be "a *second codicil* to my last will." Sir H. J. Fust decreed probate of both codicils, observing: "The latter codicil being duly executed, referring to the former, is an execution of the former codicil also" (*z*).

Fust went very fully into the doctrine and held that the unattested codicils were not incorporated, there being no reference to anything but the will, and the unattested codicils not being part of it.

In *Ferraris* v. *Hertford*, (1843) 3 Curt. 468, the testator made a will and twenty-nine codicils. Some of the codicils were made before the Wills Act of 1837 and required no attestation; others were made after the Act, some of which were attested and others not. One codicil made in 1838 was unattested. The testator made a further codicil in 1839, duly executed and attested, and thereby declared that he *ratified and confirmed his will and codicils.* The question was whether the 1838 codicil was thereby incorporated and established, and it was decided by Sir H. J. Fust that it was not, and upon this principle, that it was not a codicil; that it was not distinctly referred to as such; that there were other papers which were codicils, and which would satisfy the words of the instrument referring to them; and that the Court could not, therefore, extend the words of reference to an instrument not answering the description. Affirmed *sub nom. Croker* v. *Lord Hertford*, (1844) 4 Moo. P. C. 339. A duly executed codicil, expressed to be "a codicil to my will," was held not to incorporate unattested additions made to the will prior to the execution of the codicil: *Haynes* v. *Hill*, (1849) 1 Rob. 795; even though the will, the unattested additions, and the codicil, were all written consecutively upon the same paper: *Willmott*, (1858) 1 S. & T. 36. And see *Reynolds*, (1873) 3 P. & D. 35; *Burton* v. *Newbery*, (1875) 1 Ch. D. at p. 238.

(*y*) (1841) 2 Curt. 796.

(*z*) See *Ingoldby* v. *Ingoldby*, (1846) 4 N. C. 493, where a testator made an unattested codicil to his will; and afterwards made a second, properly attested, with the words "This is *another codicil* to my will." On his death these two codicils only were found, and Sir H. J. Fust admitted them to probate. He said: "There is only one paper here which comes under the description of a codicil. It is not, indeed, a codicil, because it was not duly executed; but it is clear that the testator intended it to be a codicil. He describes the second paper as 'another codicil,' evidently referring to what he believes to be in existence. I apprehend there are cases in which a testator has bequeathed property to his children, and there being no legitimate children to answer the description, illegitimate have taken. So, here, there being no duly executed codicil, the words may have reference to an unexecuted codicil." The learned judge then adverted to the circumstance that there was a reference in the second codicil to a bequest contained in the first, and adverted to it as a not immaterial circumstance, but did not make it a *ratio decidendi.* See *Burton* v. *Newbery*, (1875) 1 Ch. D. 234.

Unexecuted and executed papers written on the same sheet of paper.

The mere fact that a duly attested codicil is written on the same sheet of paper as an informal instrument of earlier date will not effect an incorporation, unless the codicil contains a reference to the other instrument (*a*).

Incorporation of words written beneath the testator's signature.

The question of incorporation has sometimes arisen in respect of words written on the same sheet of paper as a duly executed will, but beneath and following the operative signature of the testator (*b*). But such a question can only arise if the Court is of opinion that such words are not parcel of the will so as to invalidate the execution as not complying with the Wills Act Amendment Act, 1852 (*c*).

Probate of executed document with directions to administer the estate in conformity with the trusts of a previous unexecuted document.

Where the terms of the will show that the testator has given instructions that his property shall be disposed of in the manner set out in a previous unexecuted paper, and the terms of reference are not such as to justify the Court in regarding the unexecuted paper as incorporated in the will, the Court may grant probate of the will with directions to the executor to administer the estate in accordance with the trusts of the unexecuted paper (*d*).

But see *Stockil* v. *Punshon,* (1880) 6 P. D. 9, where an unattested document containing the words "This is a third codicil to my will" was held not to be incorporated in a codicil of a subsequent date by the words "This is a fourth codicil to my will." But in *Heathcote,* (1881) 6 P. D. 30, the same learned judge (Sir J. Hannen) said: "In *Stockil* v. *Punshon* it was of no importance which way the Court decided. I therefore did not consider the question of what extraneous evidence would be sufficient to connect the one document with the other, but I acted on the impression that the bare fact of enumeration was not sufficient to incorporate the second paper." See also *Allnutt,* (1863) 3 S. & T. 167, where the previous document was referred to as a codicil by mistake.

(*a*) *Drummond,* (1860) 2 S. & T. 8; *Tovey,* (1878) 39 L. T. 235; *Doe* v. *Evans,* (1832) 1 Cr. & M. 42; *Aaron* v. *Aaron,* (1849) 3 De G. & Sm. 475; see *Allen* v. *Maddock,* (1858) 11 Moo. P. C. at p. 448; *Brewis,* (1864) 3 S. & T. 473; *Heathcote,* (1881) 6 P. D. 30; *Burton* v. *Newbery,* (1875) 1 Ch. D. at p. 238.

(*b*) See *Watkins,* (1865) 1 P. & D. 19: A will signed and attested at the foot of the first page of a foolscap sheet contained the following words:—"I do hereby bequeath the following sums to my sons and daughters hereunder named." On pages 2 and 3 the testatrix had written, before execution, a list of bequests to her sons and daughters. It was held that the will did not refer with such distinctness to a paper then in existence as to entitle pages 2 and 3 to probate. And see *Dallow,* (1866) 1 P. & D. 189.

(*c*) *Dallow,* (1866) 1 P. & D. at p. 191; and *vide ante,* p. 125.

(*d*) *Marchant,* [1893] P. 254. The rules as to the circumstances under which the Court of Chancery will give effect to a trust not disclosed, or

Where a will refers to a non-existing document, that document afterwards comes into existence, and after that again there is a codicil republishing the will.

The principle—hereafter more fully discussed—that the execution of a codicil republishes the will to which it is a codicil, has a very important result when applied to cases of incorporation by reference. For it has been held that the Court cannot, according to the authorities, give greater or less effect to a codicil than this:—to treat its execution as if the testator had at the same time sat down and re-executed his will (*e*). Accordingly when a will contains a reference to a document not existing at the date of the will, but which comes into existence afterwards, and then, after that again, there is a codicil, the following rule has been laid down:—

Where the will, *if treated as executed on the date of the codicil, and read as speaking at that date*, contains language which, within the principles already laid down, would operate as an incorporation of the document to which it refers, testamentary effect may be given to such document. But when this is not the case, the mere fact of unexecuted papers having been written or signed between the date of the will and that of the codicil, will not suffice to add such papers to the will by force of republication, or to make that testamentary which would not have been so if the will had been originally executed at the later date (*f*).

The rule was thus stated by Sir Gorell Barnes in *In the Goods of Smart* (*g*): "If the document is not existing at the time of the will, but comes into existence afterwards, and then after that again, there is a codicil confirming the will,

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not fully disclosed, in a will, and as to the evidence which is admissible to prove the terms of the trust, are scarcely within the scope of this book, but reference may be made to the case of *Fleetwood*, (1880) 15 Ch. D. 594, where the cases are reviewed. If the trust is expressed on the face of the will, but the trusts are not fully declared, no trust *afterwards* declared by a paper not executed as a will can be binding: *Johnson* v. *Ball*, (1851) 5 De G. & Sm. 85; *Briggs* v. *Penny*, (1851) 8 Mac. & G. 546; *Singleton* v. *Tomlinson*, (1878) L. R. 3 A. C. 404; and the legatee will be treated as trustee for the next of kin: *Boyes*, (1884) 26 Ch. D. at p. 535. See further, on this subject, *Stead*, [1900] 1 Ch. 237, and Wms. on Exors., p. 304, note (*z*), and pp. 1224 *et seq.*

(*e*) *Truro*, (1866) 1 P. & D. at p. 205; *vide post*, p. 247.

(*f*) *Truro*, (1866) 1 P. & D. at p. 205, *per* Sir J. P. Wilde. The case of *Mathias*, (1863) 3 S. & T. 100, in so far as it lays down a general proposition in conflict with this rule, cannot be supported: *ibid.* at p. 204.

(*g*) [1902] P. at p. 241.

. . . the will may be treated, by the confirmation given by the codicil, as executed again, and as speaking from the date of the codicil; and if the informal document is existing then, *and is referred to in the will as existing,* so as to identify it, there will be incorporation: but if the will, treated as being re-executed at the date of the codicil, still speaks in terms which show it to be referring to a future document, then it appears to me there is no incorporation."

The two cases of *In the Goods of Truro* (*h*) and *In the Goods of Smart* (*i*), when contrasted, illustrate the operation of this rule.

If the reference in the will, read as speaking from the date of the codicil, is to the document *as existing*, there will be an incorporation.

In *In the Goods of Truro* (*h*) the testatrix on the 15th of September, 1865, executed a will which contained a bequest of all such articles of silver plate "*as are contained in the inventory signed by me and deposited herewith.*" A list in the handwriting of the testatrix and headed "List of plate and plated articles left by my will dated the 15th of September, 1865," was on the 21st of September, 1865, deposited by the testatrix at her bankers, enclosed in the same envelope as her will. The list was signed by the testatrix and bore date the 21st of September, 1865. On the 10th of October, 1865, the testatrix executed a codicil to her will. Sir J. P. Wilde held that the inventory was incorporated in the will, because, treating the will as having been re-executed on the date of the codicil, and construing the words of reference by the light of the events that had then happened, they appeared with sufficient distinctness to refer to a document then existing; for the inventory referred to had then been signed by the testatrix and deposited at the bankers (*k*).

Secus if the will, read as

In *In the Goods of Smart* (*l*) a will made in 1895 contained the following words:—"I direct my trustees to give to such of

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(*h*) (1866) 1 P. & D. 201.

(*i*) [1902] P. 238.

(*k*) See *Hunt,* (1853) 2 Rob. 622 (but see the remarks of Sir Gorell Barnes on this case in *Smart,* [1902] P. at p. 241); *Stewart,* (1863) 3 S. & T. 192, 4 S. & T. 211, where the words of reference were "I direct my executors to distribute all pictures, etc., *according to any list or lists signed by me.*" A list written after the will, but before the execution of the codicil, was held to be incorporated: *Rendle,* (1899) 68 L. J. P. 125; see *Smart,* [1902] P. at p. 242.

(*l*) [1902] P. 238.

if executed on the date of the codicil, still speaks in terms which show it to be referring to a future document.

my friends *as I may designate in a book or memorandum that will be found with this will* the different articles specified for such friends in such book or memorandum." At the time when the will was made there was no such book as that mentioned in the will in existence, but a book which in some respects answered the description was written by the testatrix, prior to the execution by her in 1900 of a codicil which confirmed the will of 1895. Sir Gorell Barnes said: "The reference made at the date of the will was, I think, clearly made as to a future document. A document next comes into existence and a codicil is afterwards made; but if you treat the will according to the cases, as speaking at the date of the codicil, the reference is still in terms to a document which, even then, is future, and therefore does not comply with one of the necessary conditions, namely, that it must refer to a document as existing at the date when the will was re-executed. For these reasons I think there ought to be no incorporation of the book (*m*)."

Distinction between *title* to incorporation and the *necessity* of taking probate of a paper as incorporated.

It is important to distinguish between the title or right of a paper to be regarded as incorporated, and the necessity of taking probate of a paper referred to in the will. The title to probate depends upon the clearness and sufficiency of the words of incorporation; the necessity of taking probate depends upon the validity or invalidity of the instrument to be incorporated. For instance, if a man, by will or codicil, simply ratifies a deed valid *per se*, no one would be compelled to take probate of that deed, but the title to probate remains the same: if he ratifies an instrument inoperative and invalid *per se*, then the

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(*m*) See *Mathias*, (1863) 3 S. & T. 100, where the words of reference were "I request my trinkets may be divided *as I shall direct by a small memorandum*." Held, no incorporation. Sir C. Cresswell said: "How can the execution of a codicil . . . make that to be a part of a will which was no part of the will before; and the codicil contains no reference to the memorandum?" If these words were intended to lay down a general rule at variance with *Truro*, (1866) 1 P. & D. 201, they can no longer be supported: see *ante*, p. 234, note (*f*).

Reid, (1868) 38 L. J. P. 1, where the words of reference were "to pay . . , some small sums . . . *to be named in a letter addressed to my two nieces*." Held, no incorporation.

Durham v. *Northen*, [1895] P. 66, where the words of reference were "to set apart funds or investments which the trustees *will find noted by me*." Held, no incorporation.

As a rule, all documents incorporated by reference in a will must form part of the probate.

title and necessity coexist. If a party refers to a valid deed, and directs that his property shall be settled on similar trusts, then there is a title to probate, and—except in cases hereafter mentioned—there is also necessity (*n*); for those interested under the will are interested in having set out in the probate, under the sanction of the Court, any document referred to in the will in such a way as to be incorporated in it, and further it is convenient that the whole of the testator's will should be on record in the registry of the Court (*o*).

But the rule may be relaxed.

But though in theory an incorporated document should always be included in the probate, in practice difficulties frequently arise in carrying out this rule (*p*). The document referred to may be one in which third persons alone are interested, and it has been held that when this is the case, and the persons who have the custody refuse to allow the document to be copied and inserted in the probate, the probate may go without it (*q*). Again, the document incorporated may be of great length, so that the expense of engrossing it in the probate would be very large. In a proper case, the Court will on that ground relax the rule requiring the incorporated document to be set out at length in the probate (*r*). And where part only of the incorporated document is material, the Court will not insist on including the whole in the probate (*s*).

(*n*) *Sheldon* v. *Sheldon,* (1844) 1 Rob. at p. 89. In *Bizzey* v. *Flight,* (1876) 3 Ch. D. 269, an incomplete settlement was held to be perfected by a confirmation contained in a will; but see *Hubbard,* (1865) 1 P. & D. 53. For cases in which clauses in a previously revoked will have been referred to in a later will, see *Sinclair,* (1843) 3 Curt. 746; *Ouchterlony,* (1863) 3 S. & T. 175; *Gill,* (1869) 2 P. & D. 6; *Bangham,* (1876) 1 P. D. 429.

(*o*) *Sibthorp,* (1866) 1 P. & D. at p. 108. It has been suggested that unless a document referred to in the will is admitted to probate, a Court of construction might hold that such document were not part of the will: *Sheldon* v. *Sheldon,* (1844) 1 Rob. at p. 89; *Sibthorp* (cited *supra*), at p. 108. But see *Bizzey* v. *Flight,* (1876) 3 Ch. D. at p. 273.

(*p*) *Sheldon* v. *Sheldon,* (1844) 1 Rob. at p. 86; *Battersbee,* (1852) 2 Rob. 439.

(*q*) *Sheldon* v. *Sheldon,* (1844) 1 Rob. at p. 87; *Battersbee,* (1852) 2 Rob. 439; *Sibthorp,* (1866) 1 P. & D. 106. An affidavit should be filed to that effect: see *Astor,* (1876) 1 P. D. 150.

(*r*) *Sheldon* v. *Sheldon,* (1844) 1 Rob. at p. 86; *Lansdowne,* (1863) 3 S. & T. 194; *Dundas,* (1863) 32 L. J. P. 165; *Balme,* [1897] P. 261; see *Astor,* (1876) 1 P. D. at p. 153.

(*s*) *Limerick,* (1850) 2 Rob. 313.

Two wills, one disposing of property in England, the other of property abroad.

If one refers to the other in such a way as to incorporate it, both must be included in the probate.

If two independent wills are made, one disposing of the testator's property in England, and the other disposing of his property abroad, the former alone will be admitted to probate in the Probate Division (*t*). But the English will, if last, may contain a reference to the foreign will, so as to incorporate it; or the foreign will, if last, may incorporate the English will, and then the probate should include both documents, as they virtually become one document (*u*).

(*t*) *Murray*, [1896] P. at p. 71; and see *ante*, p. 13.

(*u*) *Murray*, [1896] P. at p. 71; *Howden*, (1874) 43 L. J. P. 26; *Harris*, (1870) 2 P. & D. 83; *Wilson*, (1864) quoted 43 L. J. P. at p. 28; see *Coode*, (1867) 1 P. & D. 449; *Saussaye*, (1873) 3 P. & D. 42; *Astor*, (1876) 1 P. D. 150; and *Mercer*, (1870) 2 P. & D. 91, where a copy of a will, the original of which was in India, was held to be incorporated by reference in a codicil; and see *ante*, p. 13.

CHAPTER VI.

OF THE REPUBLICATION OF WILLS.

Section 1.

HOW A WILL MAY BE REPUBLISHED OR REVIVED.

The law as to the republication of wills prior to the Wills Act, 1837.

In his work on Executors (*a*) Sir Edward Vaughan Williams gives the following summary of the law as to the republication of wills prior to the Wills Act, 1837:—

"By the law as it stood before the passing of the Wills Act, by reason of sect. 5 of the Statute of Frauds, no will of lands could be republished except by re-execution in the presence of three attesting witnesses, or by a codicil duly executed according to the statute. But as that section did not apply to wills of personalty, such a will might be republished not only by an unattested codicil or other writing, but by the mere parol acts or declarations of the testator (*b*). . . . Satisfactory proof of recognition, *animo republicandi*, by the testator, was sufficient republication even of a cancelled or obliterated will, if it continued legible (*c*).

Republication of a cancelled or obliterated will.

"As to republication by codicil, the cases on wills, made before the Wills Act, show that a codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will whether it be so described in such codicil or not; and as such, furnishes conclusive evidence of the testator's considering his will as then existing (*d*). But although the effect of a codicil, as to

Republication by a codicil: in case of wills made before the Wills Act.

(*a*) Wms. on Exors., pp. 140 *et seq.*; and see further, as to the law before the Act, the judgment of Sir J. P. Wilde in *Steele*, (1868) 1 P. & D. 575, at pp. 577, 578.

(*b*) *Ibid.*, citing Wentw. Off. Ex., Chap. I., p. 60, 14th ed.

(*c*) *Ibid.*, citing Wentw. Off. Ex., Chap. I., p. 65, 14th ed.

(*d*) *Ibid.*, citing *Acherley* v. *Vernon*, (1720) 3 Bro. P. C. 107; *Potter* v. *Potter*, (1750) 1 Ves. Sen. 437; *Jackson* v. *Hurlock*, (1764) Ambl. 487; *Gibson* v. *Lord Montford*, (1750) 1 Ves. Sen. 485; *Serocold* v.

republication, is by no means dependent on its being annexed to the will, yet if there are several wills of different dates, and there be a question to which of these the codicil is to be taken as a codicil, the circumstance of annexation is most powerful to show that it was intended as a codicil to the will to which it is annexed, and to no other. . . . (*e*)

A codicil did not republish a will if a contrary intention appeared on the face of it.

"But although the general rule as to the republishing operation of a codicil is as above stated, yet in all cases of this kind the question to be considered is, whether the particular case is or is not within the general rule (*f*): for if it appears on the face of the codicil that it was not the intention of the testator to republish, the ordinary presumption derived from the existence of the codicil will be counteracted" (*g*).

Hemming, (1758) 2 Lee, 490; *Barnes* v. *Crowe*, (1792) 1 Ves. 486 (overruling *Att.-Gen.* v. *Downing*, (1769) Ambl. 573); *Doe* v. *Davy*, (1774) Cowp. 158; *Pigott* v. *Waller*, (1802) 7 Ves. 98; *Goodtitle* v. *Meredith*, (1813) 2 M. & S. 5; *Hulme* v. *Heygate*, (1816) 1 Mer. 285; *Rowley* v. *Eyton*, (1817) 2 Mer. 128; *Duffield* v. *Elwes*, (1825) 3 B. & C. 705; *Guest* v. *Willasey*, (1825) 2 Bing. 429, 3 Bing. 614; *Crosley*, (1828) 2 Hagg. 80, 1 Saund. 278, *b, et seq.*, note to *Duppa* v. *Mayo; Williams* v. *Goodtitle*, (1830) 10 B. & C. 895; *Doe* v. *Walker*, (1844) 12 M. & W. 591; *Skinner* v. *Ogle*, (1845) 1 Rob. 363; *Doe* v. *Marchant*, (1843) 6 M. & G. 813, 825; *Dickinson* v. *Stidolph*, (1861) 11 C. B. (N. S.) 341; *Re Earle's Trust*, (1858) 4 K. & J. 673; *Re Champion*, [1893] 1 Ch. 101; *Re Wilcock*, [1898] 1 Ch. 95; *Re Rayer*, [1903] 1 Ch. 685. So a will or codicil containing a devise of real estate, but not duly attested, may be republished and made operative by a subsequent codicil having the requisite attestation, though the latter document be in no way annexed to the will or codicil (*vide ante*, pp. 230 *et seq.*). But it has been held that the duly executed codicil must distinctly refer to the informal instrument: see *Doe* v. *Evans*, (1832) 1 Cr. & M. 42; *Utterton* v. *Robins*, (1834) 1 A. & E. 423. So in *Re Smith*, (1890) 45 Ch. D. 632, Stirling, J., after quoting the passage in the text, said: "The learned author is there, as I read his language, speaking of a codicil which refers to the will. While the long list of cases given in the note to the passage just cited forms an ample justification of the proposition of law which I understand to be there laid down, in every one of those cases, with one apparent exception . . . there appears to have been some sort of reference in the codicil to the preceding will. . . . Consequently none of the cases . . . support the proposition that a reference to the will is unnecessary."

(*e*) *Ibid.* citing *Rogers* v. *Pittis*, (1822) 1 Add. at p. 41; *Barnes* v. *Crowe*, (1792) 1 Ves. at p. 490.

(*f*) *Ibid.*, citing *Bowes* v. *Bowes*, (1801) 2 B. & P. at p. 506, *per* Lord Eldon, C.

(*g*) *Ibid.*, citing *Strathmore* v. *Bowes*, (1798) 7 T. R. 482; S.C. *sub nom. Bowes* v. *Bowes*, 2 B. & P. 500; *Heylin* v. *Heylin*, (1775) Cowp. 132, Lord Mansfield's judgment; *Parker* v. *Biscoe*, (1819) 3 J. B. Moore, 24; *Smith* v. *Dearmer*, (1829) 3 Y. & J. 278; *Ashley* v. *Waugh*, cited in *Doe* v.

Provisions of the Wills Act s. 22.

Sect. 22 of the Wills Act, 1837, provides: "No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same: and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

The provisions of the section only apply to wills and codicils which have been *in any manner revoked.*

It is necessary to consider the provisions of the section in detail. First, it will be observed that the provisions of the first part of the section apply only to the wills and codicils which have been in any manner revoked. It is said that although no will, since the Wills Act, 1837, came into operation, can be republished by any parol act or declaration of the testator, or by any codicil not duly executed in accordance with the provisions of the Act, yet a codicil, duly executed, will still amount to a republication of the will, according to the old law, unless it appears on the face of the codicil that it was not the intention of the testator to republish; or unless the will has been in some manner revoked, in which case the statute further requires that the codicil shall show an intention to revive (*h*).

Revival by implication abolished by the statute.

A will or codicil which has been in any manner revoked can, since the statute, be revived only by re-execution, or by a codicil duly executed, showing an intention to revive the same. The statute is designed to do away with the revival of wills by mere implication (*i*); a will can no longer be revived by any oral declaration (*k*). Nor, if a will has been revoked, wholly or in part, can destruction of the revoking instrument revive the will, or the part thereof which has been revoked (*l*).

Nor can destruction of the revoking instrument revive the will.

Walker, (1844) 12 M. & W. 598, 601; *Moneypenny* v. *Bristow,* (1832) 2 Russ. & M. 117; *Hughes* v. *Turner,* (1835) 3 My. & K. 666; *Doe* v. *Hole,* (1850) 15 Q. B. 848; *Hughes* v. *Hosking,* (1856) 11 Moo. P. C. 1.

(*h*) Wms. on Exors., pp. 145, 146.

(*i*) *Steele,* (1868) 1 P. & D. at p. 578; *Marsh* v. *Marsh,* (1860) 1 S. & T. at p. 533.

(*k*) *Hale* v. *Tokelove,* (1850) 2 Rob. at p. 325.

(*l*) *Major* v. *Williams,* (1843) 3 Curt. 432; *Brown,* (1858) 1 S. & T. 32; *Hodgkinson,* [1893] P. 339; *vide ante,* pp. 177, 178.

A revoked will may be revived by re-execution, or by a duly executed codicil, showing an intention to revive.

The methods of revival prescribed by the statute are two in number:—(1) by re-execution (*m*), and (2) by a duly executed codicil "showing an intention to revive."

The intention to revive must appear upon the face of the codicil.

Admissibility of extrinsic evidence.

With reference to the second mode of revival, it has been held that the intention to revive must appear upon the face of the codicil (*n*). Unless there is a latent ambiguity in the codicil, extrinsic evidence of the testator's intention to revive any, and what, instrument is inadmissible (*o*), but the Court will always receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will better enable it to read the true sense of the words he has used (*p*).

In what way the intention to revive may be expressed.

The intention to revive must appear on the face of the codicil, either by express words referring to the will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question (*q*).

It is not necessary to specify the date of the will.

A revoked will may be revived by a codicil which refers to it in such a way as to show an intention to revive, even though the reference in the codicil does not specify the date of the will (*r*), or gives an incomplete or inaccurate date (*s*) or description (*t*). A codicil which merely refers to the testator's "will" may revive a will which has been revoked, if it appears that there was not more than one will of the testator in existence (*u*); but where a testator refers in

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(*m*) As to what amounts to a re-execution, see *Dunn* v. *Dunn*, (1866) 1 P. & D. 277; and as to the effect of the re-execution of a will on an existing codicil thereto, see *Wade* v. *Nazer*, (1847) 1 Rob. 627, and *post*, p. 249.

(*n*) *Steele*, (1868) 1 P. & D. at p. 578.

(*o*) *Walpole* v. *Cholmondeley*, (1797) 7 T. R. 138; *Goodenough*, (1861) 2 S. & T. 141; *Steele*, (1868) 1 P. & D. at p. 576; *Chapman*, (1844) 1 Rob. 1.

(*p*) *Steele*, (1868) 1 P. & D. at p. 576.

(*q*) *Steele*, (1868) 1 P. & D. at p. 578.

(*r*) *McCabe*, (1862) 2 S. & T. 474.

(*s*) *Jansen* v. *Jansen*, (1797) quoted in *Rogers* v. *Pittis*, 1 Add. at p. 38; *Houblon*, (1865) 11 Jur. N. S. 549; *Green*, (1899) 79 L. T. 738.

(*t*) *Thomson* v. *Hempenstall*, (1849) 1 Rob. 783.

(*u*) *Neate* v. *Pickard*, (1843) 2 N. C. 406; *Marsh* v. *Marsh*, (1860) 1 S. & T. at p. 533.

a codicil to a last will, and there is nothing in the contents of the codicil to point to any particular will, it must be construed to refer to the will in legal existence as the last will, and not to a revoked will (*x*).

Mere physical annexation of a codicil to a will which has been revoked, is not sufficient to show an intention to revive, unless there is some reference to the provisions of the will.

The mere physical annexation—*e.g.*, by a piece of tape—of a duly executed codicil of later date to testamentary papers which have been revoked, is not in itself a ground for inferring the "intention to revive" required by the statute (*y*).

Where a testator, whose will leaving the residue of his property to his first wife (Sarah Terrible) had been revoked by his marriage to his second wife (Martha Terrible), executed a memorandum written at the foot of the will in the following terms: "I give and bequeath to my wife Martha Terrible, my wife Sarah Terrible being void by death," it was held that the will was revived (*z*).

Effect of reference in a codicil to a revoked will by its date alone.

Cases of difficulty arise in considering the effect of a reference, in a codicil, to a revoked will by its date alone, without any further expression of an intention to revive. In the earlier cases, it was undoubtedly held, that if a codicil referred to a revoked will by its date, that was sufficient to effect a revival of the instrument referred to, even in cases where parol evidence, if admissible, would have established beyond all doubt that the reference in question was nothing but a blunder—an error having arisen from some obvious cause, and the date of a revoked instrument having been inserted by mistake for that of another will which the testator intended to confirm (*a*).

In the early cases such a reference, even if introduced by mistake, was held to revive the revoked will.

The question was, however, exhaustively considered by Sir J. P. Wilde in *In the Goods of Steele* (*b*). After stating that he doubted whether any testator who bore in mind that he had revoked his will, and had substituted another

But in more recent cases it has been laid down that references in codicils to revoked wills by their dates

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(*x*) *Hale* v. *Tokelove,* (1850) 2 Rob. at p. 326; *Marsh* v. *Marsh,* (1860) 1 S. & T. at p. 533; *Steele,* (1868) 1 P. & D. at p. 579.

(*y*) *Marsh* v. *Marsh,* (1860) 1 S. & T. 528.

(*z*) *Terrible,* (1858) 1 S. & T. 140.

(*a*) *Walpole* v. *Cholmondeley,* (1797) 7 T. R. 138; *Goodenough,* (1861) 2 S. & T. 141; *Chapman,* (1844) 1 Rob. 1; *Payne* v. *Trappes,* (1847) 1 Rob. 583.

(*b*) (1868) 1 P. & D. 575, at p. 579.

alone are insufficient to show an intention to revive;

for it, ever sat down with the purpose of revoking his last will and reviving the former one, and set about the execution of that purpose by making a codicil simply referring by date to his first will, the learned judge said: "The Court ought to be slow to conclude that a testator has manifested in this indirect way a desire to revoke his last will, and it should scrutinize narrowly the language of a codicil which is said to show such an intention, lest in the desire to follow the testator's wishes too blindly it should set them at nought altogether." Accordingly, in *In the Goods of May* (*c*), where a testator had first made a will on the 11th of January, 1860, then a second will on the 18th of August, 1860, in terms revoking the first, and finally a codicil which was in fact intended—as parol evidence, if admissible, clearly showed—to be a codicil to the second will, but by mistake was expressed to be a codicil to the testator's "last will and testament bearing date the 11th day of January, 1860," the learned judge held that the mere reference in the codicil to the revoked will by its date was insufficient to revive the revoked will, and consequently to revoke the intermediate will, there being no other evidence on the face of the codicil of an intention to revive the will referred to. This decision has been followed in a number of subsequent cases, in which mistaken references to revoked wills by their dates have occurred in codicils (*e*).

but *semble* where there is no question of a mistake, such a reference may suffice,

But, where there is no question of any mistake, a reference in a codicil to a revoked will by its date alone may, it seems, be sufficient expression of an intention to revive. Thus in *In the Goods of Reynolds* (*f*), where a testator executed a will in May, 1866, and a codicil to it in May, 1871; then, in November, 1871, executed a will revoking all previous testamentary papers; it was held that the execution by him of a codicil in 1872, expressed to be a codicil to his will dated May, 1866, was sufficient to revive that will, there being nothing to show that

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(*c*) (1868) 1 P. & D. 581.

(*e*) *Steele,* (1868) 1 P. & D. 575, 580; *Wilson,* (1868) 1 P. & D. 582; *Ince,* (1877) 2 P. D. 777; *Gordon,* [1892] p. 228; and see *Whatman,* (1864) 34 L. J. P. 17. In *Gordon,* [1892] P. 228, the mistaken date was omitted from the probate.

(*f*) (1873) 3 P. & D. 35.

the testator did not mean what he said, namely, that the codicil should be a codicil to that will.

unless the codicil contains expressions which show a contrary intention.

On the other hand, a reference in a codicil to a revoked will by its date would not revive that will if—quite apart from any question of mistake—there were words in the codicil which showed a contrary intention (*g*).

If by mistake, a codicil not only refers to a revoked will by its date, but also refers to the terms and provisions of that will,

the revoked will must be held to be revived.

Although where a mistake has been made merely as to the date of the will to which it was intended to append the codicil, the reference to a revoked will by its date alone is held not to revive that instrument, the case is very different if the mistake goes further still, and the codicil refers not only to the date, but also to the terms and provisions of the revoked will. For where the mind of the draftsman, whether the testator himself or someone employed by him, has been really applied to the words of the particular instrument, it is impossible for the Court to say that it was by mistake that this instrument was referred to instead of another, and that a codicil which purports to be a codicil to a particular will and which refers to and modifies its provisions, does not revive that will (*h*). Thus in *In the Goods of Stedham* (*i*) a testator made two wills, one in 1877 and the other in 1878; both were kept by his solicitor in his safe. In 1880 the solicitor was desired by the testator to prepare a codicil to his will, and taking out the wrong will by mistake, he prepared a codicil, expressed to be a codicil to the will of 1877, in which the terms and language of that will were employed and its provisions referred to. It was held that the codicil revived the will of 1877 (*k*).

If a codicil refers to a will which has been entirely destroyed by the testator *animo revocandi*, no

But if a codicil refers to a will with the intention of reviving it and it turns out that such will has been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival (*l*). Nor can the draft of the will, if in

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(*g*) *Dennis*, [1891] P. 326.

(*h*) *Dyke*, (1881) 6 P. D. 207, at p. 208.

(*i*) (1881) 6 P. D. 205.

(*k*) See *Dyke*, (1881) 6 P. D. 207; *Chilcott*, [1897] P. 223.

(*l*) *Hale* v. *Tokelove*, (1850) 2 Rob. 318, 328; *Newton* v. *Newton*, (1861) 5 L. T. (N. S.) 218; *Rogers* v. *Goodenough*, (1862) 2 S. & T. 342; *Steele*, (1868) 1 P. & D. 575, 576; *Reade*, [1902] P. 75.

revival can be effected.

existence, be admitted to probate (*m*). But it seems that where one part of a will in duplicate has been destroyed by the testator on the execution of a subsequent will in terms revoking the former, but the other part is in existence, the will may be revived by a codicil, subsequently executed, expressing an intention to revive it (*n*).

An intermediate will is not revoked.

It was at one time held that although the destroyed will was not revived, any intermediate will was revoked (*o*); but this view has since been discredited (*p*).

Reason for the rule.

The reason for this remarkable rule is stated to be that a will which has been revoked and actually destroyed exists no longer in law or in fact: it does not exist as a will, since it has been revoked; nor as a written instrument, as a paper writing, for it has been destroyed. Not being either a will or a writing, how then can it again become a will? It can never be revived in its original condition as a written instrument, and thus the very first thing required of a valid will by the Wills Act, 1837, namely, that it should be in writing, cannot be satisfied (*q*).

Quære whether the rule applies to a will which has been accidentally destroyed.

Whether the rule applies to a will which has been accidentally lost, or destroyed *sine animo revocandi*, is still an open question (*r*), though the reason cited above—which can scarcely be regarded as convincing when the practice of the Court in admitting to probate the contents of wills which have been lost or destroyed by accident is remembered—certainly seems to apply to this case also. The case, however, could scarcely arise in practice (*s*).

Revival by a conditional codicil.

A codicil expressed to take effect only upon an event which

(*m*) *Hale* v. *Tokelove,* (1850) 2 Rob. at p. 331.

(*n*) *Payne* v. *Trappes,* (1847) 1 Rob. 583.

(*o*) *Hale* v. *Tokelove,* (1850) 2 Rob. at p. 329; *Newton* v. *Newton,* (1861) 5 L. T. (N. S.) 218; but see *Lord St. Helens* v. *Lady Exeter,* (1789) 3 Phill. 461, n.

(*p*) *Newton* v. *Newton,* (1861) 12 Ir. Ch. Rep. 118, C. A.; *Rogers* v. *Goodenough,* (1862) 2 S. & T. 342.

(*q*) *Rogers* v. *Goodenough,* (1862) 2 S. & T. at p. 350.

(*r*) *Hale* v. *Tokelove,* (1850) 2 Rob. at p. 330; *Rogers* v. *Goodenough,* (1862) 2 S. & T. at p. 351.

(*s*) The will would have first to be accidentally destroyed, then revoked by marriage or by a later will, and then attempted to be revived by a subsequent codicil.

does not happen, republishes a will to which it refers by date, and is on that account entitled to probate (*t*). And when a codicil revives a revoked will subject to the happening of a contingency which is in suspense at the death of the testator, the revoked will is entitled to probate immediately upon his death (*u*).

Conditional revival.

Where a revoked will had been revived by a codicil, and that codicil was subsequently destroyed by the testator, the question arose whether the destruction of the instrument upon which the will depended had left the will inoperative. It was held that the testator could not have intended the destruction of the codicil to have that effect, and that as he had destroyed it under a misconception of the effect of his act, the destruction was not *animo revocandi*, and probate was granted of the will and of the codicil as contained in a draft (*x*).

Effect of destruction of a codicil by which a revoked will has been revived.

Section 2.

CONSEQUENCES OF REPUBLICATION.

Sect. 34 of the Wills Act, 1837, provides: "Every will re-executed or republished, or revived by any codicil shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived."

The will republished is to be deemed to have been made at the time of its republication.

The republication of a will is tantamount to the making of that will *de novo*; it brings down the will to the date of the republication, and makes it speak, as it were, at that time. In short, the will so republished is, to all intents and purposes, a new will. Consequently, upon the ordinary and

It revokes any other will of a date prior to the republication.

(*t*) *Da Silva*, (1861) 2 S. & T. 315.

(*u*) *Bangham*, (1876) 1 P. D. 429.

(*x*) *James* v. *Shrimpton*, (1876) 1 P. D. 431. This case does not expressly decide that a revoked will, which has been revived by a codicil, can be rendered inoperative by subsequent destruction of the codicil by the testator with the intention not only of revoking the codicil, but also of revoking the will. This question must therefore be regarded as unsettled, but, since the statute was designed to abolish not only revival by implication, but also revocation by implication, would perhaps be decided in the negative: *vide ante*, p. 191; and see *Marsh* v. *Marsh*, (1860) 1 S. & T. at p. 533.

universal principle that of any number of wills the last and newest is that in force, it revokes any will of a date prior to that of the republication (*y*).

The republication of a will which itself contains a clause revoking former testamentary instruments, therefore, revokes any intermediate wills executed between the dates of its original execution and its republication. In the opinion of Sir Edward Vaughan Williams (*z*), the result is the same even though the republished will contains no clause of revocation, and its provisions are not wholly inconsistent with those of the intermediate wills. But the practice of the Court in such cases appears to be to hold that the intermediate wills are not necessarily revoked, and to admit all the documents to probate in order that the Court of construction may determine their effect when interpreted together (*a*).

Effect of the republication of a will on the codicils thereto,

Difficult questions arise in determining the effect of the republication of a will upon codicils thereto. Where the instrument which effects the republication expressly refers to the codicils, no difficulty can arise, for the testator may always by apt words express his intention to revoke any codicil already made, and to set up the original will unaffected by any codicil, or on the other hand to confirm and republish his will together with the codicils (*b*).

where there is first a will, then a first codicil modifying the will, then a second codicil confirming the will, but not mentioning the first codicil.

But assuming a testator to have made a will, to have made a first codicil modifying that will, to have made a second codicil confirming that will, but observing an absolute silence with regard to the first codicil, what is the effect of the second codicil? Does it republish the will as it originally stood, or does it confirm the will as modified by the first codicil?

1. Where the first codicil has been duly executed, and neither it nor the will has been revoked.

In this case *primâ facie* the will as modified by the first codicil is confirmed, and the first codicil is not revoked; for

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(*y*) *Per* Sir John Nicholl in *Rogers* v. *Pittis*, (1822) 1 Add. at p. 38. See *Truro*, (1866) 1 P. & D. 201, 203.

(*z*) Wms. on Exors., p. 147, note (*r*).

(*a*) *Stedham*, (1881) 6 P. D. 205; *Dyke*, (1881) 6 P. D. 207; *Chilcott*, [1897] P. 223; *Green*, (1899) 79 L. T. 738.

(*b*) See *Green* v. *Tribe*, (1878) 9 Ch. D. at p. 234.

if a man confirms and ratifies his last will he ratifies and confirms it with every codicil that has been added to it. And the ratification of a will, expressly described by its date without any reference to its codicils, is a ratification of the will as modified by the codicils, and does not therefore revoke the codicils which were made between the date of the will and the confirming codicil (*c*).

But in every case it is a question of the intention of the testator, and although a reference simply to the date of the will is not sufficient in itself to restrict the confirmation to that particular document, yet if other words and surrounding circumstances convey that intention with reasonable certainty, the first codicil will be treated as revoked, and the will together with the second codicil only admitted to probate (*d*).

2. Where the first codicil was duly executed, but the will and first codicil have been revoked.

In this case a reference in the reviving codicil to the will alone will not, it seems, be a sufficient expression of an intention to revive the first codicil (*e*).

3. Where the first codicil was never duly executed, and can have force and effect, if at all, only if incorporated in and set up by the later codicil.

This class of cases has been discussed in an earlier chapter (*f*). It seems that merely confirming, in the second codicil, the will by its date, will not operate upon the earlier codicil so as to give it force and effect (*g*), but if the later codicil is described as a *second* codicil to the will, that may suffice to do so (*h*).

Sect. 22 of the Wills Act provides: "When any will or

(*c*) *Crosbie* v. *MacDoual*, (1799) 4 Ves. 610; *Smith* v. *Cunningham*, (1823) 1 Add. 448; *Ward* v. *Nazer*, (1847) 1 Rob. 627 (a case of re-execution); *Saussaye*, (1873) 3 P. & D. 42; *Green* v. *Tribe*, (1878) 9 Ch. D. 231; *Follett* v. *Pettman*, (1883) 23 Ch. D. 337.

(*d*) *Greenough* v. *Martin*, (1824) 2 Add. 239; *Upfill* v. *Marshall*, (1843) 3 Curt. 636; *McLeod* v. *McNab*, [1891] A. C. 471.

(*e*) *Reynolds*, (1873) 3 P. & D. 35; *vide ante*, p. 231, note (*x*).

(*f*) *Ante*, pp. 231 *et seq.*

(*g*) *Burton* v. *Newbery*, (1875) 1 Ch. D. 234, dissenting from *Gordon* v. *Reay*, (1832) 5 Sim. 274; *Aaron* v. *Aaron*, (1849) 3 De G. & Sm. 475; *vide ante*, p. 231, note (*x*).

(*h*) *Smith*, (1841) 2 Curt. 796, *ante*, p. 232, and other cases there cited.

Where a will is first partly revoked and then wholly revoked.

codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown" (*i*).

Further consequences of republication.

The execution of a codicil which republishes a will has further important consequences. It may give effect to unattested alterations in a will (*k*), or render the will effective to incorporate documents which have come into existence subsequent to its execution (*l*), or render valid an unexecuted will or other paper (*m*). These consequences have been discussed at length in earlier chapters. It may also extend the operation of the will to persons and property to whom or to which the description is applicable at the date of republication, but that subject is not within the scope of this book.

Effect of republication by a person formerly of unsound mind, who has recovered his understanding.

Finally, if a testator make a will while of unsound mind, and afterwards recover his understanding, and republish it, it would doubtless become a valid will; though the mere fact of his recovery, without more, cannot give it any force or strength (*n*).

(*i*) See *Neate* v. *Pickard,* (1843) 2 N. C. 406; *Hodgkinson,* [1893] P. 339.

(*k*) *Ante,* p. 217.

(*l*) *Ante,* pp. 234 *et seq.*

(*m*) *Ante,* pp. 231 *et seq.*

(*n*) Wms. on Exors., p. 156, citing Swinb., Part II., s. 3, pl. 3.

CHAPTER VII.

OF THE APPOINTMENT OF EXECUTORS.

Meaning of the term "executor."

An executor is he to whom another man commits by will the execution of that his last will and testament (*a*). "To appoint an executor," says Swinburne (*b*), "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts and the performance of his will."

The bare nomination of an executor is sufficient to entitle a will to probate.

"The bare nomination of an executor, without giving any legacy or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved" (*c*).

Section 1.

WHO IS CAPABLE OF BEING AN EXECUTOR.

Who may be an executor.

All persons are capable of being executors that are capable of making wills, and some others besides (*d*).

The King.

The King may be appointed executor, in which case he nominates such persons as he shall think proper to officiate the execution of the will (*e*).

(*a*) 2 Black. Comm. 503.

(*b*) Part IV., s. 2, pl. 2, quoted Wms. on Exors., p. 157.

(*c*) Wms. on Exors., 157, citing Godolph., Part II., c. 5, s. 1; see *Brownrigg* v. *Pike,* (1882) 7 P. D. at p. 64; *Lancaster,* (1859) 1 S. & T. 464. The appointment of an executor entitled a will dealing only with realty to probate, even before the Land Transfer Act, 1897: *Jordan,* (1868) 1 P. & D. 555; *secus,* before the Married Women's Property Act, 1882, and the Land Transfer Act, 1897, the will of a married woman made in exercise of a power which related only to real estate: see *O'Dwyer* v. *Geare,* (1859) 1 S. & T. 465; *Barden,* (1867) 1 P. & D. 325; *Tomlinson,* (1881) 6 P. D. 209; *Cubbon,* (1886) 11 P. D. 169; *Hornbuckle,* (1890) 15 P. D. 149; and *vide ante,* pp. 15, 94.

(*d*) 2 Black. Comm. 503.

(*e*) Bacon's Abr. Exors., A. 1; Godolph., Part II., c. 1, s. 2.

Corporations aggregate.

A corporation aggregate may be appointed executor, and in such a case the Court will grant administration with the will annexed to its syndic, that is, the person duly appointed by the corporation to take the grant (*f*).

Corporations sole.

A corporation sole may be nominated executor, and may take probate in the same way as an individual (*g*).

Partnership firm.

The appointment of a partnership firm as executors, is the appointment of the individuals composing the firm (*h*).

Aliens.

An alien may be appointed executor, and may take probate as such (*i*).

Infants.

An infant may be appointed executor; nay, even an infant *in ventre sa mère* may be made executor (*k*).

But no infant can act as executor during his minority (*l*); accordingly where an infant is appointed sole executor, administration with the will annexed will be granted to another, for the use and benefit of the infant until he attains the age of twenty-one years (*m*). But where there are several executors, and one of them is under age, no administration *durante minore ætate* need be granted, for those of full age may execute the will (*n*).

Married women.

A married woman may be appointed executrix, and, since January 1, 1883 (the date when the Married Women's Property Act, 1882, came into operation), may act in that office as if she were a *feme sole*, without any consent on the part of her husband (*o*).

Formerly a married woman could not accept the office of executrix or administratrix without her husband's consent (*p*).

(*f*) *Darke*, (1859) 1 S. & T. 516; *Hunt*, [1896] P. 288; *Martin*, (1904) 90 L. T. 264; see *Law Guarantee Society* v. *Bank of England*, (1890) 24 Q. B. D. 406; *Re Thompson's Settlement*, [1905] 1 Ch. 229.

(*g*) *Haynes*, (1842) 3 Curt. 75.

(*h*) *Fernie*, (1849) 6 N. C. 657.

(*i*) See 33 & 34 Vict. c. 14 (Naturalization Act, 1870), s. 2, *ante*, p. 40.

(*k*) 2 Black. Comm. 503; Swinb., Part V., s. 1, pl. 6; Godolph., Part II., c. 9, s. 1; Bac. Abr. Exors., A. 7.

(*l*) *Stewart*, (1875) 3 P. & D. 244.

(*m*) 38 Geo. III. c. 87, s. 6, see *post*, p. 368. Before this Act was passed, an infant could act as executor on attaining the age of seventeen: 2 Black. Comm. 503.

(*n*) *Foxwist* v. *Tremain*, (1670) 1 Mod. 47; *Pigot and Gascoigne's Case*, (1572) cited Brownl. 46; see *post*, p. 368.

(*o*) 45 & 46 Vict. c. 75, s. 1, sub-s. 2; s. 18; s. 24.

(*p*) See Wms. on Exors., p. 160.

A convicted felon or outlaw may be appointed executor (*q*) and an executor who has obtained probate, notwithstanding a conviction of felony, and notwithstanding outlawry or attainder, may continue to act as executor, and, if his testator were himself an executor, to represent him in that capacity (*r*). The Court cannot refuse to grant probate to a person appointed executor, on the ground that, after the death of the testator, he was convicted of felony (*s*).

Felons.

Persons of unsound mind are incapable of acting as executors or administrators, for their disability renders them incapable not only of executing the trust reposed in them, but also of determining whether they will or will not take upon themselves the execution of it (*t*). Wherefore, if one of unsound mind is appointed executor, or if an executor becomes insane, the Court may commit the administration to another (*u*).

Persons of unsound mind.

If the sole executor is or becomes lunatic, it is the practice to make a grant of administration with the will annexed, for the use and benefit of the executor during his lunacy (*v*).

When one of several executors all of whom have proved the will, becomes insane, it is the practice to revoke the grant and to make a fresh grant of probate to the other executors, reserving power to the lunatic, in case of his recovery, to join in the probate (*w*).

By the Public Trustee Act, 1906, s. 5 (1), the "Public Trustee" (an office created by that Act, the holder of which office is constituted a corporation sole) may by that name, or any other sufficient description, be appointed executor, either alone or jointly with any other person or persons (*x*).

Public Trustee Act, 6 Edw. VII. c. 55.

(*q*) Bac. Abr. Exors., A. 3, *vide post*, p. 381.

(*r*) *Smethurst* v. *Tomlin*, (1861) 2 S. & T. at p. 146.

(*s*) *Smethurst* v. *Tomlin*, (1861) 2 S. & T. 143.

(*t*) Bac. Abr. Exors., A. 5; Godolph., Part II., c. 6, s. 2.

(*u*) Bac. Abr. Exors., A. 5; *Hills* v. *Mills*, (1686) 1 Salk. 36; *Evans* v. *Tyler*, (1849) 2 Rob. at pp. 133, 134.

(*v*) *Vide post*, pp. 374 *et seq.*

(*w*) *Shaw*, [1905] P. 92; *Sowerby*, (1892) 65 L. T. 764; see *post*, p. 378.

(*x*) It is considered that the Public Trustee, when he accepts office as executor, continues the chain of executorship. *Vide post*, App. IV., p. 932.

Save as aforesaid the Court has no discretion, but must grant probate to the person appointed executor.

Where a will has been made, and an executor appointed, the Court cannot exercise any discretion as to granting or refusing probate. If probate is refused, it must be on the ground of some legal disability, recognised and allowed by the common law (*z*). For an executor is but a trustee for the deceased, and such a person as the testator thought proper to appoint for that office, without any previous qualification; nobody can add qualifications to him other than those which the testator has imposed, but he shall be who, and in what manner, the testator shall judge proper (*b*).

The Court cannot pass over an executor by reason of his bad character, poverty, or insolvency.

Accordingly, it has been held that the Court cannot pass over an executor by reason of his bad character (*c*), or on account of his poverty or insolvency (*d*).

Jurisdiction of the Court of Chancery to restrain an insolvent executor, and to appoint a receiver.

There are, however, cases in which the Court of Chancery will control an insolvent or bankrupt executor, by the appointment of a receiver; and it has been suggested that the Probate Division might be justified, since the Judicature Act, in refusing to grant probate to an executor in any case where Equity would restrain the executor, if probate were granted to him, and would appoint a receiver (*e*).

(*z*) *Smethurst* v. *Tomlin*, (1861) 2 S. & T. at p. 146.

(*b*) *Rex* v. *Raines*, (1699) 1 Lord Raym. at p. 361; Bac. Abr. Exors., A. 6.

(*c*) *Samson*, (1873) 3 P. & D. 48.

(*d*) Bac. Abr. Exors., A. 6; *Rex* v. *Raines*, (1699) 1 Lord Raym. 361; see *Hathornthwaite* v. *Russell*, (1740) 2 Atk. 126; see also 3 P. Wms. 336, n.; *Hills* v. *Mills*, (1686) 1 Salk. 36.

(*e*) Wms. on Exors. 163, note (*g*); as to the jurisdiction of the Court of Chancery to restrain an insolvent or bankrupt executor and to appoint a receiver, see *Rex* v. *Simpson*, (1758) 1 W. Black. at p. 458; *Utterson* v. *Mair*, (1793) 2 Ves. 95; *Scott* v. *Becher*, (1817) 4 Price, 346; *Bowen* v. *Phillips*, [1897] 1 Ch. 174. Under the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1, sub-s. 2, the Court can, in a proper case remove the executor and appoint a judicial trustee in his place: see *Ratcliff*, [1898] 2 Ch. 352; and now, by the Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 2 (1) (*d*), the Public Trustee can accept a judicial trusteeship, if duly appointed by the Court under the Judicial Trustees Act, 1896. The courts of equity will not, on the ground of his insolvency, control, by the appointment of a receiver, a person appointed executor and known by the testator to be a bankrupt or insolvent: *Gladdon* v. *Stoneman*, (1808) reported 1 Madd. 143, n.; *Langley* v. *Hawke*, (1820) 5 Madd. 46; *Stainton* v. *Carron Co.*, (1853) 18 Beav. 146, at p. 161; nor upon the single ground that the executor is in mean circumstances: *Hathornthwaite* v. *Russell*, (1740) 2 Atk. 126; *Anon.*, (1806) 12

Power of the Court under s. 73 of the Court of Probate Act.

Sect. 73 of the Court of Probate Act, 1857, empowers the Court, where an executor is resident out of this country, to refuse to grant probate to him, if satisfied that by reason of his position abroad, or his bad character, he is unfitted to act (*f*).

Section 2.

BY WHAT WORDS AN EXECUTOR MAY BE APPOINTED.

The appointment of an executor may be express or constructive.

Executor according to the tenor.

"An executor," says Sir Edward Vaughan Williams (*g*), "can derive his office from a testamentary appointment only. His appointment may either be express, or constructive, in which case he is usually called executor *according to the tenor;* for, although no executor be expressly nominated in the will by the word 'executor,' yet, if by any word or circumlocution the testator recommend, or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors" (*h*).

By what words a person may be constituted executor according to the tenor.

In order to constitute one an executor according to the tenor of a will, it must appear, on a reasonable construction thereof, that the testator intended that such person should collect his assets, pay his debts and funeral expenses, and

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Ves. 4; *Howard* v. *Papera,* (1815) 1 Madd. 142; and see Wms. on Exors., pp. 1614 *et seq.*

(*f*) *Samson,* (1873) 3 P. & D. 48; *vide post,* p. 410.

(*g*) Wms. on Exors., p. 165; see *Fraser,* (1870) 2 P. & D. at p. 186.

(*h*) See Swinb., Part IV., s. 4, pl. 3; Godolph., Part II., c. 5, s. 2; Wentw. Off. Ex. 20, 14th ed.; and see *Manly,* (1862) 3 S. & T. 56, where a testamentary paper in the form of a letter was addressed to "my dear Eliza," and contained full information as to the amount of the testatrix's property, and directions as to its disposition; it concluded "I know of nothing else, my dear Eliza, to trouble you with." The person so designated was held to be executrix according to the tenor: Cf. *Almosnino,* (1859) 1 S. & T. 508.

In *Bradley,* (1883) 8 P. D. 215, a testator said in his will "I appoint A. B. and C. D.," but did not state in what capacity he appointed them; he however proceeded to bequeath legacies to "each of my executors," and gave to his "said executors" the residue of his property, with certain directions as to its disposition. It was held that A. B. and C. D. were executors according to the tenor.

So in *Allam,* (1892) 66 L. T. 382, a person appointed by the testator to "carry out my wishes," and in *Way,* [1901] P. 345, a person directed "to hold and administer all my estate," were held to be executors according to the tenor; see also *Russell,* [1892] P. 380; *Laird, ibid.*

discharge the legacies contained in the will (*i*); in other words, that the testator intended to cast upon him the duties of an executor (*k*).

Direction to pay debts may suffice.

A simple direction to a certain person to pay the debts of the testator, without any bequest to him, and without specifically appointing him as trustee, may suffice to constitute him executor according to the tenor (*l*). But a direction to a person to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, will not suffice; for in that case the direction to pay debts is treated as a charge on the specific legacy (*m*).

Secus a direction to pay debts out of a particular fund.

Universal legatee or mere trustee is not, as such, entitled to probate as executor according to the tenor.

A universal legatee or devisee is not, as such, entitled to a grant of probate as executor according to the tenor (*n*). And unless the Court can gather from the words of the will that a person named "trustee" therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor (*o*).

(*i*) *Adamson*, (1875) 3 P. & D. 253.

(*k*) *Earl of Leven and Melville*, (1889) 15 P. D. 23. The following directions have been held to constitute the persons designated executors according to the tenor:—A direction to "pay all and take all": *Brightman* v. *Keighley*, (1585) Cro. Eliz. 43; "to pay debts, funeral expenses, and the expenses of proving the will": *Fry*, (1827) 1 Hagg. 80; "to pay debts and legacies": *Bell*, (1878) 4 P. D. 85; "I appoint A. B. my residuary legatee to discharge all lawful demands": *Grant* v. *Leslie*, (1819) 3 Phill. 116; "to receive and pay the contents" of the will: *Pickering* v. *Towers*, (1757) 2 Lee, 401.

(*l*) *Cook*, [1902] P. 114.

(*m*) *Toomy*, (1864) 3 S. & T. 562; see *Cook*, [1902] P. at p. 115.

(*n*) *Oliphant*, (1860) 1 S. & T. 525. Nor has the rule been altered by the Land Transfer Act, 1897: *Pryse*, [1904] P. 301.

(*o*) *Punchard*, (1872) 2 P. & D. 369. In the following cases persons described in the will as "trustees" were held to be constituted executors according to the tenor:—Where the trustees were directed: "to dispose of the testator's property, and convert it into money, and to deposit the same for certain purposes": *Chappell*, (1868) 37 L. J. P. 32; *Baylis*, (1865) 1 P. & D. 21; "to get in the testator's estate, and distribute it after payment of funeral and other expenses": *Lush*, (1887) 13 P. D. 20; "to receive sums due to the residue" (the will contained directions to "my executors," and it appeared that the testator had used the terms "executors" and "trustees" indifferently as referring to the same persons): *Earl of Leven and Melville*, (1889) 15 P. D. 22; and see *Kirby*, [1902] P. 188; "to carry out this will" and "for the due execution of my will": *Russell*, [1892] P. 380; *Laird*, *ibid.*; see also *Montgomery*, (1846) 5 N. C. 99; *Collett*, (1857) Dea. & Sw. 274; *MacKenzie*, [1909] P. 305; *Brown*, [1910] 54 Sol. Jo. 478.

On the other hand, persons described in the will as "trustees" were held

Executor may be appointed by necessary implication.

An executor may be appointed by necessary implication (*p*). Thus, where a testator said in his will, "Should Mary be not living, I do constitute Eleanor my executrix," it was held that Mary was executrix by implication, according to the tenor of the will (*q*). And where a testator said, "I appoint my sister A. my executrix, only requesting that my nephews B. and C. will kindly act for and with this dear sister," it was held that B. and C. were executors according to the tenor (*r*).

But where a testatrix left "the sum of one sovereign each to the executor and witness of my will for their trouble," but did not name any executor, it was held that she had not clearly said that the witnesses to her will were to be her executors, and probate was refused to them, although, beneath the signature of the testatrix, and opposite to their names, the words "witnesses and executors" were written (*s*).

An executor according to the tenor entitled to probate jointly with the executor expressly nominated.

An executor according to the tenor may be entitled to be joined in the probate with an executor expressly nominated. Thus, where a testator made a will and four codicils, by the last of which he appointed his nephew residuary legatee "to discharge all lawful demands against my will and codicils,"

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not to be constituted executors according to the tenor in the following cases:—Where the property was left to the trustee on trust for a specific purpose, or for the benefit of particular persons: *Boddicott* v. *Dalzeel,* (1756) 2 Lee, 294; *Jones,* (1861) 2 S. & T. 155; *Stewart,* (1875) 3 P. & D. 244; *Maley,* (1887) 12 P. D. 134. Where a person was appointed "trustee" without more: *Punchard,* (1872) 2 P. & D. 369; *Lowry,* (1874) 3 P. & D. 157. Where the will was that of a married woman made in exercise of a power of appointment: *Fraser,* (1870) 2 P. & D. 183.

As to the distinction between the duties of a trustee and an executor, see *Fawkener* v. *Jordan,* (1756) 2 Lee, 327; *Moss* v. *Bardswell,* (1860) 3 S. & T. 187.

(*p*) Wms. on Exors. 168, citing Godolph., Part II., c. 5, s. 3; Swinb., Part IV., s. 4, pl. 6.

(*q*) *Naylor* v. *Stainsby,* (1754) 2 Lee, 54. See also *Brightman* v. *Keighley,* (1585) Cro. Eliz. 43, cit. *supra,* p. 256, note (*k*). In *Aird,* (1828) 1 Hagg. 336, a person appointed limited executor in a will was held to be appointed general executor in a codicil by implication and without express words.

(*r*) *Brown,* (1877) 2 P. D. 110. See *Grant* v. *Leslie,* (1819) 3 Phill. 116; *Powell* v. *Stafford,* (1803) cit. 3 Phill. at p. 118; *Stevenson,* (1852) 16 Jur. 714. Where a person is requested to assist an executor, the question may arise whether he is thereby appointed co-executor or merely coadjutor or overseer. As to the distinction between these offices, see Wentworth Off. Ex. 21, 14th ed.; Bro. Exors., pl. 73; Godolph., Part II., c. 2, s. 4; Wms. on Exors., p. 169.

(*s*) *Woods,* (1868) 1 P. & D. 556.

and the will contained an express appointment of executors, it was held that the nephew was executor according to the tenor, and was entitled to be joined in the probate with the executors expressly appointed (*t*). But where there is an express appointment of an executor, it is, of course, less probable that there should be an indirect appointment to the same office (*u*).

Authorisation of some third person to nominate the executor.

A testator may, by his will, authorise some third person to nominate his executor, and probate will be granted in such a case to the executor nominated by him to whom the testator has delegated his power of selection (*x*).

Thus, a testatrix appointed A. and B. executors of her will, and in case of the death of either of them, empowered the survivor to appoint another, so that there should continue to be two executors. Upon the death of A., B. appointed C. executor to act with him, but C. did not take out probate during the lifetime of B. On B.'s death it was held that probate might be granted to C., and that he might appoint another executor to act with him (*y*).

Several executors in several degrees.

Instituted executor.

Substituted executor.

A testator may appoint one person to be his executor, and another to be his executor in case the first cannot or will not act. For example, the appointment may take the following form: "I appoint A. my executor, but if A. will not or cannot act, then I appoint B. my executor, and if B. will not or cannot act, I appoint C.," and so on. In such a case A. is called the instituted executor in the first degree, B. is said to be substituted in the second degree, C. to be

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(*t*) *Grant* v. *Leslie,* (1819) 3 Phill. 116. See *Collard* v. *Smith,* (1799); and *Powell* v. *Stratford,* (1803) quoted 3 Phill. at pp. 117, 118; *Brown,* (1877) 2 P. D. 110; *Wright,* (1908) 25 T. L. R. 15. In *Lynch* v. *Bellew,* (1820) 3 Phill. 424, a person was held to be executor according to the tenor for limited purposes, although another had been expressly nominated executor for general purposes.

(*u*) *Grant* v. *Leslie,* (1819) 3 Phill. at p. 117.

(*x*) *Cringan,* (1828) 1 Hagg. 548, where the testator directed that the legatees should appoint two executors; *Jackson* v. *Paulet,* (1851) 2 Rob. 344, where A. and B. were appointed executors with directions, conjointly with the testator's wife, to appoint a third person as trustee and executor. In *Ryder,* (1861) 2 S. & T. 127, a testator requested A. B. "to appoint some one to see this my will executed." Probate was granted to A. B. on his appointment of himself being filed in the registry.

(*y*) *Deichman,* (1842) 3 Curt. 123.

substituted in the third degree, and so on (*z*). In such cases the substituted executor cannot propound the will unless the instituted executor is incapable of acting, or renounces, or has been cited to accept or refuse the office (*a*).

Substituted executor cannot propound the will, unless the instituted executor has been cited.

Where there is an instituted and a substituted executor, the question sometimes arises whether the substitution is to take place only in the event of the instituted executor not acting at all, or whether it is to take place in the event of the instituted executor's death after having taken probate. This is a question of intention to be decided on the construction of the words of the will, and it has been said that the Court will not construe the words in a technical spirit, but will endeavour to carry out the real object of the testator (*b*).

Whether, if the instituted executor takes probate, and dies intestate, the substituted executor shall be regarded as excluded.

Thus, if the second executor is substituted if the first "will not or cannot be executor," it is said that if the instituted executor once accepts office and afterwards dies intestate the substitutes are all excluded, for the condition is fulfilled once and for all by the acceptance of the instituted executor (*c*).

But where a testator appoints an executor and provides that "in case of his death" (*d*) or "in his default" (*e*) another is to be substituted, on the death of the instituted executor

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(*z*) See Swinb., Part IV., s. 19, pl. 1; Godolph., Part II., c. 4, s. 1; Wms. on Exors. 171.

(*a*) *Smith* v. *Crofts*, (1758) 2 Lee, 557. In *Lane*, (1864) 33 L. J. P. 185, A. was appointed executor, but in the event of his going abroad or being or remaining abroad for upwards of two months, B. was appointed executor. After the death of the testator, A. went abroad without taking probate. Probate was granted to B., with power reserved to A. to come in and prove the will.

In *Wilmot*, (1852) 2 Rob. 579, A. was appointed executor, and the will proceeded: "In case he shall happen at the time of my decease to be abroad, or from any other cause incapable of acting as such executor, I appoint B. executor, to act only during such time as A. shall be resident abroad, or otherwise be incapable of acting." A. died in the lifetime of the testator. Probate was granted to B. as executor.

In *Langford*, (1867) 1 P. & D. 458, A. was appointed executor, and "in case of his absence on foreign duty" B. was appointed executrix. A. was in England at the testator's death, but was absent on foreign service when the application for probate was made. Probate was granted to B. See also *Betts*, (1861) 30 L. J. P. 167.

(*b*) *Foster*, (1871) 2 P. & D. 304.

(*c*) Swinb., Part IV., s. 19, pl. 10; Godolph., Part II., c. 4, s. 2; Wms. on Exors. 172.

(*d*) *Lighton*, (1828) 1 Hagg. 235; *Johnson*, (1858) 1 S. & T. 17.

(*e*) *Foster*, (1871) 2 P. & D. 304.

even after he has proved the will, the substituted executor may be admitted to the office, if it appear that the testator intended the substitution to take place on the death of the instituted executor, whether happening in the testator's lifetime or afterwards (*f*).

The person appointed executor must be identified with certainty.

Whether an executor is appointed by express terms or by implication, there must be no uncertainty as to the identity of the person intended. Thus, where a testator appointed "A. as my executor, with any two of my sons," the Court held the appointment of "any two" of his sons to be void for uncertainty (*g*). Again, a testator by his will appointed "one of my sisters my sole executrix"; he had three sisters living at that time, but two died in his lifetime. It was held that the appointment was void for uncertainty (*h*).

Where the description of the executor in the will is imperfect or ambiguous.

Parol evidence, however strong, cannot be admitted to supply a complete blank.

Where the description of the executor in the will is imperfect or ambiguous, the question frequently arises whether parol evidence is admissible to any, and if to any, to what extent, in order to assist the Court to ascertain the meaning of the testator as expressed in his will. In this connection it has been held that, in considering whether a particular person has been sufficiently designated by a testator, there must be a description in the will to which the required meaning can be attached. A complete blank cannot be filled up by parol testimony, however strong (*i*).

But where there are any words to which a reasonable meaning can be attached, parol evidence is admissible

But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to to show what that meaning is (*k*). So where a person is described by an initial, as "Mrs. C.," evidence is admissible to show that the testator was accustomed to speak of a particular person

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(*f*) *Lighton,* (1828) 1 Hagg. 235; *Bourke,* (1826) 1 Hagg. 237, n.

(*g*) *Baylis,* (1862) 2 S. & T. 613. See *Altham's Case,* (1610) 8 Co. Rep. 155 a; *Strode* v. *Russel,* (1708) 2 Vern. at p. 624.

(*h*) *Blackwell,* (1876) 2 P. D. 72. But in *Hubbuck,* [1905] P. 129, where a testator appointed his "granddaughter ——" his executrix, and there were three granddaughters, probate was granted to the one whom the Court found, from the extrinsic evidence, to be the person intended.

(*i*) *De Rosaz,* (1877) 2 P. D. at p. 69. Thus a legacy to "Mr. ——" cannot have effect given to it: *Baylis* v. *Att.-Gen.* (1741) 2 Atk. 239; nor a legacy to "Lady ——": *Hunt* v. *Hort,* (1791) 3 Bro. C. C. 311.

(*k*) *De Rosaz,* (1877) 2 P. D. at p. 69.

by the initial of her name (*l*). And where a blank was left for the Christian name, parol evidence was admitted to show who was intended (*m*). The principle upon which the Court acts is that laid down by Sir John Wigram: "For the purpose of determining the object of the testator's bounty, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person intended by the testator." So where the deceased by his will appointed as his executor "Percival ——, of Brighton, the father," the Court admitted evidence of the circumstances under which the deceased made his will, and of the persons about him, in order to satisfy itself who was meant by the imperfect description of the executor contained therein (*n*).

to identify the person intended.

Parol evidence is admissible to the same extent where the description of the executor is true in part but not in every particular.

So where the description of the executor is true in part, but not true in every particular—as where the Christian or surname is mistaken—parol evidence is admissible to show who was intended to take, provided there is sufficient indication of intention on the face of the will to justify the application of the evidence (*o*). In such cases, which include cases where the description is applicable partly to one person and partly to another (*p*), the extrinsic evidence is confined to evidence of surrounding circumstances (*q*), and direct evidence of intention, *e.g.*, statements of the testator as to which person was intended, is inadmissible (*r*).

(*l*) *Abbot* v. *Massie*, (1796) 3 Ves. 148; *Clayton* v. *Lord Nugent*, (1844) 13 M. & W. at p. 207.

(*m*) *Price* v. *Page*, (1799) 4 Ves. 680.

(*n*) *De Rosaz*, (1877) 2 P. D. 66. And see *Hubbuck*, [1905] P. 129.

(*o*) *Miller* v. *Travers*, (1832) 8 Bing. at p. 248. So where a testator appointed "William McCormack" his executor, and the only two persons at all answering the description were Thomas McCormack and William Abraham McCormack, parol evidence was admitted to prove which person was intended by the testator, and probate was granted to Thomas McCormack: *Brake*, (1881) 6 P. D. 217. See also *Charter* v. *Charter*, (1871) 2 P. & D. 315, L. R. 7 H. L. 364; *Chappell*, [1894] P. 98.

(*p*) *Vide supra*, note (*o*).

(*q*) *Charter* v. *Charter*, (1874) L. R. 7 H. L. 364, at p. 377; *Brake*, (1881) 6 P. D. 217.

(*r*) *Charter* v. *Charter*, (1874) L. R. 7 H. L. at pp. 376, 377; *Doe* v. *Hiscocks*, (1839) 5 M. & W. 363; *Sugden* v. *Lord St. Leonards*, (1876) 1 P. D. at p. 227.

Direct evidence of the testator's intention is admissible only when the description is equally applicable in all its parts to two or more persons.

The only case in which parol evidence of statements of the testator as to whom he intended to benefit or supposed he had benefited by his will, can be received, is where the description is equally applicable in all its parts to two persons (*s*). In *Grant* v. *Grant* (*t*) a testator appointed as his executor his "nephew, Joseph Grant." There were in fact two persons named Joseph Grant, one the son of the testator's brother and the other the nephew of the testator's wife. In that case it was held that where a word is used in a will as part of the description of a person specified by name, and is applicable to the persons so specified both in an ordinary and popular sense and in a strict and primary sense, an ambiguity is raised, and the Court may receive evidence of the circumstances of the testator and of the sense in which he was accustomed to use the word, in order to ascertain the person indicated (*u*).

Where there is no ambiguity, evidence is not admissible to show that the testator intended to appoint a person other than the person described.

But where there is no ambiguity in the description of the executor, evidence cannot be admitted to prove that the testator intended to appoint a person other than the person described in the will. Thus, where a testator appointed "Francis Courtenay Thorpe, of Hampton, gentleman," his executor, and there was living a youth, twelve years of age, to whom the name and description applied, the Court refused to admit evidence to show that the testator intended the father of the youth, whose name was Francis Corbet Thorpe (*x*).

Probate is granted to all the executors named in the several testamentary papers.

When probate is granted of two or more testamentary papers as together constituting the will of the deceased, it is the practice of the Court to make the grant to all the executors named in the several papers (*y*).

(*s*) *Charter* v. *Charter,* (1874) L. R. 7 H. L. at pp. 376, 377; *De Rosaz,* (1877) 2 P. D. at p. 70.

(*t*) (1869) 2 P. & D. 8.

(*u*) See also *Ashton,* [1892] P. 83.

(*x*) *Peel,* (1870) 2 P. & D. 46.

(*y*) *Leese,* (1862) 2 S. & T. 442; *Budd,* (1862) 3 S. & T. 196; *Geaves* v. *Price,* (1862) 3 S. & T. 71; *Nickalls,* (1865) 4 S. & T. 40; *Morgan,* (1867) 1 P. & D. 323; *Strahan,* [1907] 2 Ir. R. 484. *Secus,* where it appears to be the intention of the testator to revoke the appointment of executors contained in the first paper, and to substitute for them the executors named

Section 3.

IN WHAT WAYS THE APPOINTMENT OF AN EXECUTOR MAY BE QUALIFIED (*z*).

Appointment of executor may be absolute or qualified.

The appointment of an executor may be either absolute or qualified. It may be qualified either (1) as to time, or (2) as to place, or (3) as to purpose or subject-matter; and (4) the appointment of an executor may be conditional or contingent.

Appointments limited as to time.

Where a time is limited when the person appointed executor is to begin, or when he shall cease to be executor, and the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other, the Court may grant administration with the will annexed until there be an executor, or a cessate administration after the executorship is ended (*a*).

Appointments limited as to place.

A testator may appoint different persons for the representation and distribution of his property in different places (*b*). Thus, where a testator appointed certain persons "executors in Portugal" and others, "executors in England," it was held that the persons appointed executors "in Portugal" (*i.e.*, for Portugal) were not entitled to probate in England (*c*).

Appointments limited as to purpose or subject-matter.

A testator may appoint an executor for a particular purpose: *e.g.* for the purpose of administering the estate of another person, whose sole surviving executor the testator himself was; or for the purpose of carrying into effect the provisions of a particular codicil; and in such a case probate limited for such purpose is granted to him (*d*).

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in the second paper: *Lowe,* (1864) 3 S. & T. 478; *Baily,* (1869) 1 P. & D. 628. And see *Henfrey* v. *Henfrey,* (1842) 4 Moo. P. C. 29; *Howard,* (1869) 1 P. & D. 636; *Cottrell* v. *Cottrell,* (1872) 2 P. & D. 397; *Griffith,* (1872) 2 P. & D. 457; *vide ante,* p. 174.

(*z*) See further on this subject Swinb., Part IV., ss. 5—16; Godolph., Part I., cc. 13, 14, Part II., c. 2; Wms. on Exors., pp. 175 *et seq.*

(*a*) Swinb., Part IV., s. 17, pl. 2; Wms. on Exors. 175. See *Lighton,* (1828) 1 Hagg. 235; *Johnson,* (1858) 1 S. & T. 17, *ante,* p. 259; *Bond* v. *Faikney,* (1757) 2 Lee, 371. *Vide post,* p. 281.

(*b*) *Spratt* v. *Harris,* (1833) 4 Hagg. at p. 408.

(*c*) *Velho* v. *Leite,* (1864) 3 S. & T. 456; *Wallich,* (1864) 3 S. & T. 423. See *Pulman,* (1863) 3 S. & T. 269; and the cases cited *ante,* p. 13, note (*k*).

(*d*) *Vide post,* p. 279.

Again, the power of the executor may be limited as to the subject-matter upon which it is to be exercised, as where a person is made executor for a particular part of the testator's property alone; and in such a case probate limited to that part of the estate will be granted to him (*e*).

In *In the Goods of Wakehan* (*f*), a testator by his will gave certain specific legacies, but did not dispose of the residue of his personal estate. He appointed his daughter executrix for all property "not named in the will." The Court refused to grant probate of the will to the daughter as executrix, since she was precluded from dealing with the property which passed under the will.

The same will may contain the appointment of one executor for general, and of another for limited purposes (*g*). In such a case the general executor is entitled to probate in respect of all the estate, save and except the property which vests in the limited executor; while the limited executor is granted probate limited to the purposes prescribed by the will (*h*).

The appointment of an executor may be conditional: condition precedent,

The appointment of an executor may be subject to a condition precedent, as where a testator appoints A. to be his executor if he give security to perform the will (*i*), or if he prove the will within three calendar months after the testator's death (*k*), or repay to the testator's estate a debt owed by him to the testator (*l*). And probate will not be granted to the executor unless and until the condition precedent is fulfilled (*l*).

condition subsequent.

But where the condition is not a condition precedent, but a condition subsequent intended to abridge the power of the executor if he perform it not, the person named executor is

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(*e*) *Davies* v. *The Queen's Proctor,* (1851) 2 Rob. 413; but see *Rose* v. *Bartlett,* (1635) Cro. Car. 293, where an executrix "of all my cattle, corn, and movable goods," was held to be executrix for the whole estate. See Wms. on Exors., p. 177, citing Dyer, 4 a; Wentw. Off. Ex. 29, 14th ed.; Godolph., Part II., c. 3, ss. 2, 3.

(*f*) (1872) 2 P. & D. 395.

(*g*) *Lynch* v. *Bellew,* (1820) 3 Phill. 424.

(*h*) Tristram & Coote, 115. *Vide post,* p. 279.

(*i*) Godolph., Part II., c. 2, s. 1; Wentw. Off. Ex. 28, 14th ed.; Wms. on Exors., p. 178.

(*k*) *Wilmot,* (1834) 1 Curt. 1; and see *Day,* (1850) 7 N. C. 553; *Lane,* (1864) 33 L. & P. 185.

(*l*) *Stapleton* v. *Truelock,* (1553) 3 Leon. 2.

executor presently (*m*), though the executorship may be determined by a breach of the condition (*n*).

Section 4.

IN WHAT CASES THE APPOINTED EXECUTOR MAY TRANSMIT HIS APPOINTMENT.

Transmissibility of the office of executor.

An executor cannot assign his office, for it is a personal trust (*o*). Nevertheless, the interest vested in the executor by the will of the deceased may under certain circumstances be continued and kept alive by the will of the same executor (*p*).

The executor of a sole, or sole surviving executor, represents the first testator,

1. If a sole executor, or the survivor of several executors, having proved the will, dies without having completely administered the estate, his executor, by the mere act of proving his will, becomes the legal personal representative of the original testator (*q*).

The executor of a sole executor is to all intents and purposes the executor and representative of the original testator. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another in whom he has equal confidence (*r*). Unless an executor has proved the will (*s*), he cannot transmit the executorship. Therefore, if the first executor dies in the lifetime of the testator, or without having proved the will, his executorship is wholly determined, and administration with the will annexed must be granted (*t*).

provided the first executor has proved the will of the original testator.

His title, how evidenced.

An executor, upon taking out probate of the will of an

(*m*) *Alice Francis' Case*, (1550) 1 Dyer 4 a, pl. 8 *in margine;* Wentw. Off. Ex. 28, 14th ed.; *Jennings* v. *Gowers*, (1589) 1 Leon. 229.

(*n*) Wentw. Off. Ex. 23, 14th ed.; Godolph., Part 11., c. 2, s. 1.

(*o*) Vaugh. 182.

(*p*) 2 Black. Comm. 506.

(*q*) 2 Black. Comm. 506; stat. 25 Edw. III., st. 5, c. 5. See Wms. on Exors. 180, citing Com. Dig. Admin. G., B 6; Touchstone, 464; Wentw. Off. Exor. 461, 14th ed.

(*r*) 2 Black. Comm. 506; *Wankford* v. *Wankford*, (1700) 3 Salk. 164.

(*s*) The will must be proved in England: see *Gaynor*, (1869) 1 P. & D. 723, and cases cited. As to grants made before the Court of Probate Act came into operation: see *Freckleton*, (1858) 1 S. & T. 16; *Tucker*, (1860) 2 S. & T. 123.

(*t*) *Day* v. *Chatfield*, (1683) 1 Vern. 200; *Wankford* v. *Wankford*, (1700) 1 Salk. 303, S.C. 3 Salk. 164. And see *Anon.*, 3 Salk. 21; *Pullen* v. *Sarjeant*, (1684) 2 Ch. Rep. 300.

Whether he can take administration with the will annexed.

executor, becomes *ipso facto* the executor of the will of the first testator (*u*); his title as such is evidenced by the existence and production of each independent probate (*x*); he cannot be compelled, and it is doubtful whether he can be allowed, to take an administration *de bonis non* of the first testator (*y*).

Transmission of executorship through *feme covert* executrix, provided probate of her will is not limited.

A married woman, who is executrix, may continue the claim of representation by appointing her own executor. The rule is that a *limited* probate taken out of the will of a *feme covert*, will not continue the claim of representation under the general probate of the will of the original testator (*z*). But the practice of granting limited probate of the wills of married women has, since the Married Women's Property Act, 1882, been altered, and probate in the general form is now granted (*a*).

If there are several executors, no interest is transmissible except through the survivor of the proving executors.

Where there are more executors than one, the executorship can be transmitted through *the survivor of the acting executors* alone.

Thus if A. and B. are executors, and both actually prove the will, on the death of A. no interest in the executorship is transmissible to his executor, but the whole representation survives to B. On the death of B.—the survivor of the acting executors—the executorship is transmitted to B.'s executor (*b*).

(*u*) *Perry*, (1840) 2 Curt. 655. He is not permitted to renounce probate of the first will and take probate of the second: *ibid.*; and *Brooke* v. *Haymes*, (1868) L. R. 6 Eq. 25; *vide post*, p. 270.

(*x*) Tristram & Coote, p. 22.

(*y*) *Ibid.*, citing *Dawkins* v. *Eyton*, Dr. Cottrell's M.S. cases. And see *Noddings*, (1860) 2 S. & T. 15; *Tucker*, (1860) 2 S. & T. 123; *Richards*, (1866) 1 P. & D. at p. 158.

(*z*) *Bayne*, (1858) 1 S. & T. 132. The office is transmitted when the *original* probate was limited: see *Beer*, (1851) 2 Rob. 349. The chain is broken if an executor is appointed for life only, or if an executrix is appointed during widowhood and remarries: see *Bond* v. *Faikney*, (1757) 2 Lee, 371.

(*a*) *Price*, (1887) 12 P. D. 137. *Vide ante*, p. 93. Under the old practice the will of a married woman, made under a power, and appointing executors, did not continue the chain of representation from a former will, of which the married woman was executrix; but a *feme covert* might make a will for the express purpose of transmitting the executorship: see *Hughes*, (1860) 4 S. & T. 209; *Bayne*, (1858) 1 S. & T. 132; *Martin*, (1862) 3 S. & T. 1; *Richards*, (1866) 1 P. & D. 156; *Bridger*, (1878) 4 P. D. 77; *Tugman* v. *Hopkins*, (1842) 4 M. & G. at p. 400; but see *Birkett* v. *Vandercom*, (1831) 3 Hagg. 750; *Barr* v. *Carter*, (1797) 2 Cox, 429.

(*b*) If B. dies intestate, the executor of A. shall not be executor of

Effect of renunciation by some of several executors. Before 1858.

The law was formerly the same where there were several executors and one alone proved the will, and the rest renounced. In such a case, upon the death of him who proved the will, no interest was transmitted to his executor, if any of those who had renounced were surviving (*c*).

After 1858.

But the law in this respect was altered by the Court of Probate Act, 1857, s. 79, and by the Court of Probate Act, 1858, s. 16 (*d*); and now where an executor who has renounced probate, survives his acting co-executor, the representation will devolve as if his name had never appeared in the will, and the executor, if any, of the acting executor will represent the original testator. The law is the same in cases where an executor to whom power has been reserved, survives his acting co-executor, and does not appear to a citation to accept or refuse probate (*e*); and where a non-acting executor who has never renounced probate, survives an acting executor but dies without having taken probate of the will (*f*).

Where non-proving executors renounce, or survive proving executor and fail to appear to citation, or die without taking a grant.

Administrator of executor.

2. The administrator (*g*) of an executor cannot represent the original testator (*h*).

The administrator of an

For the administrator of an executor has clearly no privity

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the original testator, for the executorship wholly and solely vested in B. by the survivorship; and so administration *de bonis non* must be granted: *Smith,* (1842) 3 Curt. 31. See Wms. on Exors. 182, citing Wentw. Off. Exors. 215, 14th ed.

(*c*) Wms. on Exors., 182.

(*d*) *Vide post,* p. 273.

(*e*) *Noddings,* (1860) 2 S. & T. 15; and see Errata et Corrigenda, 2 S. & T., facing page 1; *Reid,* [1896] P. 129. See Court of Probate Act, 1858, s. 16, *post,* p. 273.

(*f*) *Lorimer,* (1862) 2 S. & T. 471. See Court of Probate Act, 1858, s. 16, *post,* p. 273. For form of citation, see App. VII., Form 82.

(*g*) *I.e.*, an administrator appointed on intestacy or with the will annexed. But the administrator *durante minore ætate* of the executor of an executor is the representative of the first testator, for such an administrator is *loco executoris:* Wms. on Exors. 181, note (*e*), citing *Anon.*, (1675) 1 Freem. 288; *contra, Limner* v. *Every,* (1595) Cro. Eliz. 211, cit. Bac. Abr. Exors., B 1; but see Mr. Smirke's note in his edition of Freeman (1 Freem. 288). And if administration *cum testamento annexo* is granted to the *attorney* of an executor, for his use and benefit, it is the same thing as if the executor had actually proved the will himself. Therefore a grant to the attorney of an executor does not break the chain of representation: *Bayard,* (1849) 1 Rob. 768; *Murguia,* (1884) 9 P. D. 236.

(*h*) The executor of A.'s administrator is not the representative of A., executor does not represent the original testator.

or relation to the original testator, being only commissioned to administer the effects of the executor and not of the original testator (*i*).

Office transmitted through several successive executors,

An executorship may be transmitted through several successive executors, each in turn, upon proving the will of his own immediate testator, becoming the representative of every preceding testator (*k*).

so long as the course of representation from executor to executor is not broken by any one administration.

But whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the Court to commit administration afresh, and to appoint an administrator of the goods of the original testator not administered by the former executor (*l*).

Section 5.

OF THE EXECUTOR'S REFUSAL OR ACCEPTANCE OF THE OFFICE.

SUB-SECTION 1.—*When and how an Executor can Renounce.*

An executor, at any time after the death of the testator, may renounce probate and execution of the will.

An executor, being a private officer of trust named by the testator, and not by the law, may refuse his office. He cannot be compelled to accept the executorship, but he may at any time after the death of the testator renounce probate and execution of the will (*m*).

And if he fails to appear to a citation to accept or

An executor cannot indefinitely delay his decision to accept or refuse the executorship. At any time (*n*) after the death of the testator he may, at the instance of some interested

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for the administrator of A. is merely the officer of the Court of Probate, prescribed to him by Act of Parliament or by the practice of the Court, in whom the deceased has reposed no trust at all; and therefore upon the death of that officer it results back to the Court to appoint another: see 2 Black. Comm. 506.

(*i*) 2 Black. Comm. 506.

(*k*) See Wms. on Exors. 180; Tristram & Coote, 18.

(*l*) 2 Black. Comm. 506. The chain of executorship is broken if, of two executors who have died after taking probate, it is impossible to show which was the survivor: *Richards* v. *All Persons,* (1845) 4 N. C. Suppl. viii.

(*m*) Bac. Abr. Exors. E. 9; *Douglas* v. *Forrest,* (1828) 4 Bing. at p. 704. He may refuse, even though in the testator's lifetime he had agreed to accept the office: *Doyle* v. *Blake,* (1804) 2 Scho. & Lef. at p. 239.

(*n*) The time, says Swinburne, is left to the discretion of the judge, who has used, at his pleasure, not only within the year, but within a month or two, to issue his citation: Swinb., Part VI., s. 4.

person, be cited to accept or refuse probate of the will; and should he fail to appear to such a citation he will be treated as if he had renounced (*o*).

refuse probate, is taken to have renounced.

An executor who has once intermeddled, may be compelled to prove the will.

The right of an executor to refuse the executorship is determined by acts which amount to an administration. For if an executor has once administered, he cannot afterwards refuse to prove the will; because by administering he has taken upon himself the burden and acquired the responsibility of an executor, and is therefore considered to have made his choice (*p*).

And if administration has been committed to another, it may be revoked.

An executor who has intermeddled may be compelled to accept the executorship and to prove the will (*q*). And if after an executor has renounced, and administration has been committed to another, it appears that the executor had administered before renunciation, the letters of administration may be revoked, and the executor compelled to prove the will (*r*).

If one of several executors, after administering, renounces, his renunciation is invalid.

Where one of several executors, after intermeddling, executes a renunciation, and probate is granted to his co-executors, his renunciation is invalid, and he may take probate of the will of the deceased (*s*).

(*o*) Court of Probate Act, 1858, s. 16; see *post*, p. 273. If he appear to the citation, and pray time to consider whether he will act or not, it is said that the Court might grant letters *ad colligendum* in the interim. But this practice seems now obsolete: Wms. on Exors. 226. If he appear, and refuse to act, the Court will grant administration with the will annexed to another: *ibid.*

(*p*) Bac. Abr. Exors. (E.) 10; *Haywood* v. *Bridges*, (1767) cit. 3 Phill. at p. 579; *Jackson* v. *Whitehead*, (1821) 3 Phillim. at p. 579; *Long* v. *Symes*, (1832) 3 Hagg. at p. 774.

(*q*) Bac. Abr. Exors. (E.) 9; *vide post*, p. 522, n. If, after having been cited to do so, he fails to obey the citation within the time limited by it, he is subject to process for contempt of Court: *Mordaunt* v. *Clarke*, (1868) 1 P. & D. 592; *Lister*, (1894) 70 L. T. 812; *Coates*, (1898) 78 L. T. 820. If he administer, and omit to take out probate within six months after the death of the deceased, or within two months after the termination of any suit or dispute respecting the will, if there be any such which shall not be ended within four months after the death of the testator, he is liable to a penalty of double the amount of the duty chargeable: 55 Geo. III., c. 184, s. 37, as amended by 44 Vict. c. 12, s. 40.

(*r*) Bac. Abr. Exors. (E.) 9; *Pytt* v. *Fendall*, (1754) 1 Lee, 553. But the grant of administration is valid until revoked: Bac. Abr. Exors. (E.) 9; *Doyle* v. *Blake*, (1804) 2 Scho. & Lefr. at p. 237. And it seems that the Court *may* accept an executor's refusal, although he has administered: Bac. Abr. Exors. (E.) 9; Wms. on Exors. 199; *Doyle* v. *Blake* (*ubi supra*).

(*s*) *Badenach*, (1864) 3 S. & T. 465.

Executor of executor cannot refuse if he once administer.

If the executor of an executor accepts the executorship of his immediate testator, he cannot renounce the executorship of the original testator; and if he intermeddles in the administration of the estate of the original testator, he cannot refuse to administer the estate of his immediate testator (*t*).

What acts amount to administration.

In considering what acts will amount to an administration, so as to render an executor compellable to take probate, two general rules may be laid down. First, that whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon him the executorship, will amount to an administration. Secondly, that whatever acts will make a man liable as an executor *de son tort*, will be deemed an election of the executorship (*u*).

Taking possession of the testator's goods, unless the executor claim a property in them himself.

Hence, if the executor takes possession of the testator's goods, and converts them to his own use, or disposes of them to others, this is an administration (*x*). But if he seizes the testator's goods, claiming a property in them himself, though afterwards it appears that he had no right, yet this will not make him executor; for the claim of property shows a different view and intention in him than that of administering as executor (*y*).

Receiving debts and giving acquittance.

If an executor receives debts due to the testator, and especially if he gives acquittances for such debts (*z*), this amounts to an election of the executorship; so, if he releases a debt due to the testator (*a*).

Inserting advertise-

Where two persons who had been named executors, inserted

(*t*) *Perry*, (1840) 2 Curt. 655; *Brooke* v. *Haymes*, (1868) L. R. 6 Eq. 25.

(*u*) Bac. Abr. Exors. (E.) 10; Ro. Abr. 917; *Long* v. *Symes*, (1832) 3 Hagg. 771; *Rayner* v. *Green*, (1839) 2 Curt. 248. An executor *de son tort* is a person who without any authority from the deceased or the Court, does such acts as belong to the office of an executor or administrator: Bac. Abr. Exors. (B.) 3. As to what acts shall constitute a man executor *de son tort*, see Bac. Abr. Exor. (B.) 3; Swinb., Part VI., s. 22; Wentw. Off. Exors., Chap. XIV.; Godolph., Part II., c. 8; Wms. on Exors., Part I., Book III., Chap. V.

(*x*) Bac. Abr. Exors. (E.) 10. If he takes the goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration: Bac. Abr. Exors. (E.) 10.

(*y*) Bac. Abr. Exors. (E.) 10.

(*z*) *Pytt* v. *Fendall*, (1754) 1 Lee, 553; *Coates*, (1898) 78 L. T. 820.

(*a*) Bac. Abr. Exors. (E.) 10. If he takes possession of a legacy devised to him, this amounts to an administration, for a devisee cannot take his legacy without the assent of the executor: Rolle's Abridgement, 917.

in the newspapers an advertisement requesting all who had claims against the testator's estate to send in their accounts, and to pay all money due to the said estate to A. and B. (naming themselves) "his executors in trust," it was held that their conduct not merely showed an intention to take upon themselves the executorship, but was an absolute acceptance of the office (*b*). And where one of several executors joined in the execution of a power of attorney (wherein he was described as executor), whereby another was empowered to receive part of the testator's estate, that was held to be an act of administration which rendered him chargeable as executor (*c*).

ments for claims and accounts.

Joining in the execution of a power of attorney.

A letter written by one of several executors, stating that he and the others were executors, was held to afford sufficient evidence that he had acted as executor (*d*).

Writing a letter stating that he is executor.

An executor may, it should seem, pay the deceased's funeral expenses, or discharge the deceased's debts and legacies with his own money, without running the hazard of losing his right to renounce. These and other acts of necessity, such as feeding the deceased's cattle and the like, do not bind the executor; for they are to be esteemed offices of kindness and charity, and not such as shall involve him in the executorship (*e*).

Secus, paying deceased's funeral expenses with his own money, or doing offices of kindness and charity;

An executor who has not proved is not to be considered as acting, by assisting a co-executor who has proved, in writing letters to collect debts, or even by writing directly to a debtor of the testator, and requiring payment (*f*). For an act which would otherwise amount to an intermeddling in the administration, will not be so considered if done by an executor as agent for his co-executor, who has proved the will (*g*).

assisting co-executor who has proved; or acting as agent for his co-executor.

It is said that if one who is both trustee and executor, acts under the will, and has not renounced, it will be pre-

Where executor and trustee intermeddles,

(*b*) *Long* v. *Symes,* (1832) 3 Hagg. 771. See *Coates,* (1898) 78 L. T. 820.

(*c*) *Harrison* v. *Graham,* (1700) 3 Hills MSS. 239, quoted 1 P. Wms. 243, n.

(*d*) *Vickers* v. *Bell,* (1864) 10 Jur. N. S. 376.

(*e*) Bac. Abr. Exors. (B.) 3; *Long* v. *Symes,* (1832) 3 Hagg. at p. 774.

(*f*) *Orr* v. *Newton,* (1791) 2 Cox, 274.

(*g*) *Rayner* v. *Green,* (1839) 2 Curt. 248; *Stacey* v. *Elph,* (1833) 1 My. & K. 195. And see *Cooke* v. *Stevens,* [1898] 1 Ch. 162; *Harrison* v. *Graham, ubi supra.*

he is presumed to act in his superior capacity.

sumed that he has acted in his superior capacity, that of executor (*h*).

Taking the oath of office as executor, or entering an appearance in a suit in which the validity of the will is called in question.

Taking the usual oath of office as executor is not an intermeddling in the estate, and will not preclude the executor from renouncing (*i*). An executor who has taken the oath of office, and entered an appearance in a suit in which the validity of the Will is called in question, may yet be allowed to withdraw from the suit, and to renounce probate, provided he has not intermeddled with the effects (*k*).

Executor cannot renounce after probate granted.

But an executor cannot renounce after probate has actually been granted to him (*l*).

A person cannot accept part of the duties of executor, and refuse the rest.

A person cannot accept one part of the duties of an executor and refuse the rest (*m*). Accordingly, as has been seen, the executor of an executor who has accepted the executorship of the latter testator cannot renounce the executorship of the former (*n*).

Mode of renunciation.

There must be a formal act entered and recorded.

An executor cannot refuse by any act or declaration other than a formal renunciation in writing signed by him, and entered and recorded in the Court (*o*).

An informal refusal by letter to take the office of executor is insufficient. Until the refusal is recorded in Court, no person can take the administration (*p*). Nor will the Court

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(*h*) *Pytt* v. *Fendall,* (1754) 1 Lee, at p. 557.

(*i*) *McDonnell* v. *Prendergast,* (1830) 3 Hagg. at p. 216. The refusal of the oath amounts to a refusal of the office of executor: *Rex* v. *Raines,* (1699) 1 Ld. Raym. at p. 363.

(*k*) *Jackson* v. *Whitehead,* (1821) 3 Phill. 577. See *Panchard* v. *Weger,* (1811) 1 Phill. 212; *Meek* v. *Curtis,* (1827) 1 Hagg. 129. The early case, *Anon.*, (1671) 1 Ventr. 335, where it was said "an executor having taken the oath could not be admitted to refuse," can no longer be regarded as an authority for that proposition: *Jackson* v. *Whitehead* (*ubi supra*).

(*l*) *Veiga,* (1862) 3 S. & T. at p. 15.

(*m*) *Brooke* v. *Haymes,* (1868) L. R. 6 Eq. at p. 30. See *Paule* v. *Moodie,* (1620) 2 Roll. Rep. 132; 11 Vin. Abr. 139, pl. 10.

(*n*) *Ante,* p. 270.

(*o*) In practice the renunciation is entered in the Probate Registry: *vide post,* p. 502; it need not be under seal: *Boyle,* (1864) 3 S. & T. 426; and may be made by an attorney, where the power of attorney expressly authorises him to renounce on behalf of the executor: *Rosser,* (1864) 3 S. & T. 490.

(*p*) *Long* v. *Symes,* (1832) 3 Hagg. at p. 776. Where the executors wrote a letter to the Ordinary signifying that they could not attend the executorship, and desiring him to commit the administration, that, being recorded, was holden a sufficient refusal: *Goodier's Case,* (1590) 1 Leon. 135.

grant administration to another on the consent of the executor. It can only do so on the executor's renunciation of probate, or after a citation has been served upon him, and he has failed to appear thereto within the prescribed time (*q*).

A renunciation, until it is filed and recorded, is not final and may be withdrawn (*r*).

A renunciation may be withdrawn before it has been filed and recorded.

It is not the practice to receive the renunciation of a party unless it be accompanied by the original will of the deceased to which the renunciation relates (*s*).

The renunciation must be accompanied by the will.

Sect. 16 of the Court of Probate Act, 1858, provides: "Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor" (*t*).

Executor surviving and dying without proving, or not appearing to a citation, to be treated as if he had not been appointed.

SUB-SECTION 2.—*Consequences of an Executor's Renunciation—Retractation.*

The Court of Probate Act, 1857, s. 79, provides: "Where any person, after the commencement of this Act (*u*), renounces probate of the will of which he is appointed executor or

An executor who renounces is to be treated as

(*q*) *Garrard* v. *Garrard*, (1871) 2 P. & D. 238.

(*r*) *Morant*, (1874) 3 P. & D. 151.

(*s*) *Fenton*, (1825) 3 Add. 35. This practice may be departed from in a proper case: *ibid.*

(*t*) An executor who has been cited to take probate of a missing will, and has not appeared to such citation, is barred from taking probate of the original will when found: *Davis* v. *Davis*, (1859) 4 S. & T. 208. There is a distinction between a citation to propound and prove a will in solemn form of law, and a citation to take probate. The latter form of citation is that referred to by the statute: *Bewsher* v. *Williams*, (1861) 3 S. & T. 62. *Vide post*, p. 575.

(*u*) The section does not apply to an executor who had renounced before the Act came into operation; and the retractation of such renunciation after the Act came into operation, and a second renunciation after such retractation, will not bring him within the action: *Whitham*, (1866) 1 P. & D. 303.

if he had never been appointed executor.

one of the executors, the rights of such person in respect of the executorship shall wholly cease ; and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

Retractation of renunciation by executor : before the Court of Probate Act, 1857 ;

Under the old law, where a sole executor or all the executors of a will renounced, and administration had been granted, the renunciation could not be retracted, for the reason that the representation had been suffered to go into another channel, and the executors could not be allowed to come in and alter the state of things to which their conduct had given rise (*x*). But an executor who had renounced might retract at any time before administration had passed the seal (*y*).

Where some executors proved and others renounced, those who had renounced were allowed to retract at any time before an actual grant of administration *de bonis non*, but not afterwards. For until then they could be let in without altering the devolution of the representation, seeing that they would only occupy the position which they might originally have occupied (*z*).

since the Court of Probate Act, 1857.

It was at one time suggested that the words of sect. 79 prevented retractation by an executor under any circumstances (*a*), but it has now been decided that there is nothing in that section to prevent the Court from allowing a retractation according to the old practice in a case fit for it (*b*) ; though such a retractation will not be permitted unless the executor can show that it will be for the benefit of the estate or of those interested under the deceased's will (*c*). If an executor has renounced after intermeddling in the effects, and subsequently desires to take probate, his right course

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(*x*) See *Stiles*, [1898] P. at p. 14.

(*y*) *McDonnell* v. *Prendergast*, (1830) 3 Hagg. 212.

(*z*) See *Stiles*, [1898] P. at p. 14.

(*a*) By counsel in *Badenach*, (1864) 3 S. & T. at p. 466.

(*b*) *Stiles*, [1898] P. 12, affirming the *dictum* of Lord Penzance to that effect in *Badenach*, (1864) 3 S. & T. at p. 466. See *Whitham*, (1866) 1 P. & D. 303.

(*c*) *Gill*, (1873) 3 P. & D. 113.

is to apply to the Court for a declaration that his renunciation was invalid, and not for leave to retract (*d*).

A person who has renounced probate as executor cannot take a representation to the same deceased in another capacity.

By Rule 50 N.-C. B.: "No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the deceased in another character." A renunciation of probate by an executor is therefore a waiver of his right to represent the deceased in any other capacity. But this rule, though intended for the general guidance of the business of the Registry, is capable of modification by the Court, if sufficient reason can be shown for a departure from it (*f*).

(*d*) *Badenach,* (1864) 3 S. & T. 465; and see *post,* pp. 507, 508.

(*f*) *Loftus,* (1864) 3 S. & T. 307. See *Richardson,* (1859) 1 S. & T. 515; *Morrison,* (1860) 2 S. & T. 129; *Wheelwright,* (1878) 3 P. D. 71; *Rayner,* (1908) 52 Sol. Jo. 226; and see *post,* p. 506. The rule does not prevent an executor, who has renounced, from taking administration with the will annexed as the attorney of the other executors: *Russell,* (1869) 1 P. & D. 634.

CHAPTER VIII.

OF PROBATE.

Section 1.

OF THE VARIOUS FORMS OF PROBATE.

SUB-SECTION 1.—*Of Probate in Common Form, and in Solemn Form, or per Testes.*

A testament may be proved in two ways.

A TESTAMENT may be proved in two ways, either in common form, or by form of law; which latter mode is also called the solemn form, and, sometimes, proving *per testes* (*a*).

Proof in common form.

A will is proved in common form where there is no contest about the will, but the executor, without citing the parties interested and in their absence, presents it at the Registry, and upon formal proof of its validity obtains the probate and seal of the Court thereto (*a*).

Proof in solemn form.

A will is proved in solemn form when it is propounded in an action to which the persons interested, as the widow and next of kin, are parties, and after the proof examined and fully heard receives the sentence and decree of the Court pronouncing for its validity (*a*).

Difference in effect between probate in common form and probate in solemn form.

The difference in effect between these two forms of probate is, that the executor of a will proved in common form may at any time thereafter be called upon, by those whose interests are adversely affected, to prove the will in solemn form, and if he then shall fail to establish its validity the probate so granted is revoked (*b*). But if the will is proved in solemn

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(*a*) Wms. on Exors., p. 238; Swinb., Part VI., s. 14; Godolph., Part I., c. 20, s. 4.

(*b*) *Vide post*, pp. 527, 577; see Wms. on Exors., p. 242; Godolph., Part I., c. 20, s. 4; *Hoffman* v. *Norris*, (1805) 2 Phill. 230, n.; *Merryweather* v. *Turner*, (1844) 3 Curt. 802, 817; *Topping*, (1853) 2 Rob. 620. The suggestion by Godolphin, perpetuated in Wms. on Exors., p. 242, that the lapse of thirty years works a prescription, is discredited by the cases cited above. In *Blake* v. *Knight*, (1843) 3 Curt. at p. 553, where the defenform, no person who has been a party or privy to the proceedings can afterwards by any fresh citation put the executor again to proof of the will (*c*).

In what cases an executor who has proved the will in solemn form may again be cited to the end that the probate should be revoked.

There are, however, two cases in which an executor who has proved the will in solemn form may again be cited to the end that the probate granted to him should be revoked. First, if the judgment of the Court pronouncing for the will has been obtained by fraud, in which case it may be set aside not only as against those who obtained it by fraud, but as against all persons interested thereunder, for the will is either good or bad as against all the world (*d*). But a person will not be allowed to maintain an action to set aside, on the ground of fraud, a judgment establishing a will and granting probate of it, unless he adduces evidence of facts discovered since the judgment which render it reasonably probable that the action will succeed. If he is unable to do this, the proceedings in the action will be stayed as frivolous and vexatious, on the motion of the defendant (*e*).

Secondly, if the existence of a will of later date is discovered after the judgment has been pronounced, the parties having an interest under such later will may again cite an executor, who has proved an earlier will in solemn form, and obtain a revocation of the probate (*f*).

What persons are bound by a decree pronouncing for a will in solemn form.

All persons who were parties to the action,

It must further be noticed that the judgment in an action for probate in solemn form binds only those persons who were parties or privies to the suit. All persons who were actually parties to the suit, whether in the character of plaintiffs, defendants, or interveners, and persons who have been cited to see proceedings, whether they actually intervene or not (*g*),

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dant after some years called in probate of a will, and put the executor to proof in solemn form, Sir John Nicholl said that though he was entitled to do so, yet, considering the time at which he had chosen to exercise his right, he was not entitled to any indulgence ; he was entitled to have the law strictly administered, but to nothing beyond it.

(*c*) *Wytcherley* v. *Andrews*, (1871) 2 P. & D. 327 ; *Young* v. *Holloway*, [1895] P. 87.

(*d*) *Birch* v. *Birch*, [1902] P. 130, C. A. ; *Priestman* v. *Thomas*, (1884) 9 P. D. 70.

(*e*) *Birch* v. *Birch*, [1902] P. 130 ; see *Young* v. *Holloway*, [1895] P. 87.

(*f*) Wms. on Exors., p. 451 ; Wentw. Off. Ex., 111, 112, 14th ed.

(*g*) For an explanation of these terms, see *post*, pp. 592, 593.

are bound by the judgment of the Court pronouncing for the will, and cannot, except in the two cases mentioned above, call it in question at a later date (h). But it is not necessary in the Probate Division that a person should be a party to the suit in order to be bound by the result. There is a practice in this Court whereby any person having an interest may make himself a party to a suit by intervening; and because of the existence of this practice it has been held that if a person, knowing what was passing, is content to stand by and see his battle fought by some one else in the same interest, he is bound by the result, and cannot be allowed to reopen the case (i).

and all persons who were cognizant of the proceedings, and had a right to intervene in them, are bound by the decree,

It follows that a person who is not a party to proceedings in the Probate Division is bound by the result if he was cognizant of the proceedings and had the right to intervene.

But if a person, though cognizant of the proceedings, could not, so far as he then knew, have intervened in them, he cannot be held bound by their result, if at a later date he discovers facts which would have given him a right to intervene had he known of them at the time (j).

unless the suit terminated in a compromise.

The rule in question does not extend to cases in which the decree of the Court has been pronounced in consequence of a compromise entered into between the parties to the suit. Persons who, while cognizant of a suit, are willing to stand by while a contest is going on are bound by the decision of the Court, but they are not compelled to abide by a compromise, which binds only those by whom it was made (k).

SUB-SECTION 2.—*Of Limited, Double, and Cessate Probate.*

(1) Probate limited until the original will is brought in,

When probate is granted of the contents of a missing will, as contained in a draft, or copy, or in the depositions of the witnesses, the probate is limited until such time as the original will or a more complete copy is brought into the registry (l).

(h) *Wytcherley* v. *Andrews,* (1871) 2 P. & D. at p. 328.

(i) *Newell* v. *Weeks,* (1814) 2 Phill. 224; *Ratcliffe* v. *Barnes,* (1862) 2 S. & T. 486; *Wytcherley* v. *Andrews,* (1871) 2 P. & D. at pp. 328, 329.

(j) *Young* v. *Holloway,* [1895] P. 87; see also *Peters* v. *Tilly,* (1886) 11 P. D. 145.

(k) *Wytcherley* v. *Andrews,* (1871) 2 P. & D. at p. 329; *Ritchie* v. *Malcolm,* [1902] 2 Ir. R. 403.

(l) See *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. at p. 205.

And where there is a will and a codicil, and one of them is lost, in the absence of any evidence of the contents of the missing document, probate may be granted of the other, limited until the original or a copy of the missing document be found and brought in (*m*).

or is transmitted to this country.

Where the original will is in the custody of a foreign Court or in the possession of a person residing abroad, who refuses to deliver it up, probate may be granted of a properly authenticated copy, limited until such time as the original shall be transmitted to this country (*n*).

In a case of urgency, where the original will is in the possession of a person residing abroad, who is about to transmit it to England, probate may be granted of a copy without waiting for the arrival of the original, and the probate is then limited in a similar way (*n*).

(2) Probates limited as to time and purpose.

Probate of the will of a married woman no longer limited.

There has already been occasion to observe that since the Married Women's Property Act, 1882, the probate of the will of a married woman is general in form, and is not limited to the property which she had power to dispose of and did dispose of by her will (*o*).

Limited probate where the testator has limited the executor.

There are, however, still certain cases in which the probate is limited in form; for the Court will grant a limited probate wherever the testator has limited the executor (*p*).

So if a testator appoints an executor solely for the purpose of administering the estate of one whose sole executor he himself was, probate is granted to him limited for such purpose. Or if an executor is appointed solely for the purpose of carrying into effect the provisions of a particular codicil, the probate is limited accordingly (*q*).

The practice when there are two executors, one appointed generally and the other for a limited purpose, is stated (*q*) to

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(*m*) *Coulthard,* (1865) 11 Jur. (N. S.) 184; *Clements,* [1892] P. 254.

(*n*) *Lemme,* [1892] P. 89; *Von Linden,* [1896] P. 148; and see *post,* pp. 389, 390.

(*o*) *Ante,* p. 93; and as to wills of married women, valid as an execution of a power, but invalid by the law of the domicil, see *ante,* p. 94.

(*p*) *Sutton* v. *Smith,* (1753) 1 Lee, at p. 280; *Davies* v. *The Queen's Proctor,* (1851) 2 Rob. 413; *Beer,* (1851) 2 Rob. 349; *vide ante,* pp. 263—265.

(*q*) Tristram & Coote, p. 114.

be as follows: If both apply for probate at the same time, the grant is made in the same instrument, but the powers of each are distinguished, that is to say, probate is therein granted to the general executor of all the estate, save and except the property which vests in the limited executor; while as regards the latter, his probate is restricted according to the will. If the executors apply singly the grant is special in each case.

Wills invalid save as the exercise of a power of appointment.

It has already been stated that *probate* will not be granted of the will of a married woman, valid as the exercise of a power of appointment, but invalid as a will by the law of the testatrix's domicil. Administration with the will annexed, limited to the property comprised in the power, is granted to the appointee (*r*).

Wills revoked by marriage save in so far as they exercise a power of appointment.

And where a will which has been revoked by marriage exercises a power of appointment within the exception of sect. 18 of the Wills Act, administration with the will annexed is granted to the appointee, limited to the property over which the testator has a power of appointment (*s*).

(3) Double probate.

Where there are divers executors named in the will, upon the grant of probate to one of them, it is the practice to reserve power of making a like grant to the others. An executor to whom power is reserved may at any time during the lifetime or after the death of the proving executor take a grant of probate, unless he shall in the meantime have renounced, or have failed to appear to a citation to accept or refuse probate.

And this is what is called a double probate, which is in this manner: the first that comes in takes probate in the usual form, with reservation to the rest; afterwards, if another comes in, he also is to be sworn in the usual manner, and an engrossment of the original will is to be annexed to such probate in the same manner as the first, and in the second grant such first grant is to be recited; and so on, if there are more that come in afterwards (*t*).

(4) Cessate probate.

Where the original grant has been limited for any specified time, or until the happening of any specified event or contingency, a new grant is made upon the efflux of the time and

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(*r*) *Ante*, p. 94.

(*s*) *Russell*, (1890) 15 P. D. 111.

(*t*) 4 Burn. E. L. 310, 9th ed.

the happening of the event referred to in the original probate. Such grants are distinguished from grants *de bonis non* and are known as second or cessate grants (*u*).

So if an executor is appointed for life or for a specified time, the grant to him ceases upon his death or at the expiration of the time, and the substituted executor, if any, takes a second or cessate grant of probate.

If probate is granted to an executrix during her widowhood, it ceases on her remarriage, and a cessate grant is made to the substituted executor, if any.

If probate has been granted of a copy of the will, limited until such time as the original shall be brought in, the grant ceases on the original being found and brought into the registry, and the executor takes probate of the original will. The same observation, *mutatis mutandis*, applies to cases where the grant is limited until such time as a more authentic copy shall be brought in.

Section 2.

OF WHAT INSTRUMENTS PROBATE IS NECESSARY, AND WHAT INSTRUMENTS OUGHT NOT TO BE PROVED.

Testamentary instruments disposing of personal property situate in England.

Probate of every testamentary instrument, whether will or codicil, which disposes of personal property situate in England must be obtained in the Probate Division; otherwise its existence cannot be recognised by any Court of law or equity.

Since the Land Transfer Act, 1897, a will disposing only of real property situate in England.

Since the Land Transfer Act, 1897, a will disposing of real property in England, but neither appointing an executor, nor disposing of any personal estate, is in the case of a testator dying after the commencement of that Act entitled to probate (*x*).

Wills made in execution of a power.

A will made in execution of a power must be proved in the Probate Division (*y*). According to the decision in the case of *Barnes* v. *Vincent* (*z*), the duty of the Ecclesiastical Court,

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(*u*) Tristram & Coote, p. 150.

(*x*) *Vide ante*, pp. 15—17; and as to the law before the Act, *ante*, pp. 15, 16.

(*y*) *Tatnall* v. *Hankey*, (1838) 2 Moo. P. C. at pp. 351—353; *Goldsworthy* v. *Crossley*, (1844) 4 Hare, 140.

(*z*) (1846) 4 N. C. Suppl. xxi.; 5 Moo. P. C. 201.

Practice of the Ecclesiastical Court as to wills in execution of a power.

whenever a will purporting to be made and executed under a power was presented for probate, was to grant probate if satisfied as to the testamentary capacity and intention of the maker of the instrument, and that the provisions of the Wills Act had been complied with, and to leave the Court which had to deal with the rights under the instrument to decide whether or not it was authorised by that power and by its execution; and their Lordships appear to have considered that, on a power being alleged, the Ecclesiastical Court should grant probate without inquiring as to the existence of the power.

Practice in the Probate Division.

But in *In the Goods of Tharp* (*a*) it was pointed out by the Court of Appeal that the case of *Barnes* v. *Vincent* (*b*) was decided at a time when the Court of Probate, being an Ecclesiastical Court, was a Court of very limited jurisdiction, and could not decide the question of the sufficiency of the execution of the power; and that since the Judicature Act every one of the Divisions of the High Court of Justice has now jurisdiction to do that which might be done by any other Division. Accordingly it was laid down that, in cases of wills made under a power, it is not only competent to, but incumbent upon, the Probate Division, if that Court has all persons interested before it, to decide the question whether there was a power, and whether it was well executed (*c*).

A will disposing only of property abroad is not entitled to probate in England.

A will disposing only of property in a foreign country is not entitled to probate in England (*d*), even though it contain an appointment of executors to administer the estate in the foreign country (*e*).

A will which, though it contains no disposition of

A will which contains the bare nomination of an executor to act in this country is entitled to probate, though it gives

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(*a*) (1878) 3 P. D. 76; *ante*, p. 7.

(*b*) (1846) 5 Moo. P. C. 201.

(*c*) *Vide ante*, p. 7; and see *Gunn*, (1884) 9 P. D. at p. 244; *Att.-Gen.* v. *Lord Ailesbury*, (1887) L. R. 12 A. C. at p. 696. The Judicature Act has no effect upon the non-contentious branch of the jurisdiction of the Probate Division, and has not, therefore, in any way enlarged that jurisdiction: *Tomlinson*, (1881) 6 P. D. at p. 210.

(*d*) *Coode*, (1867) 1 P. & D. 449; *Mann*, [1891] P. 293; *vide ante*, p. 13.

(*e*) *Mann*, [1891] P. 293; *Murray*, [1896] P. 65; and as to the practice where there are two independent wills, one disposing of property in England and the other of property abroad, *vide ante*, pp. 13, 14, 238.

property, nominates an executor to act in this country, is entitled to probate.

no legacy and appoints nothing to be done by him (*f*). So the nomination of executors in a testamentary paper which disposed only of real estate was sufficient, even before the Land Transfer Act, 1897, to entitle the instrument to probate (*g*), even though the executor renounced (*h*).

A paper which merely revokes all former wills is not entitled to probate.

A paper which contains no disposition of property or appointment of executors, but merely revokes all former wills, is neither will nor codicil and is not entitled to probate (*i*).

Declarations of trust.

The Courts of Equity will, in certain cases, give effect to a trust not disclosed or not fully disclosed in a testamentary instrument which has been admitted to probate, although the paper on which the terms of the trust have been written has not been proved as a testamentary instrument (*j*).

A will merely appointing testamentary guardians need not be proved.

It is not necessary that a will merely appointing testamentary guardians should be proved in the Probate Division (*k*).

A will may consist of several documents.

It has been seen that a will need not consist of one document only. As a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each duly executed, and together constituting the last will and testament of the deceased (*l*).

An unattested paper, incorporated by reference.

A paper not duly executed or attested may be entitled to probate, if incorporated by reference in a duly executed paper (*m*).

As a general rule, a will and all the codicils thereto must be proved at one and at the same time. Nor will probate of the

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(*f*) Godolph., Part II., c. 5, s. 1; see *Brownrigg* v. *Pike*, (1882) 7 P. D. 61; *Lancaster*, (1859) 1 S. & T. 464.

(*g*) *O'Dwyer* v. *Geare*, (1859) 1 S. & T. 465; *Barden*, (1867) 3 P. & D. 325. As to the exception to this rule in the case of wills of married women made in the exercise of a power of appointment before the Married Women's Property Act, 1882, *vide* the cases cited, and *Tomlinson*, (1881) 6 P. D. 209; *Brownrigg* v. *Pike*, (1882) 7 P. D. 61; *Cubbon*, (1886) 11 P. D. 169; *Hornbuckle*, (1890) 15 P. D. 149; *ante*, pp. 15, 16.

(*h*) *Jordan*, (1868) 1 P. & D. 555.

(*i*) *Fraser*, (1869) 2 P. & D. 40; *secus* where the paper also contains provisions of a testamentary character: *Durance*, (1872) 2 P. & D. 406. The grant is made as upon intestacy without annexing the paper writing, but with a note that it is so made in consequence of the execution of the document revoking the former will: *Toomer* v. *Sobinska*, [1907] P. 106. The case of *Brenchley* v. *Still*, (1850) 2 Rob. 162, has not been followed.

(*j*) *Vide ante*, p. 233, note (*d*), and Wms. on Exors., pp. 304, 305.

(*k*) *Morton*, (1864) 3 S. & T. 422.

(*l*) *Ante*, p. 164.

(*m*) *Ante*, Chap. VI., pp. 220 *et seq.*

Probate of a will cannot be had during a *lis pendens* as to a codicil.

The rule relaxed in a proper case.

will be granted to the executor while a contest subsists as to the validity of the codicil, for that being undetermined it does not appear what was the will, and the executors cannot take the common oath (*n*). But where there is a necessity for an immediate representation, the Court may, in a proper case, grant probate of a will only to the executors or some of them, reserving all questions as to the validity of a codicil which is being litigated. Such a probate does not empower the executors to distribute the estate affected by the codicil (*o*).

Probate of some alone of several testamentary papers, where the others are not in this country.

Under special circumstances the Court may grant probate of some papers only of those which constitute the will of the deceased, the other papers or authentic copies thereof not being in this country at the time, reserving power to the executor to prove the other papers when they arrive, and on an undertaking on his part that he will do so (*p*).

Codicil discovered after will proved.

If a will has been proved, and subsequently a codicil thereto is discovered which neither revokes nor alters the appointment of executors contained in the will, a supplemental probate of the codicil may be granted to the executor (*q*). But if the codicil alters or revokes the appointment of executors in the will, the probate of the will is revoked, and a new probate of the will and codicil is granted to the executors entitled thereto (*r*).

Where the will has been proved abroad, the codicils must be proved in the same Court.

Where the will has been proved abroad, probate of the codicils, if any, must be obtained from the Court which granted probate of the will (*s*).

Exclusion of words or clauses in the will from probate.

It has appeared in earlier chapters that a will may in part be admitted to probate, and in part probate may be refused; as, for instance, where some clause or clauses in the will have been inserted therein by fraud, or, *per incuriam*, without the knowledge of the testator (*t*).

In such cases, as in cases where the will has been lost or destroyed after the death of the testator, and only part of its

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(*n*) *Neagle* v. *Cantillon*, (1755) 2 Lee, 246.

(*o*) *Fowlis* v. *Davidson*, (1845) 4 N. C. 149; see Tristram & Coote, p. 14, n., where a number of unreported cases are cited.

(*p*) *Robarts*, (1873) 3 P. & D. 110; *vide post*, p. 390.

(*q*) Tristram & Coote, p. 15.

(*r*) *Langdon* v. *Rooke*, (1841) 1 N. C. 254; *Beetson*, (1848) 6 N. C. 13.

(*s*) *Miller*, (1883) 8 P. D. 167; *ante*, p. 26.

(*t*) *Ante*, pp. 90, 100 *et seq*.

provisions can be proved, probate will be granted of the remainder of the will, omitting such clause or clauses, or of that part of the contents of the missing will which is proved to the satisfaction of the Court (*u*).

Power of the Court to exclude scandalous and offensive passages in the will from the probate.

The Court has power to exclude from the probate of the will, and from the copy kept at the Registry, words which are gratuitously offensive, scandalous or libellous (*v*).

Section 3.

CONDITIONAL OR CONTINGENT WILLS.

Where a will is expressed to take effect on the happening of a contingency which fails, the will is not entitled to probate.

A will may be expressed so as to take effect only in the event of the happening of some contingency or condition, and if such is the case, and the contingency does not happen or the condition fails, the will is not entitled to probate.

But a will is not conditional or contingent unless it appears by plain words on the face of it that its provisions were intended to take effect only in the event of the happening of the contingency, and not otherwise.

But, in order that a will should be regarded as conditional or contingent and probate refused on the ground that the contingency to which the testator referred has not occurred, it must plainly appear from the terms of the will that the testator intended to limit its operation, and that its provisions were intended to take effect only in the event of the happening of the contingency, and not otherwise (*w*). If the testator refers to a contingency or the happening of an impending or anticipated event merely by way of ascribing a reason for his making a will, but does not express in terms his intention of limiting its operation to the happening of such contingency or event, the will shall not be regarded as contingent or conditional, nor shall probate thereof be refused on the ground that the contingency or event has not occurred (*x*).

The test as to the conditional nature of a will.

The distinction is clearly drawn by Sir F. H. Jeune in *In the Goods of Spratt* (*y*) in a judgment in which the preceding cases were exhaustively considered. "In cases of the character of the present," said the learned judge, "the difficulty which

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(*u*) For the limits of this rule, see *Rhodes* v. *Rhodes,* (1882) L. R. 7 A. C. 192; and (as to lost wills) *Woodward* v. *Goulstone,* (1886) L. R. 11 A. C. 469; but see *Boehm,* [1891] P. at p. 251; *ante,* p. 101.

(*v*) *Vide post,* p. 559.

(*w*) See *Porter,* (1869) 2 P. & D. at p. 23.

(*x*) *Ibid.*; and see *Edmondson* v. *Edmondson,* (1901) 17 T. L. R. 396.

(*y*) [1897] P. 28, at p. 29.

If the will is clearly expressed to take effect only on the happening or not happening of any event, it is conditional.

arises in determining the intention of the testator as expressed in his will is that an ambiguity is caused by the use of language which renders it doubtful whether the testator meant to refer to a possible event as his reason for making a will, or as limiting the operation of the will made.

"If the will is clearly expressed to take effect only on the happening, or not happening, of any event, *cadit quæstio*, it is conditional (*z*).

But if the testator

"If the testator says, in effect, that he is led to make his

(*z*) In the following cases wills were held to be conditional on the happening of an event, and, as the event had not happened, probate was refused :—

A testator, intending to go to Ireland, made a will in the following terms : "*If I die before my return from my journey to Ireland* I wish," etc. Held : a conditional will : *Parsons* v. *Lanoe*, (1748) 1 Ves. Sen. 189.

"Being on the eve of embarking for San Francisco . . . I do hereby, *in the case of my decease during my absence* being fully ascertained and proved, direct," etc. Sir C. Cresswell, while stating that the Court is unwilling by reason of such expressions to set aside testamentary papers which probably contain the deceased's intentions, held that the will was conditional on death during the voyage or at San Francisco : *Winn*, (1861) 2 S. & T. 147 ; see *Roberts* v. *Roberts*, (1862) 2 S. & T. 337.

"Being obliged to leave England to join my regiment in China . . . I leave this paper containing my wishes and desires. *Should anything unfortunately happen to me while abroad*, I wish, etc. . . . Everything I may be in possession of at that time or anything appertaining to me hereafter to be equally divided." Held, though reluctantly, that the provision as to the disposition of the property, and especially the use of the words "*at that time*," showed that the will was conditional on death abroad : *Porter*, (1870) 2 P. & D. 22.

"*In case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London*." Held : a conditional will : *Robinson*, (1870) 2 P. & D. 171 ; contrast *Martin*, (1867) 1 P. & D. 380 ; *Mayd*, (1880) 6 P. D. 17.

A mariner's will commencing "*Instructions to be followed if I die at sea or abroad*." Held : conditional : *Lindsay* v. *Lindsay*, (1872) 2 P. & D. 459.

A husband made a will in which he left all his property to his wife. Subsequently he and his wife, being about to start upon a journey, executed a joint will expressed to take effect *in case they should be called out of the world at one and the same time and by one and the same accident*. By this will they revoked all former wills. The husband died in the lifetime of his wife. Held : that the joint will was a conditional will, dependent upon a contingency which did not happen, and was therefore inoperative even to revoke the previous will : *Hugo*, (1877) 2 P. D. 73.

A testator in India executed a will commencing "I write this as my last will and testament *in case of a sudden or accidental death befalling me in India*." He died in England. Held : a conditional will : *Jobson* v. *Ross*, (1873) 42 L. J. P. 58. Contrast *Vines* v. *Vines*, [1910] P. 147.

will by reason of the uncertainty of life in general, or for some special reason, *cadit quæstio*, it is not conditional (*a*).

merely refers to the contingency as a reason for making his will, it is not conditional.

(*a*) In the following cases wills were held to be unconditional, the intention of the testator clearly being not to limit the operation of the will, but to ascribe a reason for its execution:—

The testator, before proceeding on a voyage, made a will containing the following clause: "*Therefore, as I may easily die,* I think it my duty to inform you what you have to do with my property in case I should die." Held: unconditional: *Strauss* v. *Schmidt,* (1820) 3 Phill. 209.

"All men are mortal, and no one knows how soon his life may be required of him. *Lest I die before the next sun,* I make this my last will." Held: unconditional: *Burton* v. *Collingwood,* (1832) 4 Hagg. 176.

"In the prospect of a long journey, *should God not permit me to return home,* I make this my last will." The will was not, in fact, executed until after the testator's return from his journey. It seems clear, however, that the Court did not consider the language used to show that the will was intended to be conditional: *Cawthron,* (1863) 3 S. & T. 417.

The testator, while stationed on the Gold Coast, wrote a letter containing the following: "*In the event of my death while serving in this horrid climate, or any accident happening to me,* I leave, etc. . . . I consider that every person should be prepared for the worst and particularly in such a treacherous climate as this . . . which has compelled me to write this letter." After the letter was written the testator left Africa, invalided, and died in England some three months later. Lord Penzance held that the testator did not intend to limit the operation of the will to the event of his death happening in Africa, but the decision of the Court seems to have been that the contingency contemplated by the testator was that of death from the effects of the climate of Africa, and that such contingency had actually happened: *Thorne,* (1865) 4 S. & T. 36; see *Spratt,* [1897] P. at p. 32.

"*In case of any fatal accident happening to me,* being about to travel by railway, I hereby leave, etc." Held: not a conditional will, the reference to the railway journey being regarded merely as a reason ascribed for the execution of a will: *Dobson,* (1866) 1 P. & D. 88.

The deceased, a military officer on active service, wrote: "If we remain here for some time to come the chances are in favour of more of us being killed, and, as I may not have another opportunity of saying *what I wish to be done . . . in case of an accident,* I wish to make over everything I possess to you." Held: not conditional on the death of the deceased while on active service: *Spratt,* [1897] P. 28.

"As I am about to leave home for Bangor, *should any accident, etc., take me out of this world,* I will to S. C. the remainder of my property. And should, in God's inscrutable providence, anything take S. C. away from this world before I again make my will, I will everything to E. McD." Held: the will was not conditional on any accident happening to the testator during his projected journey to Bangor: *Stuart,* (1888) 21 L. R. Ir. 105.

A will contained the following clause: "I leave to P. and D. the house and lands of *L.*, *until I am able to live there and enjoy it myself.*" The testator, after repeatedly revisiting and residing at *L.*, died. It was proved that he was a man of peculiar religious notions, and believed that he would revisit the earth after his death, and had frequently stated that he would reside at *L.* during the millennium. Held: the above clause was a devise and not a gift *inter vivos,* and took effect on the death

Where the intention of the testator, to be gathered from the words of the will, is doubtful, the whole language of the document and the surrounding circumstances must be considered.

"But if it be not clear whether the words used import a reason for making a will or impress a conditional character on it, the whole language of the document and also the surrounding circumstances must be considered (*b*). In such cases there are two criteria which are especially useful for determining the problem: first, whether the nature of the disposition made appears to have relation to the time or circumstances of the contingency (*c*); and, secondly, where the contingency is connected with a period of danger to the testator, whether it is coincident with that period, because, if it is (*d*), there is ground to suppose that the danger was regarded by the testator only as a reason for making a will, but, if it is

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of the testator, and that the words in italics should be rejected as a limitation until an impossible event: *Bunbury* v. *Doran,* (1873) Ir. R. 8 C. L. 516, affirmed, Ir. R. 9 C. L. 284—Ex. Ch.

(*b*) In the following cases, where the words of the will were equivocal, the will was held not to be conditional, the Court coming to the conclusion, from the disposition of the property and the circumstances surrounding the execution, that the testator intended the will to operate without regard to the happening of the contingency:—

"I, W. M., being physically weak in health, . . . have obtained permission to cease from all duty for a few days, and I wish during such time to be removed from the brig *A.* to the floating hospital ship *B. W.* in order to recruit my health; and *in the event of my death occurring during such time,* I hereby give and bequeath," etc. Held: the will was not contingent on the testator's death in consequence of the illness from which he was suffering when the will was made: *Martin,* (1867) 1 P. & D. 380.

"On leaving this station for T. and M., *in case of my death on the way,* know all men this is a memorandum of my last will." Held: not contingent on death before arriving at T. or M.: *Mayd,* (1880) 6 P. D. 17; cf. *Vines* v. *Vines,* [1910] P. 147.

A testator made a will leaving the residue of his estate to his wife during her widowhood, but not disposing of the residue in the event of her dying a widow. Being about to sail with his wife from Calcutta to England, he wrote the following letter (in form a good will by Scots law) to his brother: "*If anything happens to us on the way,* my will has been accidentally packed in a tin box to which I cannot now get access. . . . However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan." The letter proceeded to deal with the disposition of the testator's estate after his wife's death, should she survive him. Neither the testator nor his wife died on the voyage. On the death of the testator, Held: that the letter was not conditional, but a valid testamentary document, and must be admitted to probate: *Halford* v. *Halford,* [1897] P. 36.

(*c*) *E.g.*, *Porter,* (1870) 2 P. & D. 22.

(*d*) *E.g.*, *Strauss* v. *Schmidt,* (1820) 3 Phill. 209; *Cawthron,* (1863) 3 S. & T. 417; *Mayd,* (1880) 6 P. D. 17.

not (*e*), it is difficult to see the object of referring to a particular period, unless it be to limit the operation of the will."

The Court will endeavour so to construe the will as to support its admissibility to probate.

The Court is unwilling to refuse probate of a testamentary paper on the ground that it is contingent, unless it is clear that the testator intended that it should operate only in a certain event or during a certain period (*f*).

If the will is contingent, and the contingency fails, it is inoperative to revoke a previous will.

If a will is in terms clearly contingent, and the contingency has failed, the will cannot be set up by any subsequent declaration of adherence, or by any means, save by some act amounting to a re-execution of it (*g*). Without some such act it is a nullity, and is inoperative to revoke a previous will; for the contingency attaches to every part of the instrument, including the clause of revocation (*h*).

A conditional *codicil* may republish the will.

But a *codicil*, in other respects contingent on an event which has not happened, may, it seems, republish a will to which it refers, or render that will valid if it has not been duly executed, and, on that ground, is entitled to probate (*i*).

Declarations made by testator after the failure of the contingency.

In coming to its decision as to whether a will is or is not contingent on the happening of an event, the Court cannot take into consideration declarations made by the testator after the failure of the contingency, expressing his adherence to the provisions of the will (*j*), unless the language of the document is ambiguous (*k*).

Will conditional on assent of third person

A will may be made conditional on the assent of a third person to its provisions, and if that assent is withheld the instrument is not entitled to probate (*l*).

(*e*) *E.g.*, *Parsons* v. *Lanoe*, (1748) 1 Ves. Sen. 189; *Roberts* v. *Roberts*, (1862) 2 S. & T. 337.

(*f*) *Dobson*, (1866) 1 P. & D. 88; see *Winn*, (1861) 2 S. & T. at p. 149; *Porter*, (1869) 2 P. & D. at p. 23.

(*g*) *Roberts* v. *Roberts*, (1862) 2 S. & T. 337; *Parsons* v. *Lanoe*, (1748) 1 Ves. Sen. 189; *Winn*, (1862) 2 S. & T. 147; *Burton* v. *Collingwood*, (1832) 4 Hagg. 176. As to execution after the contingency has failed: see *Cawthron*, (1863) 3 S. & T. 417.

(*h*) *Hugo*, (1877) 2 P. D. 73.

(*i*) *Da Silva*, (1861) 2 S. & T. 315.

(*j*) *Martin*, (1867) 1 P. & D. at p. 381; *Winn*, (1861) 2 S. & T. 147; *Roberts* v. *Roberts*, (1862) 2 S. & T. at p. 339.

(*k*) *Vines* v. *Vines*, [1910] P. 147, where Sir John Bigham held, on the authority of *Bryan*, [1907] P. 125, that where the language of the document is ambiguous, evidence of declarations by the deceased is admissible.

(*l*) *Smith*, (1869) 1 P. & D. 717.

Where the contingency is in suspense at the death of the testator.

When, on the death of the testator, the event on the happening of which the will is contingent is still in suspense, probate will, it seems, be granted at once, though such probate operates subject to the happening of the event, and only determines what is to be done with the property in the meantime (*m*).

A will in exercise of a power not necessarily contingent on the existence of the power.

A will intended to take effect as an exercise of a power of appointment is not necessarily contingent on the existence of the power; so if it turn out that the power was either not well created, or was defeated by the happening of some contingent event subsequently to the will, the disposition will not fail if the testator had a bequeathable interest in the property independent of the power (*n*).

Section 4.

JOINT AND MUTUAL WILLS.

Two persons may make a joint will.

A joint will is a single instrument whereby two persons give effect to their testamentary dispositions.

On the death of each testator, so much of the provisions of the joint will as relates to the disposition of his property is entitled to probate.

Two or more persons may make a joint will, which, if properly executed by each of them, is, so far as the property belonging to any one of them is concerned, as much his will and as well entitled to probate upon his death as if he had made a separate will dealing only with his own property (*o*). Such a will is, however, revocable at any time by either of the testators during their joint lives, and after the death of one of them by the survivor (*p*), but, if not altered or revoked, will, on the death of the survivor, be entitled to take effect as his last

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(*m*) *Cooper,* (1855) Dea. & Sw. 9; *Bangham,* (1876) 1 P. D. 429.

(*n*) *Southall* v. *Jones,* (1859) 1 S. & T. 298; *Sing* v. *Leslie,* (1864) 2 H. & M. 68.

(*o*) Thus probate was granted of a joint will of two persons, as a distinct will, upon the death of each: *Stracey,* (1855) Dea. & Sw. 6.

Two persons made a joint will, disposing of no personal estate, but containing the appointment of executors. Held: that the will was entitled to probate on the death of one of the joint testators: *Miskelly,* (1869) Ir. R. 4 Eq. 62.

Where a husband and wife made a joint will, the Court, upon the death of the wife, granted probate of so much of the instrument as became operative upon her death: *Piazzi-Smyth,* [1898] P. 7.

As a point of practice, when a joint will is proved for the first time, notice should be given to the Record Keeper, who will have it entered in the calendar of wills deposited during lifetime.

(*p*) *Hobson* v. *Blackburn,* (1822) 1 Add. 274.

Quære whether a joint will, disposing only of joint property, can be admitted to probate until the death of *both* testators.

will (*q*). In *In the Goods of Raine* (*r*), A. and B., two partners in a farming business and joint tenants in certain freeholds, executed a joint will containing various devises and bequests to take effect after the death of both of them. On the death of A., B. surviving, application for probate as of the will of A. was made by the executor therein named. Sir Cresswell Cresswell said: "Two persons profess to make their will, and neither gives anything without the other; and the instrument is to have no effect until the death of both. It is distinguished from the cases referred to (*s*): it is not a mutual will which purports to leave the survivor of one or more parties the property of the other; nor is it such an instrument as that in *In the Goods of Stracey* (*t*), calling itself a joint will, where the husband and wife disposed of separate property, over which they had respectively powers of appointment. I cannot grant probate of this paper during the life of either." This decision was disapproved of in the Irish case of *In the Goods of Miskelly* (*u*), and, as Sir Edward Vaughan Williams (*x*) points out, it is to be doubted whether the delay in the effect of the will interfered with its title to immediate probate as the will of the deceased testator; the decision has not been followed, and if it is still an authority, its effect is confined to a case where the joint will is not a disposition by each testator of his own property, but a disposition of joint property to take effect only after the death of both testators.

Mutual wills—what are.

A mutual will is one of two testamentary papers made respectively by two persons, each giving the other similar rights in his property, and being in fact identical, so far as they can be, for the purpose of carrying out the intention of the two testators.

Joint and mutual wills—what are.

A joint and mutual will is a mutual will executed by the two testators in the form of a single instrument (*y*). So far as

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(*q*) *Lovegrove*, (1862) 2 S. & T. 453; *Fletcher*, (1883) 11 L. R. (Ir.) 359.

(*r*) (1858) 1 S. & T. 144.

(*s*) *Hobson* v. *Blackburn*, (1822) 1 Add. 274; *Stracey*, (1855) Dea. & Sw. 6.

(*t*) (1855) Dea. & Sw. 6.

(*u*) (1869) Ir. R. 4 Eq. 62.

(*x*) Wms. on Exors., p. 7, n.

(*y*) As to the effect of joint and mutual wills by the Roman-Dutch law, see *Denyssen* v. *Mostert*, (1872) L. R. 4 P. C. 236; *Dias* v. *Livera*, (1879) L. R. 5 A. C. 123.

So far as their admissibility to probate is concerned, mutual and joint and mutual wills do not differ from any other form of will.

their title to probate is concerned, joint and mutual wills differ in no respect from any other form of joint will. On the death of one of the joint testators the Court will grant probate of so much of the instrument as becomes operative upon his death. And upon the death of the survivor the Court will grant probate of the instrument as his will if, and only if, the instrument remains unrevoked; for *so far as the admissibility of the instrument to probate is concerned*, the Court recognizes no limitation on the right of the surviving testator to revoke or to alter the provisions of the joint and mutual will at his pleasure. Thus in *Hobson* v. *Blackburn* (*z*) Martha, Susannah, and Joshua Hobson made a joint and mutual will, dated September 2nd, 1794, containing provisions for the devolution of their property from the one to the others on the decease of each of them, and providing for its distribution after the death of the survivor. Joshua died in 1796, without having altered or revoked his part of the joint and mutual will, and probate thereof, as to his effects, was granted to Martha and Susannah. On November 30th, 1820, Martha made a separate will, disposing of all of her property in a different manner from the dispositions in the joint and mutual will. On the death of Martha, in December, 1820, leaving Susannah surviving, probate was prayed of the joint will of September, 1794; but such probate was opposed on behalf of persons interested under the separate will of November, 1820. Sir John Nicholl said: "I have no hesitation whatever in rejecting the allegation propounding the mutual or conjoint will as that of the party deceased in this cause, on the principle that an instrument of this nature is unknown to the testamentary law of this country, or, in other words, that it is unknown as a will to the law of this country at all (*a*). It may, for aught I know, be valid as a compact, it may be operative in equity, to the extent of making the devisees of the will

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(*z*) (1822) 1 Add. 274.

(*a*) These words must be read with the rest of the judgment. They go no further than to deny that such a will can be made with the quality of being irrevocable, but if either of the testators dies without revoking it, the will is valid and entitled to probate as far as respects his property: *Piazzi-Smyth*, [1898] P. 7.

trustees for performing the deceased's part of the compact. But these are considerations wholly foreign to this Court, which looks to the instrument entitled to probate as the deceased's *will*, and to that only. The allegation plainly proceeds upon a notion of the irrevocability of the instrument which it propounds as the will of the deceased. Why, this very circumstance destroys its essence as a will and converts it into a contract; a species of instrument over which this Court has no jurisdiction. Upon these broad and, as I apprehend, sufficiently intelligible grounds, I reject this allegation."

But under certain circumstances a mutual will may be regarded as irrevocable in equity.

Although a mutual will cannot be admitted to probate as the will of the survivor of two co-testators if it has been revoked by him either during the lifetime or after the death of his co-testator, under certain circumstances, the provisions of a mutual will were enforced in equity as a compact, to the extent of making the devisees under a will, by which the survivor of two co-testators revoked a joint and mutual will, trustees for those who would have taken under the joint and mutual will, had it remained unrevoked. Since the Judicature Acts the Probate Division has a similar power, and, while admitting to probate the later will by which a joint and mutual will is revoked, may, in a proper case, direct the executors thereof to hold the property of the testator in trust for the persons who would have benefited under the joint and mutual will, had that instrument remained unrevoked (*b*).

And if a mutual will has been revoked by the survivor of the two testators, the Court may in certain circumstances declare the beneficiaries under the revoking instrument to be trustees for the persons who would have taken had the mutual will not been revoked.

The result of the cases on this point may be summarised as follows. Mutual wills, whether they are contained in the same or in different instruments, are revocable acts. Each testator is at liberty to revoke his will during the lifetime of his co-testator, with or without the concurrence of his co-testator, provided the co-testator has notice, so that he too may alter or revoke his will if he please. But where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement

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(*b*) *Stone* v. *Hoskins*, [1905] P. 194.

shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who died first has, by the death, become irrevocable (*c*). But, on the contrary, where the one who dies first has departed from the bargain by executing a fresh will revoking the former one, the survivor cannot claim to have the

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(*c*) In *Dufour* v. *Pereira,* (1769) 1 Dick. 419, a husband and wife made mutual wills, and the wife, after her husband's death, possessed all his personal estate under his will, and enjoyed the interest thereof during her life. Lord Camden held that by this act she bound her assets to make good all her bequests in the mutual will, and that her subsequent will, made after the death of her husband, so far as it broke in upon the mutual will, was void. The learned judge said: "Consider how far the mutual will is binding, and whether the accepting of legacies under it by the survivor is not a confirmation of it. I am of opinion it is. It might have been revoked by both jointly; it might have been revoked separately provided the person intending it had given notice to the other of such revocation." [The only object of notice is to enable the other party to the bargain to alter his or her will also: *Stone* v. *Hoskins,* [1905] P. at p. 197.] "But I cannot be of opinion that either of them could, during their joint lives, do it secretly; or that after the death of either it could be done by the survivor by another will. It is a contract between the parties which cannot be rescinded but by the consent of both. The first that dies carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not. The defendant hath taken the benefit of the bequest in her favour by the mutual will, and hath proved it as such; she hath thereby certainly confirmed it, and therefore I am of opinion that the last will of the wife, so far as it breaks in upon the mutual will, is void." The judgment of Lord Camden is set out at much greater length than the report in Dickens in Hargraves' Juridical Arguments, Vol. II., p. 304 [see also 2 Harg. Jurid. Exerc. 101], where it is said: "A mutual will is a revocable act. . . . But to affirm that the survivor (who has deluded his partner into this will upon the faith and persuasion that he would perform his part) may legally recall his contract, either secretly during the joint lives or after at his pleasure, I cannot allow. . . . If not revoked during the joint lives by any open act, he that dies first dies with the promise of the survivor that the joint will shall stand. It is too late afterwards for the survivor to change his mind, because the first dier's will is then irrevocable, which would otherwise have been differently framed if that testator had been apprised of this dissent. . . . This Court does not set aside the [later] will, but makes the devisee, heir, or executor, trustee to perform the contract."

In *Walpole* v. *Lord Orford,* (1797) 3 Ves. 402, Lord Loughborough refused to enforce the compact of a mutual will on the ground of the uncertainty and unfairness of the compact, and that case leaves the decision in *Dufour* v. *Pereira,* (1769) 1 Dick. 419, wholly unshaken (see note to *Hobson* v. *Blackburn,* 1 Add. p. 278). And the principle in *Dufour* v. *Pereira* (*ubi supra*) was affirmed by Sir Gorell Barnes in *Stone* v. *Hoskins,* [1905] P. 194.

later will of the deceased set aside or modified, either by way of declaration of trust or otherwise, even though he has received no express notice of the revocation during the lifetime of his co-testator. The only object of notice is to enable the other party to the bargain to alter his will also, and the survivor, who has notice as from the death of his co-testator that the latter has departed from the terms of the bargain, is not in any way prejudiced, for his will may be altered or revoked at his pleasure (*d*).

Section 5.

OF THE WILLS OF SOLDIERS AND SEAMEN.

Privileged wills of soldiers and seamen under sect. 11 of the Wills Act, 1837.

A will or codicil which is not entitled to probate under the general provisions of the Wills Act, 1837, may be admitted to probate as a good and valid disposition of personal property, if it is within the exception of sect. 11 of that Act, which enacts "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act."

Similar provision of the Statute of Frauds.

This exceptive clause is the same as that in the Statute of Frauds (*e*), by which statute it became for the first time necessary that wills of personal property should be in writing, except when made "by any soldier being in actual military service, or any mariner or seaman being at sea."

A person who comes within the exception in sect. 11 of the Wills Act may make a will of personal property by word of mouth, and by writing, however informal;

Wherefore a person who comes within the exception in sect. 11 of the Wills Act, 1837, may dispose of his personal property, not only by a writing unattested by witnesses, but by a will made by word of mouth (*f*). The Court, if satisfied that a document, however informal, written by such a person was intended by him as a disposition of his personal estate to take effect after his death, or that the substance of a verbal declaration made by him with a like intent is proved, will grant probate of the will of the testator as contained in the

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(*d*) *Stone* v. *Hoskins*, [1905] P. 194.

(*e*) 29 Car. II. c. 3, s. 23.

(*f*) *Drummond* v. *Parish*, (1843) 3 Curt. at p. 527, in which case the origin and nature of the privilege is discussed in detail; *Scott*, [1903] P. 234.

informal document, or in a writing setting forth the substance of the verbal declaration.

and even though an infant, provided he be over the age of fourteen.

And since, before the Statute of Frauds, a soldier in actual military service, and a mariner or seaman at sea, might make a will of personal property at or after the age of fourteen, it has been held that such persons retain that privilege notwithstanding the provision of sect. 7 of the Wills Act, 1837 (*g*).

Presumption as to unattested alterations in a soldier's or seaman's will.

Where a will in the testator's handwriting contains material alterations, about the making of which no information can be obtained, and such will was signed by the testator when as a soldier he was engaged in actual military service, it has been held that the alterations will be presumed to have been made during the continuance of such military service, and therefore will be included in the probate (*h*).

Construction of sect. 11 of the Wills Act.

Who is a "soldier."

Soldier.—The term "soldier" includes, it should seem, all persons in His Majesty's Regular Army, irrespective of rank (*i*). It has been held to include a surgeon in the military service of the East India Company (*k*), a militiaman (*l*), and a volunteer (*m*). The military status of irregular troops was established in 1901 with regard to the Imperial Yeomanry, the Natal Police, and the South African Constabulary (*n*).

"Actual military service."

In Actual Military Service.—Not every soldier is included in the provision under consideration; the section is expressly confined to those "in actual military service." The principle of the exemption contained in sect. 11 of the Act was adopted from the Roman Law; it must be taken to have been adopted subject to the limitations imposed by that law and by the Civil Law; it has therefore been held that, by the insertion of the words "actual military service," the privilege, as

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(*g*) *Farquhar*, (1846) 4 N. C. 651; *McMurdo*, (1867) 1 P. & D. 540; *Hiscock*, [1901] P. 78.

(*h*) *Tweedale*, (1874) 3 P. & D. 204.

(*i*) This seems to follow from the construction given to the term "mariner or seaman," *vide post*, p. 299.

(*k*) *Donaldson*, (1840) 2 Curt. 386.

(*l*) *Horton* v. *Leeds*, (1855) 5 El. & Bl. 595.

(*m*) *Scott*, [1903] P. 243; *Hiscock*, [1901] P. 78.

(*n*) *Hebelen*, deceased; *Quack*, deceased; *Fletcher*, deceased; the cases are not reported; *Cory*, (1901) 84 L. T. 270.

respects the British soldier, is confined to those who are *on an expedition* (*p*); in other words, there must be a state of war, and the soldier must be in some place for the purposes of that war (*q*).

The soldier must be *on an expedition.*

The meaning of the words "*in expeditione*," or, in the language of the Wills Act, "in actual military service," was considered by Sir F. H. Jeune in *In the Goods of Hiscock* (*r*). "I think it must be assumed, in the first place," said the learned judge, "that a state of war exists, with which the soldier is, or may be, connected; but, assuming such a state of war to exist, the question arises when, or how soon, does the soldier become on actual military service? . . . I cannot help thinking that the true test to be applied in all these cases is this,—had the soldier done something—had he taken some step at the time when he made his will, towards joining the forces in the field? (*s*). The step may be a small one, both as regards place and time. In case of invasion or civil war . . . the step might be merely that a man was taken from his home to man the walls or defences of his own native town."

There must be a state of war, and the soldier must have taken some step towards joining the forces in the field.

In the case of *Gattward* v. *Knee* (*t*) the same learned judge somewhat extended his ruling in *In the Goods of Hiscock*, by holding that mobilization may fairly be considered as a commencement of actual military service. He said (*u*): "I am of opinion that if the order for mobilization has been received, although the man himself may have done nothing under it, yet that order so alters his position as practically to place him *in expeditione*. Such an order goes beyond a mere warning; I do not think a mere warning for active service would be sufficient."

Mobilization.

Accordingly it has been held that a will made by a soldier while quartered in barracks in England (*x*), or in the

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(*p*) *Drummond* v. *Parish*, (1843) 3 Curt. at p. 542.

(*q*) *Hiscock*, [1901] P. at p. 82.

(*r*) [1901] P. at pp. 82, 83.

(*s*) Two sentences in the judgment have been combined, without, it is hoped, perverting the sense.

(*t*) [1902] P. 99.

(*u*) [1902] P. at p. 102; but see *Bowles* v. *Jackson*, (1854) 1 Spinks, Eccl. & Adm. 294.

(*x*) *Drummond* v. *Parish*, (1843) 3 Curt. 522.

Colonies (*y*), is not within the exception—for instance, a will made by a soldier while in command of the Mysore division of the army stationed in the East Indies, who died while on a tour of inspection of the troops under his command (*z*).

On the other hand, a will made by a soldier while on his way from one regiment to another, both of which were engaged in actual military service, was held to be privileged (*a*), as was a will made by an officer who had gone with his regiment to Africa to join a military expedition into the interior, though the will was made before the expedition actually left the British settlement (*b*).

And where a private in a volunteer battalion, who resided with his father in Chichester, sent in his name for active service in the war then being waged in South Africa, and, pursuant to an order, went into barracks at Chichester, where he made his will, actually embarking for South Africa two days after the will was made; it was held that by taking the step of going into barracks with a view to being drafted to the seat of the war, he had brought himself within the operation of sect. 11 of the Wills Act, 1837 (*c*).

And where on September 7th, 1899, a battalion stationed in India was "warned" for service, and two days later was "ordered to mobilize" for active service in South Africa, and embarked on September 19th, 1899; the informal will of a private soldier in that battalion, undated, but written between September 8th and 19th, was held to be the will of a soldier "in actual military service" within the meaning of the section (*d*).

(*y*) *White* v. *Repton,* (1844) 3 Curt. 818; *Phipps,* (1840) 2 Curt. 368; *Pery,* (1844) 2 L. T. (O. S.) 335.

(*z*) *Hill,* (1845) 1 Rob. 276.

(*a*) *Herbert* v. *Herbert,* (1855) Dea. & Sw. 10.

(*b*) *Thorne,* (1865) 4 S. & T. 36; *secus* the will of a soldier under orders to proceed from his station in one Indian Presidency to take part in the war going on in another, made two days before the march commenced: *Bowles* v. *Jackson,* (1854) 1 Spinks, Eccl. & Adm. 294; but see *Gattward* v. *Knee,* [1902] P. 99.

(*c*) *Hiscock,* [1901] P. 78; see *Stopford* v. *Stopford,* (1903) 19 T. L. R. 185; *Gordon,* (1905) 21 T. L. R. 653.

(*d*) *Gattward* v. *Knee,* [1902] P. 99; *May* v. *May,* [1902] P. 103, n.; see *Bowles* v. *Jackson,* (1854) 1 Spinks, Eccl. & Adm. 294; *supra,* note (*b*).

"Mariner or seaman."

Mariner or Seaman.—According to the construction given by Sir William Wynne, and adopted by subsequent judges, the term "mariner or seaman" does not exclude any person in His Majesty's navy, though superior officers of the ship, from the exception contained in the Act. The reasons for the exemption apply equally to a commander-in-chief as to a common seaman, and the learned judge said that it was the inclination of his mind to hold that the term included the whole profession, because he "did not know where to stop" (*e*). Nor is the term confined to seamen in the navy, it applies equally to those in the mercantile marine (*f*).

Who is a mariner or seaman.

An admiral of the fleet (*g*), the purser of a man-of-war (*h*), and a surgeon in the navy (*i*) are "mariners and seamen" within the meaning of the section.

What constitutes being "at sea."

At Sea.—The cases on the construction of the term "at sea" go to this length: that where a man has joined a vessel on service and has commenced a voyage in it, a will made in the course of that voyage, though on shore, is within the exception (*k*). So where a seaman, while his ship was in harbour, went ashore on leave, and there met with an accident from which he died, a will made by him after the accident while on shore was held to be the will of a seaman "at sea" (*l*).

Will written on shore in the course of a voyage.

In *In the Goods of Patterson* (*m*), a letter written by a mariner while on board his ship, which was lying in the river Thames at Gravesend, and before the ship had sailed on its voyage, was held to be a will made by a seaman "at sea." But in *In*

Will written on shipboard before the voyage has commenced.

(*e*) Sir William Wynne, in *Euston* v. *Seymour* (1802), cit. 2 Curt. at pp. 339, 340; Sir H. Jenner, in *Hayes,* (1839) 2 Curt. at p. 340; *Saunders,* (1865) 1 P. & D. at p. 18.

(*f*) *Morrell* v. *Morrell,* (1827) 1 Hagg. 51; *Donaldson,* (1840) 2 Curt. at p. 387; *Milligan,* (1849) 2 Rob. 108; *Parker,* (1859) 2 S. & T. 375.

(*g*) *Euston* v. *Seymour* (*ubi supra*).

(*h*) *Hayes* (*ubi supra*).

(*i*) *Saunders* (*ubi supra*).

(*k*) *McMurdo,* (1867) 1 P. & D. at p. 541.

(*l*) *Lay,* (1840) 2 Curt. 375. Contrast *Euston* v. *Seymour* (*ubi supra*), where the commander-in-chief of the naval force at Jamaica, who lived on shore at an official residence, was held not to come within the exemptive clause relating to mariners "at sea," and, consequently, a nuncupative will made by him on shore was pronounced invalid.

(*m*) (1898) 79 L. T. 123.

the Goods of Corby (*n*), where a vessel was lying at Melbourne when the testator shipped on board as an able seaman to return to England, Dr. Lushington seems to have held that irregular papers, written by him on board on the very day on which he shipped, could not be admitted to probate as a mariner's will, since the vessel did not sail until fifteen days afterwards.

Will written on a ship permanently stationed in harbour.

Ship in navigable river.

A will made on board a ship of war permanently stationed in Portsmouth Harbour, is within the section (*o*), as is a will made on board a ship of war in a *river*, by the commander-in-chief actually engaged in a naval operation (*p*).

Where a surgeon in the navy was invalided at a foreign station and wrote a letter at sea on board a steamship, on which he was a passenger homewards, it was held that although the deceased was not on duty at the date of the letter, yet, as he was returning from service, the document was entitled to probate as the will of a seaman "at sea" (*q*).

Special statutory formalities required for the execution of the wills of seamen and marines.

With regard to the wills of seamen and marines and the disposal of their effects, various statutes have been passed from time to time. Those which are now in force are 28 & 29 Vict. c. 72; 28 & 29 Vict. c. 111; 60 & 61 Vict. c. 15; and an Order in Council of December 28th, 1865 (*r*).

The provisions of these statutes will be found in the Appendix (*s*).

Merchant seamen.

With regard to the wills of merchant seamen, the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 176—179, provides for the mode of payment by the Board of Trade of the money and effects of deceased seamen and apprentices (*s*).

Section 6.

OF EVIDENCE IN TESTAMENTARY CAUSES, AND HEREWITH OF PROOF OF THE CONTENTS OF A LOST WILL.

Wills Act, 1837.

Sect. 14 of the Wills Act, 1837, provides: "If any person who shall attest the execution of a will shall at the time of the

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(*n*) (1854) 1 Spinks, Eccl. & Adm. 292.
(*o*) *McMurdo,* (1867) 1 P. & D. 540.
(*p*) *Austen,* (1853) 2 Rob. 611; see *Patterson,* (1898) 79 L. T. 123.
(*q*) *Saunders,* (1865) 1 P. & D. 16.
(*r*) *Vide post,* pp. 453, 454.
(*s*) App. I., Pt. I.

execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid" (*t*).

Sect. 14. Will not to be void on account of incompetency of attesting witness.

Sect. 15. Gifts to an attesting witness to be void.

Sect. 15: "If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will" (*u*).

Sect. 17. Executor to be admitted a witness.

Sect. 17 provides: "No person shall, on account of his

(*t*) Further, as to competency of witnesses and parties, see 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.

(*u*) Where a will had been executed in the presence of two witnesses, and in addition to their signatures the signature of a third person, who was also residuary legatee, appeared at the foot of the will, the Court received evidence to explain why such signature was written, and, on being satisfied that it was not written with the intention of attesting the signature of the testator, ordered it to be omitted from the probate: *Sharman,* (1869) 1 P. & D. 661; followed in *Smith,* (1889) 15 P. D. 2; but see *Mitchell,* (1841) 2 Curt. 916; *Forest,* (1861) 2 S. & T. 334; *Smith,* (1864) 3 S. & T. 589; *Raine,* (1865) 34 L. J. P. 125. In order to invalidate the legacy to an attesting witness, the interest bequeathed to him must be a beneficial interest, not, *e.g.*, a legacy in trust: *Ryder,* (1843) 2 N. C. 462; *Cresswell* v. *Cresswell,* (1868) L. R. 6 Eq. 69. A direction in the will that an executor, who was a solicitor, might charge and receive payment for all professional business to be done by him under the will, was held to be avoided by the fact that he was one of the attesting witnesses: *Re Barber,* (1886) 31 Ch. D. 665; *Re Pooley,* (1888) 40 Ch. D. 1. A bequest of a legacy by a will is not void because the legatee attests a codicil which gives him nothing, nor does the residuary legatee under the will lose his share of the residue by attesting a codicil which revokes specific legacies in the will and thereby increases his share in the residue: *Gurney* v. *Gurney,* (1855) 3 Drew. 208; *Tempest* v. *Tempest,* (1856) 2 K. & J. 635; *Re Marcus,* (1887) 57 L. T. 399; *Re Trotter,* [1899] 1 Ch. 764. See further, on this subject, Wms. on Exors., pp. 800, 801. The marriage, after the attestation of the will, of a devisee to one of the attesting witnesses does not avoid the devise: *Thorpe* v. *Bestwick,* (1881) 6 Q. B. D. 311. See also *Aplin* v. *Stone,* [1904] 1 Ch. 543.

being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."

To prove due execution, not necessary to call both attesting witnesses.

To prove the attestation of a will in the Court of Probate, it is not necessary to examine both attesting witnesses (*v*). But a party propounding a will is bound to call at least one of the attesting witnesses, if he can be produced, to prove due execution (*x*), and, if such witness fails to prove due execution, he is bound to call the other, although he may know him to be an adverse witness (*y*).

Affidavit of attesting witness admitted as evidence in suit for revocation

In a suit for revocation of probate, where it appeared that every effort had been made to find one of the attesting witnesses, but without success, the Court, with doubt and hesitation, allowed the affidavit sworn by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of due execution and of testamentary capacity (*z*).

An attesting witness who gives evidence against due execution may be contradicted by the party on whose behalf he is called.

If an attesting witness called by a party propounding the will gives evidence against the will, such party may cross-examine him, and may call evidence to disprove such of the facts stated by the witness as are material to the issue, and to prove that he has made statements inconsistent with his evidence, although he denies having made such statements, and is not a hostile but merely an adverse witness (*a*); for such a witness is not the witness of either party, but of the Court.

Procedure where the attesting witnesses decline to give any information.

The Court will not, under sect. 26 of the Court of Probate Act, 1857, order the attendance for examination in open Court of the attesting witnesses to a will because they have declined to give information as to the circumstances attending its execution to persons who are attacking the will (*b*); but where the attesting witnesses refused to make an affidavit as to the

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(*v*) *Belbin* v. *Skeats*, (1858) 1 S. & T. 148; *Forster* v. *Forster*, (1864) 33 L. J. P. 113.

(*x*) *Coles* v. *Coles*, (1866) 1 P. & D. 70; *Bowman* v. *Hodgson*, (1867) 1 P. & D. 362.

(*y*) *Owen* v. *Williams*, (1863) 4 S. & T. 202; *Coles* v. *Coles*, (1866) 1 P. & D. 70.

(*z*) *Gornall* v. *Mason*, (1887) 12 P. D. 142; *vide post*, p. 633.

(*a*) *Coles* v. *Coles*, (1866) 1 P. & D. 70; *Jones* v. *Jones*, (1908) 24 T. L. R. 839.

(*b*) *Evans* v. *Jones*, (1867) 36 L. J. P. 70; *vide post*, p. 514.

execution of a will, the Court, under the Court of Probate Act, 1857, s. 24, required their attendance in person to state what they knew about the execution (*c*).

Admissibility of extrinsic evidence, including evidence of declarations of the testator, for certain purposes.

There has already been occasion, in the chapters in which these subjects are respectively considered, to discuss the admissibility of parol evidence, including proof of declarations of intention made by the testator, for the purpose of negativing the presumption that unattested alterations appearing on the face of a will were made after the execution (*d*); to rebut the presumption that a will not forthcoming at the death of the testator was destroyed by him *animo revocandi* (*e*); to prove the intention of a testator in cases of dependent relative revocation (*f*) or of revocation by implication (*g*); to prove that a paper was intended by the testator to be testamentary (*h*); and to determine what papers the testator intended to be constituent parts of his will (*i*).

Further, in dealing with the appointment of executors, there has been occasion to consider the question whether parol evidence is admissible to any, and, if to any, to what extent in order to assist the Court in ascertaining the meaning of the testator as expressed in his will (*k*).

Evidence of statements made by the testator is inadmissible to prove that the will was duly executed,

It remains to add that a statement by a testator that he has duly executed his will cannot be received as evidence of its due execution, for the exercise of the testamentary power being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the execution of the right (*l*). Not only are declarations made by a testator after the date of an alleged will inadmissible to prove its due

or was executed in duplicate.

(*c*) *Sweet*, [1891] P. 400; *Bays*, (1910) 54 Sol. Jo. 200; *vide post*, p. 514.

(*d*) *Vide ante*, p. 217.

(*e*) *Ante*, pp. 194 *et seq.*

(*f*) *Ante*, pp. 199 *et seq.*

(*g*) *Ante*, pp. 169 *et seq.*

(*h*) *Ante*, pp. 143, 148.

(*i*) *Ante*, p. 219.

(*k*) *Ante*, pp. 260—262.

(*l*) *Ripley*, (1858) 1 S. & T. 68; *Sugden* v. *Lord St. Leonards*, (1876) 1 P. D. at p. 227. See *Doe* v. *Palmer*, (1851) 16 Q. B. at p. 757; *Atkinson* v. *Morris*, [1897] P. 40.

execution, they are equally inadmissible to prove that the will was executed in duplicate (*m*).

Proof of the Contents of a Lost Will.

Proof of the contents of a lost will.

The contents of a lost will may be proved by secondary evidence.

When the will of a testator is not forthcoming at his death, and there is evidence sufficient to satisfy the Court that the instrument was never destroyed by him *animo revocandi* (*n*), its contents may be proved by parol evidence.

In the case of *Sugden* v. *Lord St. Leonards* (*o*), where the whole question of the admissibility of extrinsic evidence to prove the contents of a lost will was considered by the Court of Appeal, the four following propositions were laid down:—

First.—The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence (*p*).

Declarations, written or oral, made by the testator, either before or after execution, are admissible as secondary evidence of the contents of a lost will.

Second.—Declarations, written or oral, made by a testator, either before or after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents (*q*).

Prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will (*r*); and so are declarations

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(*m*) *Atkinson* v. *Morris*, [1897] P. 40, C. A.

(*n*) *Vide ante*, pp. 193—198.

(*o*) (1876) 1 P. D. 154.

(*p*) *Sugden* v. *Lord St. Leonards*, (1876) 1 P. D. at pp. 238—240, following *Brown* v. *Brown*, (1858) 8 E. & B. 876 (see *Brown*, (1858) 1 S. & T. 32), and setting at rest the doubt raised by Sir J. P. Wilde in *Wharram* v. *Wharram*, (1864) 3 S. & T. 301. See also *Burls* v. *Burls*, (1868) 1 P. & D. 472; *Johnson* v. *Lyford*, (1868) 1 P. & D. 546; *Gardner* (1858) 1 S. & T. 109; *Harris* v. *Knight*, (1890) 15 P. D. 170; *Clements*, [1892] P. 254; *Berry*, (1891) 65 L. T. 763; *Attlay*, (1892) 67 L. T. 502; *Allan* v. *Morrison*, [1900] A. C. 604; *Crandon*, (1901) 84 L. T. 330.

(*q*) *Sugden* v. *Lord St. Leonards*, (1876) 1 P. D. 154, at pp. 226, 228, *per* Cockburn, C.J., overruling, as regards declarations made *after* the execution of the will, *Quick* v. *Quick*, (1864) 3 S. & T. 442 (Mellish, L.J., dissenting). See also *Johnson* v. *Lyford*, (1868) 1 P. & D. 546. The decision in *Sugden* v. *Lord St. Leonards* (*ubi supra*), that statements by the testator *after* the execution of the will are admissible to prove its contents, did not receive the approval of the House of Lords in *Woodward* v. *Goulstone*, (1886) L. R. 11 A. C. 469, but that decision has not been overruled and is binding on the Courts, though its application will not be extended: *Atkinson* v. *Morris*, [1897] P. at p. 47.

(*r*) *Sugden* v. *Lord St. Leonards*, (1876) 1 P. D. at p. 226. See *Johnson* v. *Lyford*, (1868) 1 P. & D. 546.

made by him subsequently to the execution of the will (*s*). There are no degrees of secondary evidence, and where a will has been lost or destroyed, the Court must take the parol evidence of its contents side by side with the supposed draft, and out of them extract, as best it may, the contents of the will (*t*). So where the will of a testator, after his death, was torn in pieces by his son while a copy was being made by the executor, and most of the pieces were recovered, but there were some blanks left, and in this incomplete state it was presented for probate, probate was granted of the incomplete will and the copy as together constituting the will of the deceased (*u*).

Admissibility of declarations by deceased persons other than the testator.

In *Sly* v. *Sly* (*x*) declarations of a deceased person (not the testator) who had been in possession of property, claiming a limited interest therein under a particular will, were admitted to prove the fact that such will had a legal existence and that certain persons were named executors therein, on the ground that they were in disparagement of the declarant's title; and a copy of the will, the original not being forthcoming, was used as evidence of the contents of such will.

The contents of a lost will may be proved by the evidence of a single witness.

Third.—The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity and credibility are unimpeached (*y*).

But the Court must be guided in each particular case by the evidence submitted in proof of the contents of the will, having regard to the rule that in order to support a will propounded, when it is proved by parol evidence only, that evidence must be of extreme cogency and such as to satisfy the Court beyond all reasonable doubt that

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(*s*) *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. at pp. 227 *et seq.*

(*t*) *Burls* v. *Burls,* (1868) 1 P. & D. 472.

(*u*) *Leigh,* [1892] P. 82; *Lafone* v. *Griffen,* (1909) 25 T. L. R. 308. Where the will has been destroyed or rendered partially illegible by mere accident, as by stains, fading of the ink, and the like, the contents may be established by parol, as in the case quoted by Toller, p. 70, where a will was found gnawed by rats and in part illegible; on proof of the substance of the will, by the joining of the pieces, and by the memory of the witnesses, probate was granted; *vide ante,* p. 200, note (*e*).

(*x*) (1877) 2 P. D. 91. And see *Fawke* v. *Miles,* the Times Newspaper, January 24th, 1911.

(*y*) *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. 154.

there really are before it the testamentary intentions of the testator (*z*).

Where the contents of a lost will are not completely proved, probate may be granted to the extent to which they are proved.

Fourth.—Where the contents of a lost will are not completely proved, probate may be granted to the extent to which they are proved (*a*).

(*z*) *Per* Lord Herschell, L.C., in *Woodward* v. *Goulstone,* (1886) L. R. 11 A. C. at p. 475.

(*a*) *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. at pp. 233—235. The reasons given for this rule by Jessel, M.R., were not assented to by Lord Herschell, L.C., in *Woodward* v. *Goulstone,* (1886) L. R. 11 A. C. at p. 477, but he stated that he did not mean to cast doubt upon the decision in that case: *ibid.*, at p. 478.

CHAPTER IX.

GRANTS OF ADMINISTRATION.

THAT branch of the jurisdiction of the Probate Division which relates to the granting of probate of wills having been disposed of, the subject turns to the consideration of the other branch of the jurisdiction of the Court, namely, the granting of letters of administration of the estates of deceased persons.

Summary of the various kinds of administration.

Grants of administration are either general or special (*b*).

1. General grants of administration are made when a man dies intestate, and in certain other cases subsequently to be enumerated.

2. Special grants of administration are classified according as they are special (a) by reason of the nature of the estate which is to be administered, and (b) by reason of the limited nature of the grant.

(a) Grants which are special by reason of the nature of the estate which is to be administered.

The following grants fall under this heading:—

(i.) Administration *cum testamento annexo*, which is granted when the deceased has made a will but has appointed no executor who is able or willing to act.

(ii.) Administration *de bonis non administratis*, which is granted when the sole or sole surviving executor has died intestate after a grant of probate has been made to him, or where the administrator has died after obtaining a grant; in either case without having completely administered to the estate.

(b) Grants which are special by reason of the limited nature of the grant may be classified according as they are limited (1) in respect of the time for which they endure, or (2) in respect of the property to which they extend, or (3) in respect of the purpose for which they are granted.

(*b*) See Holdsworth & Vickers, "Law of Succession," pp. 166—171.

(1) Grants limited in respect of the time for which they endure. Of this kind the following are the most important:—

(i.) Administration to an attorney for the use and benefit of the person entitled, when the latter is abroad.

(ii.) Administration *durante minore ætate*, which is granted when the executor or the person entitled to a grant of administration is a minor.

(iii.) Administration for the use and benefit of a lunatic, which is granted when the executor or person entitled to a grant of administration is a lunatic, or becomes a lunatic after grant obtained.

(iv.) Administration for the use and benefit of a convict.

(v.) Administration *pendente lite*, granted during the pendency of a lawsuit in the Probate Division.

When these temporary administrations cease by the death of the administrator during the currency of his office, a second or *cessate* grant of administration is made.

(2) Grants limited in respect of the property to which they extend are of various kinds.

(3) Grants limited in respect of the purposes for which they are granted are chiefly administrations *ad litem*, limited to proceedings in Chancery; administrations *ad colligenda bona*, limited to collecting and preserving the property of the deceased until a general grant can be made; and administrations *durante absentia*, limited for certain specified purposes, or to certain property, when the executor or administrator is abroad.

When administration limited to a particular part of the deceased's estate is granted, or administration limited for a particular purpose has issued, the persons entitled to the general grant are given administration *cæterorum*.

Under certain circumstances a grant of administration "save and except" certain property of the deceased is made.

Section 1.

GRANT OF GENERAL ADMINISTRATION IN CASES OF TOTAL INTESTACY.

In what circumstances general ad-

When granted.—If a person dies without having made any valid testamentary disposition of his property, he is said to die intestate, and the administration of his estate is committed by the Court to an administrator by a grant of letters of administration.

ministration as on intestacy is granted

In certain cases administration as on intestacy is granted, although the deceased has made a valid will; *i.e.*—

(1) Where the will appoints no executor and disposes only of land of copyhold tenure or customary freehold, and admission or some act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*a*).

(2) Where the testator died before the 1st January, 1898 (*b*), and his will appoints no executor and disposes only of real estate (*c*).

(3) Where the will appoints no executor to act in England and disposes only of property situate abroad (*d*).

(4) Where parties interested under a testamentary paper have been cited to appear and propound it, and have not appeared and propounded it, the Court will grant administration as to an intestate, without requiring evidence as to the invalidity of the will (*e*).

Origin and sources of the jurisdiction of the Court.

At common law the disposal of intestates'

The jurisdiction which the Ecclesiastical Courts exercised over the effects of persons dying without a will rested on a very ancient foundation; in the early periods of our history the Ordinary had by common law the absolute disposal of the personal property of all intestates (*f*), and, under the pretext

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(*a*) Such property does not vest in the deceased's personal representative under the Land Transfer Act, 1897, and a will disposing only of such property is not entitled to probate: see Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4).

(*b*) The date when the Land Transfer Act, 1897, came into operation.

(*c*) Such a will is not entitled to probate: *vide ante*, p. 15.

(*d*) Such a will is not entitled to probate: *Coode*, (1867) 1 P. & D. 449. *Vide ante*, p. 13.

(*e*) *Morton* v. *Thorpe*, (1863) 3 S. & T. 179; *Palmer* v. *Dent*, (1850) 2 Rob. 284; or probate in common form of an earlier will: *ibid.* So administration as to an intestate will be granted where the testator is proved on affidavit to have died insane and the will on the face of it shows signs of insanity: *Bourget*, (1837) 1 Curt. 591; where those interested under the will have been cited to propound it and have not appeared: *Perry* v. *Dike*, (1858) 1 S. & T. 12. See *Whiting* v. *Deal*, (1854) 2 Spinks, Eccl. & Adm. 56; *vide post*, p. 526, note (*a*).

(*f*) But see *Dyke* v. *Walford*, (1846) 5 Moo. P. C. 434, where it is stated that the clergy had never at any time in this country a beneficial interest in the property of intestates.

estates was vested in the Ordinary.

of applying their goods to religious purposes (*in pios usus*), possessed himself of them not only in cases where the deceased left a widow and children or other near relations, but in defiance also of the just claims of creditors. On this footing the law continued under the Norman kings and the first sovereigns of the line of Plantagenet; but when the free spirit of our Constitution commenced those struggles which ultimately led to its emancipation, the abuses practised by the Ordinary in the administration of the effects of intestates became in their turn subjected to correction and control (*g*).

By Stat. Westminster II. Ordinary bound to pay debts of intestate.

The first statute which abridged the power of the Ordinary was the statute 13 Edw. I. st. 1, c. 19, commonly called the Statute of Westminster II., by which it is enacted: "Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the Ordinary to be disposed, the Ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament."

But though the Ordinaries were thus made liable to the creditors of the intestate for their just and lawful demands, the residue, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the Ordinary should approve. It is said (*h*) that the flagrant abuses of that power occasioned the Legislature again to interpose, in order to prevent the Ordinaries from keeping any longer the administration in their own hands or those of their immediate dependants.

31 Edw. III. st. 1. Administration to be granted to the next and most lawful friends: whence administrators originate.

Wherefore the statute 31 Edw. III. st. 1, c. 11, was passed, which provides "that in case where a man dieth intestate, *the Ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods;* which deputies shall have an action to demand and recover as executors the

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(*g*) *Warwick* v. *Greville,* (1809) 1 Phill. at p. 124, n.; 4 Burn, E. L. 353, 9th ed. See 2 Black. Comm. pp. 494, 495.

(*h*) 2 Black. Comm. 495. But Lord North states that the statute was due to other causes: see Bac. Abr., tit. Exors. (F.).

debts due to the said person intestate in the King's Court . . . and shall answer also in the King's Court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer; and they shall be accountable to the Ordinaries, as executors be in the case of a testament."

This, says Blackstone (*i*), is the original of administrators, who are only the officers of the Ordinary, appointed by him in pursuance of this statute; their title and authority being derived exclusively from the Ecclesiastical Judge, by grants which are usually denominated letters of administration (*k*).

21 Hen. VIII. c. 5, Ordinary to grant administration to the widow or the next of kin, or to both, in his discretion.

The statute 21 Hen. VIII. c. 5, enlarged the power of the Ecclesiastical Judge, and permitted him to grant administration either to the widow, or to the next of kin, or to both, at his own discretion, and, where there were two or more persons in the same degree of kindred, gave the Ordinary his election to accept whichever he pleased.

By the Statute of Distributions, administrator compelled to distribute the surplus, after payment of debts.

Although an administrator was answerable for the debts of the deceased, there was nothing to compel him to distribute the surplus after the payment of debts (*l*). To remedy this injustice, and to oblige the administrator to distribute, the Statute of Distributions (22 & 23 Car. II. c. 10) was passed.

By Court of Probate Act, 1857, jurisdiction of Ecclesiastical Courts to grant administration abolished and transferred to the Court of Probate.

Upon this footing stood the general law of administrations until the year 1857, in which year the Court of Probate Act, 1857, was passed, whereby the jurisdiction of the Ecclesiastical and all other Courts to grant letters of administration of the effects of deceased persons was abolished, and that jurisdiction transferred to the newly constituted Court of Probate (*m*).

Sect. 73 of the Court of Probate Act, 1857.

The power of the Court of Probate in making grants of administration and in deciding to whom they should be granted was greatly enlarged, in comparison with that of the Ecclesiastical Courts, by sect. 73 of that Act (*n*).

Jurisdiction of the Court of Probate

The jurisdiction of the Court of Probate, as has been stated, is now exercised by the Probate Division of the High Court of

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(*i*) 2 Black. Comm. 496.

(*k*) Wms. on Exors., p. 314.

(*l*) *Carter* v. *Crawley*, (1682) Sir T. Raym. at p. 500.

(*m*) *Vide ante*, pp. 2, 3.

(*n*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 73. *Vide post*, pp. 409 *et seq.*

now exercised by the Probate Division.

Justice, to which it was transferred by the Judicature Acts of 1873 and 1875.

Since the Land Transfer Act, 1897, real estate devolves to and becomes vested in the deceased's personal representative,

Until the year 1897 the rights and duties of an administrator extended only to the personal estate and effects of the deceased, but in that year the Land Transfer Act, 1897 (*o*), was passed, which provides: "Where real estate (*p*) is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him" (*q*).

and letters of administration may be granted in respect of real estate.

Under the Act, which came into force on January 1, 1898, letters of administration may be granted, in cases of death after the commencement of the Act, in respect of real estate only, although there is no personal estate (*r*).

The Court, in granting administration, is to have regard to the rights of persons interested in real estate.

And by sect. 2, sub-sect. 4, of the Act, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

SUB-SECTION 1.—*Grant to the Husband.*

Exclusive right of the husband to be his wife's administrator

The husband, whether as her next and most lawful friend under the statute of Edw. III. (*s*), as some assert (*t*), or independently of statute by virtue of his *jus mariti* at common law, as other authorities insist (*u*), has the right to be appointed

(*o*) 60 & 61 Vict. c. 65.

(*p*) The expression does *not* include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant: s. 1, sub-s. 4.

(*q*) 60 & 61 Vict. c. 65, s. 1, sub-s. 1.

(*r*) *Ibid.*, s. 1, sub-ss. 3, 5.

(*s*) 31 Edw. III., st. 1, c. 11. *Vide ante*, p. 310.

(*t*) 3 Salk. 21; *Elliott* v. *Gurr*, (1812) 2 Phill. at p. 19; *Fettiplace* v. *Gorges*, (1789) 1 Ves. Jun. at p. 49; *Re Lambert's Estate*, (1888) 39 Ch. D. 626.

(*u*) Com. Dig. Administrator B. (6); *Watt* v. *Watt*, (1796) 3 Ves. at p. 247.

administrator of his wife's estate if he survive her, exclusively of all other persons (x). And the Court has no power or election to grant administration to any other person, save in the excepted cases hereafter mentioned (y).

recognised by the stat. 29 Car. II. c. 3,

This right of the husband was expressly recognised by the statute 29 Car. II. c. 3, which provides that the Statute of Distributions (z) "shall not extend to the estates of femes covert that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act."

unaltered by the Married Women's Property Act, 1882,

The Married Women's Property Act, 1882, has not affected the husband's right to a grant of administration to his deceased wife's estate if she die intestate, for that Act has not altered the devolution of the undisposed of separate property of a married woman (a); the quality of separate property, whether created by statute or by settlement, ceases on the death of the married woman, and thereupon her undisposed of property devolves as if the separate use had never existed (b).

unaffected by the Land Transfer Act, 1897.

But the husband may be passed over in special circumstances and the grant made to the heir-at-law under sect. 73 of the Court of Probate Act.

The prior right of the husband of an intestate to a grant is not affected by the Land Transfer Act, 1897, and where there is both real and personal estate he is entitled to a grant in priority to the heir-at-law (c). But, under special circumstances, the husband may be passed over, and the grant made to the heir-at-law under sect. 73 of the Court of Probate Act, 1857 (d). Where a wife leaves real estate and no personal estate, the husband, unless he is tenant by curtesy of the real estate, has no interest, and will be passed over in favour of the heir-at-law (e).

(x) *Humphrey* v. *Bullen*, (1737) 1 Atk. 458.

(y) *Sir George Sand's Case*, (1705) 3 Salk. 22; *Fawtry* v. *Fawtry*, (1690) 1 Salk. 36.

(z) 22 & 23 Car. II. c. 10.

(a) *Re Lambert's Estate*, (1888) 39 Ch. D. 626.

(b) *Per* Stirling, J., in *Re Lambert's Estate*, (1888) 39 Ch. D. 626, at p. 633; and see the cases there cited.

(c) See Land Transfer Act, 1897, s. 2, sub-s. 4; *Ardern*, [1898] P. 147; Instructions to the officers of the Registries under the Land Transfer Act, 1897 (*post*, p. 929), No. 7.

(d) *Ardern*, [1898] P. 147.

(e) Tristram & Coote, p. 65.

The husband has no right to the grant unless there has been a valid marriage, or if the marriage has been dissolved, or if he has parted with all his interest in his wife's fortune.

Husband passed over.—Where there has never been a valid marriage (*f*), or where the marriage has been dissolved during the lifetime of the parties (*g*), the husband has no right to a grant of administration.

And, as a result of the long-established practice recognised by the Court to vest the right of administration in the person who is possessed of the beneficial interest in the personal estate, it has been held that if the husband has parted with all his interest in his wife's fortune, he shall not have administration to her estate (*h*).

Administration to wife dying after judicial separation or protection order.

So where a wife has been judicially separated from her husband, or has obtained a protection order under 20 & 21 Vict. c. 85, or a separation order under the Summary Jurisdiction (Married Women) Act, 1895, and afterwards dies intestate during the lifetime of her husband, the Court may grant administration to her next of kin, limited to such property as she had acquired or become possessed of since the separation (*i*), without specifying of what that property

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(*f*) A distinction has been drawn between marriages which are voidable on the ground of some canonical disability, *e.g.*, impotence, and marriages invalid on the ground of a civil disability, *e.g.*, prior marriage, unsoundness of mind, consanguinity and affinity. The former are esteemed valid unless declared null in the lifetime of the parties; the latter are void *ab initio,* and the husband is not entitled to a grant of administration: see *Elliott* v. *Gurr,* (1812) 2 Phill. 16, 19; and, as to marriages void for insanity, *Browning* v. *Reane,* (1812) 2 Phill. 69. It seems that a conviction for bigamy, though pleaded and proved, is not conclusive evidence in an administration suit that the husband's marriage with the intestate was void *ab initio*: *Wilkinson* v. *Gordon,* (1824) 2 Add. 152.

(*g*) A divorced spouse, whether petitioner or respondent, ceases to have an interest in the estate of the other party to the dissolved marriage who subsequently dies intestate, and the Court will pass over the surviving spouse without citation: *Wallas,* [1905] P. 326; *Nares,* (1888) 13 P. D. 35 (wife). As to divorce by foreign law, see *Argent* v. *Argent,* (1865) 4 S. & T. 52.

(*h*) Com. Dig. Administrator B. (6), *in notis; Rex* v. *Betteswortħ,* (1740) Str. 1111; see 2 Hagg. App. 149.

(*i*) See, as to judicial separation, the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25; as to protection orders, *ibid.*, s. 21; *Worman,* (1859) 1 S. & T. 513; *Faraday,* (1861) 2 S. & T. 369; *Weir,* (1862) 2 S. & T. 451; *Brighton,* (1865) 34 L. J. P. 55; *Stephenson,* (1866) 1 P. & D. 287; as to separation orders, 58 & 59 Vict. c. 39, s. 5, sub-s. (a); *Jones,* (1904) 74 L. J. P. 27.

In such cases, it is not, as a general rule, necessary to cite the husband: *Brighton,* (1865) 34 L. J. P. 55; unless a question as to the validity of the order arises: *Faraday,* (1861) 2 S. & T. 369.

consisted (*k*). The husband, having no interest in the property, is not entitled to a general grant of administration, though if the wife were possessed of other separate property he would be entitled to a grant *cæterorum* or to a grant "save and except" (*l*).

Administration to wife living apart from husband under separation deed.

Where a husband agrees by deed of separation that if his wife shall die intestate her next of kin shall be entitled to her property, upon her death intestate during his lifetime administration, limited to the property to which they are entitled by virtue of the deed, will be granted to her next of kin, to the exclusion of the husband, who has no interest in that property (*m*).

Husband cited to accept a grant.

Where the husband has been cited to take out administration to the estate of his intestate wife, and has failed to do so, the Court will grant administration to her next of kin (*n*).

Husband's right to administer does not vest in his trustee in bankruptcy.

A husband's right to administer to his wife's estate is not such a right as will vest in the trustee under his bankruptcy. Where the husband of a deceased intestate had left this country and had been adjudicated bankrupt before he had administered to his wife's estate, the Court refused to regard his right to administer as "property divisible among his creditors" under sect. 44 of the Bankruptcy Act, 1883, but made a grant of administration to the wife's estate to his trustee in bankruptcy under sect. 73 of the Court of Probate Act, 1857 (*o*).

Husband has no right to administration of property held by the wife as executrix to another.

If the wife were an executrix to another, then, as to the goods which she had in that capacity, her husband has no title to a grant of administration; for in this case the administration is not of the goods of the wife, but *de bonis non administratis* of her testator, to be granted in accordance with the rules which apply to that species of grant (*p*).

(*k*) *Worman*, (1859) 1 S. & T. 513; but see *Tharp*, (1878) 3 P. D. 76.

(*l*) In *Stephenson*, (1866) 1 P. & D. 287, a general grant to the next of kin of the wife appears to have been made. And see *Jones*, (1904) 74 L. J. P. 27.

(*m*) *Allen* v. *Humphrys*, (1882) 8 P. D. 16. But the husband should be cited, for he might dispute the deed: *Megson*, (1899) 80 L. T. 295.

(*n*) *Moore*, [1891] P. 299.

(*o*) *Turner*, (1886) 12 P. D. 18. *Vide post*, p. 336.

(*p*) 3 Salk. 21.

If the husband survives the wife, and dies before he obtains administration, the grant is made to his representatives.

Grant to the Husband's Representatives.—When a wife dies intestate, and her husband, who survives her (*q*), afterwards dies without having taken out administration to her estate, letters of administration to the estate of the wife will be granted to the legal personal representatives of the husband, in preference to her next of kin (*r*).

Husband's next of kin must first constitute themselves his personal representatives.

The next of kin of the husband must constitute themselves his legal personal representatives, before they have any claim to administer to the wife's estate (*s*).

If the husband's representatives are co-administrators, they must all join in taking out administration to the wife's estate (*t*).

If property belongs to wife's next of kin, they are entitled in preference.

If the next of kin of the wife are entitled to the beneficial interest in her estate (as by settlement) administration will be granted to them, and not to the husband's representatives, on the principle that the grant follows the interest (*u*).

Where there is real estate, the wife's heir-at-law is entitled in

Where the wife dies intestate, leaving both real and personal estate, her heir-at-law is, since the Land Transfer

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(*q*) There must be affirmative proof of his survivorship, and in the absence of such proof the grant is made to her next of kin: *vide post*, pp. 427—429.

(*r*) Formerly the practice was otherwise. The Ecclesiastical Court considered itself bound by the statute to grant administration in such a case to the next of kin of the wife: *Reece* v. *Strafford*, (1800) 1 Hagg. 347; and see the cases collected in 2 Hagg. App., pp. 158 *et seq.* In equity, however, such administrator was considered as trustee for the representatives of the husband: *Cart* v. *Rees*, cited in *Squib* v. *Wyn*, (1717) 1 P. Wms. 377, 381; *Humphrey* v. *Bullen*, (1737) 1 Atk. 458; *Elliott* v. *Collier*, (1747) 3 Atk. 526. This practice of granting administration to those who had no beneficial interest in the estate to be administered was in direct conflict with the general principle that the grant follows the interest. Its inconvenience was pointed out by Sir John Nicholl in *Gill*, (1828) 1 Hagg. 341; and in *Fielder* v. *Hanger*, (1832) 3 Hagg. 769, it was decided that in future the rule that the grant follows the interest must prevail, and that, unless it could be shown that the representatives of the husband had no interest, and that the property of the wife belonged to her next of kin, the former are entitled to the grant. And this practice is now uniformly followed: see *Partington* v. *Att.-Gen.*, (1869) L. R. 4 H. L. 100.

(*s*) *Crause*, (1858) 1 S. & T. 146; *Partington* v. *Att.-Gen.* (1869) L. R. 4 H. L. 100, 115, overruling *Gutteridge* v. *Stilwell*, (1833) 1 M. & K. 486; *Harding*, (1872) 2 P. & D. 394.

(*t*) *Nayler*, (1851) 2 Rob. 409. But one alone of several *executors* may take a grant: *ibid.*; and see *post*, p. 329.

(*u*) *Pountney*, (1832) 4 Hagg. 289; *Austen* v. *Hodges*, (1860) cited Tristram & Coote, p. 66.

Act, 1897, entitled to a grant in priority to the representatives of her husband, who survived her (*x*).

priority to husband's representatives

If the husband's representatives renounce, or are cited and fail to appear, the grant will be made to the wife's next of kin (*y*).

If husband's representatives renounce, grant made to wife's next of kin.

Where the deceased, a legatee under the will of her father, died in his lifetime, leaving issue living at his death, the Court granted administration limited to the estate bequeathed to her by will to her next of kin, and dispensed with the renunciation and citation of the personal representative of her husband, who survived her, but died in the lifetime of her father; on the ground that, under sect. 33 of the Wills Act, 1837, the deceased must be taken to have died immediately after the death of the testator (her father), and, had that been the case, she would have died a widow, and her son would have been entitled to administration (*z*).

Wife's next of kin entitled to the grant under sect. 33 of the Wills Act.

SUB-SECTION 2.—*Grant to the Widow.*

The statute 21 Hen. VIII. c. 5, s. 2, provides: "In case any person die intestate . . . then the Ordinary . . . shall grant the administration of the goods of the . . . person deceased to the widow of the same person deceased, or to the next of his kin, or to both, as by the discretion of the same Ordinary shall be thought good."

By stat. 21 Hen. VIII. c. 5, the Court may grant administration to the widow, or next of kin, or both jointly, in its discretion.

It is therefore in the discretion of the Court to grant administration to the widow alone, or to the next of kin alone, or to the widow jointly with the next of kin. And it has been held that the Court may, in its discretion, grant administration to the next of kin as to a part, and to the widow as to the rest of the estate (*a*).

The title of the widow to a grant being in the discretion of the Court, it was held that a *mandamus* would not issue to compel the Ordinary to commit the administration to her; for that would be to deprive the Ordinary of his election, in granting it to her, or to the next of kin (*b*).

(*x*) *Roberts*, [1898] P. 149; see App. VII., Form 101.

(*y*) *Bell*, (1859) 1 S. & T. 288.

(*z*) *Councell*, (1871) 2 P. & D. 314.

(*a*) *Fawtry* v. *Fawtry*, (1690) 1 Salk. 36.

(*b*) *Anon.*, (1725) 1 Stra. 552.

The Court will grant administration to the widow, except for good cause shown.

Grant to the Widow alone.—The Court, in the exercise of its discretion, will grant administration to the widow of the intestate, to the exclusion of his next of kin (*c*) or heir-at-law (*d*), except for good cause shown (*e*).

The Court will not make a joint grant to the widow and one of the next of kin, unless all the other next of kin are of full age and consent.

Joint Grant to Widow and Next of Kin.—The Court at all times prefers a sole to a joint administration, and where a joint grant is made to the widow and one of the next of kin, all the other next of kin must consent that the grant shall be so made (*f*). The consent of minor next of kin is insufficient, unless there are special grounds for the application for a joint grant (*g*). Since the Land Transfer Act, 1897, if the deceased left real estate, the consent of the heir-at-law also is requisite. And in such a case a joint grant may be made to the widow and the heir-at-law, with the consent of all the next of kin.

Joint grant to widow and heir-at-law.

Joint grant to widow and person entitled in distribution (not next of kin).

It was at one time held that the Court is precluded by the statute 21 Hen. VIII. c. 5, from making a joint grant to the widow and one of the persons entitled in distribution who is not next of kin (*h*), even with the consent of the next of kin and all other persons entitled in distribution. But in a later case it was held that the Court may make such a grant under sect. 73 of the Court of Probate Act, 1857, where there are special circumstances which render that course convenient (*i*).

(*c*) *Webb* v. *Needham,* (1823) 1 Add. at p. 495; *Conyers* v. *Kitson,* (1831) 3 Hagg. at p. 557; *Stretch* v. *Pynn,* (1752) 1 Lee, at p. 36; *Goddard* v. *Goddard,* (1821) 3 Phill. at p. 638; and see *Rogerson,* (1840) 2 Curt. 656; *Chappell* v. *Chappell,* (1843) 3 Curt. at p. 431.

(*d*) The prior right of the widow of an intestate to a grant is, it seems, not affected by the Land Transfer Act, 1897: see Instructions under the Land Transfer Act (*post,* p. 929), No. 7.

(*e*) As to what is good cause for passing over the widow, *vide post,* pp. 319, 320.

(*f*) *Newbold,* (1866) 1 P. & D. at p. 286. Affidavit to lead the grant: App. VII., Form 43; Consent: App. VII., Form 118; Order: App. VII., Form 261.

(*g*) *Ibid.* And see *Dickinson,* [1891] P. 293, where the consent of a minor (next of kin) aged twenty was accepted, there being special circumstances to justify the Court in making a joint grant.

(*h*) *Browning,* (1861) 2 S. & T. 634.

(*i*) *Grundy,* (1868) 1 P. & D. 459. This was a grant *de bonis non,* but such grants are governed by the same rules as original grants; it therefore seems that the contrary decision in *Browning,* (1861) 2 S. & T. 634, must be regarded as dissented from.

A divorced wife has no right to a grant.

Widow passed over.—A divorced wife has no interest in the estate of her former husband and is passed over without citation, the grant being made to his next of kin (*k*). But a wife who has been judicially separated from her husband on the ground of a matrimonial offence committed by her, is still his wife, and does not by that fact alone forfeit her right to a grant of administration; though the Court may regard her conduct as good ground for exercising its discretion in favour of the next of kin (*l*). Accordingly it has been held that the Court will not pass over the widow, who has been judicially separated from her husband on the ground of her cruelty, without giving her an opportunity of showing cause against the application (*m*).

Widow judicially separated—will not be passed over, unless cited.

Widow may be passed over for good cause,

Though usually a preference is given to the widow, yet it has always been held and repeatedly been decided that the widow may be set aside and administration, at the discretion of the Court, be granted to the next of kin (*n*). This discretion will, however, only be exercised on reasonable considerations and for good cause (*o*).

as where she has barred herself of all interest in the estate,

Thus the widow was passed over and the grant made to the next of kin where she had, by her marriage settlement, barred herself of all interest in her husband's estate (*p*).

or has eloped from her husband,

And where the widow, many years before the death of her husband, had eloped with another man, with whom she had cohabited until his death, the Court granted administration to the next of kin of the husband to the exclusion of the widow (*q*).

or has lived separate and apart from him.

The fact that the widow has lived separate and apart from

(*k*) *Nares*, (1888) 13 P. D. 35. As to divorce by foreign law, see *Ryan* v. *Ryan*, (1816) 2 Phill. 332; *Argent* v. *Argent*, (1865) 4 S. & T. 52; *Nares, ubi supra.*

(*l*) *Pettifer* v. *James*, (1714) Bunbury, 16; *Davies*, (1840) 2 Curt. 628.

(*m*) *Ihler*, (1873) 3 P. & D. 50.

(*n*) *Conyers* v. *Kitson*, (1831) 3 Hagg. at p. 557; *Anderson*, (1864) 3 S. & T. 489; *Williams*, (1830) 3 Hagg. 217.

(*o*) *Conyers* v. *Kitson, loc. cit.*

(*p*) *Walker* v. *Carless*, (1758) 2 Lee, 560. And see *Hughes*, (1873) 3 P. & D. 140.

(*q*) *Fleming* v. *Pelham*, (1807) 3 Hagg. 217, n.; *Conyers* v. *Kitson*, (1831) 3 Hagg. 556; *Anderson*, (1864) 3 S. & T. 489; *Boddan*, (1873) 28 L. T. (N. S.) 368; *Stevens*, [1898] P. 126.

her husband has been held sufficient to justify her exclusion (*r*), *a fortiori* if she has contracted a second marriage during his lifetime (*s*).

Where widow has contracted second marriage after death of husband.

In a contest with next of kin other than children of the deceased, the circumstance that the widow has married again after the death of the intestate is no valid ground of objection to her; but where the deceased has left children, one of whom, supported by the rest, applies for administration in preference to the widow, the circumstance that the widow had married again *might* induce the Court to grant administration to the child (*t*).

Where misconduct is alleged as a ground for passing over the widow, she must be cited, unless her adultery has been established in a suit.

Whenever application is made for a grant of administration to the next of kin to the exclusion of the widow, on a suggestion of misconduct on her part, the widow must be cited, in order that she may have an opportunity of answering the charges (*u*). But where her adultery has been established in a suit instituted by the deceased in his lifetime the widow need not be cited (*x*).

SUB-SECTION 3.—*Grant to Next of Kin or Heir-at-Law.*

Failing widow or husband, or if the widow or husband renounces, administration is granted to the "next of kin."

If the intestate has left no widow or husband, as the case may be, administration is to be granted to the "next of kin."

Administration is granted to the next of kin of an intestate wife, although her husband survived her, if he has renounced his right to a grant, or has been cited to take out administration to the intestate and has failed to do so.

Administration to the estate of an intestate husband is granted to his next of kin although his wife survived him, if she has renounced her right to a grant, or has been cited and failed to appear, or is passed over for any of the reasons discussed in the preceding sub-section.

Since the Land Transfer Act, 1897, where the assets include real estate,

Right of the Heir-at-Law.—The Land Transfer Act, 1897, s. 2, sub-s. 4, provides: "Where a person dies possessed

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(*r*) *Lambell* v. *Lambell*, (1831) 3 Hagg. at p. 570.

(*s*) *Chappell* v. *Chappell*, (1843) 3 Curt. 429.

(*t*) *Webb* v. *Needham*, (1823) 1 Add. 494.

(*u*) *Middleton*, (1888) 14 P. D. 23; *Ihler*, (1873) 3 P. & D. 50.

(*x*) *Frost*, [1905] P. 140; *Conyers* v. *Kitson*, (1831) 3 Hagg. 556. As to the effect of the lunacy of the widow, *vide post*, p. 377.

of real estate . . . his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin."

the heir-at-law is equally entitled with the next of kin.

Instructions to the officers of the Principal and District Probate Registries have been framed under the Act and will be found in the Appendix (*y*).

Where the deceased leaves no real estate the Act does not apply.

If the deceased did not die possessed of any real estate the Act does not apply. Where, however, the deceased left real and personal estate the next of kin and heir-at-law are equally entitled to a grant.

Grant to heir-at-law without notice to next of kin.

Where the title of the person applying for administration as heir-at-law is clear, and there is no personalty, a grant may be made to him without notice to the next of kin; but where the title of the applicant as heir-at-law is doubtful, or the amount of the personalty is large as compared with the realty, notice must be given to the next of kin (*z*).

Where heir-at-law and next of kin contend for a grant.

Where the heir-at-law and one of the next of kin contend for a grant, the Court, in the exercise of its discretion, is guided by the same considerations as in a case where there is a contest between two or more of the next of kin (*a*).

Prior right of husband or widow not affected by the Act.

The prior right of the husband or widow of the intestate to a grant is not affected by the Act (*b*).

Where husband of intestate renounces, heir-at-law must be cited, *secus*, where widow renounces.

Although the next of kin and heir-at-law are equally entitled to a grant, yet, in the case of the renunciation of the husband of an intestate, the heir-at-law must be cleared off (*c*) before a grant is made to the next of kin, who have no interest in the estate under such circumstances (*d*). But on the renunciation of the widow of an intestate, the grant may be made to her next of kin, without clearing off her heir-at-law (*e*).

Heir-at-law must be cited before grant made to person entitled in

A grant will not be made to a person who, though not one of the next of kin, is entitled in distribution to the personal estate, without clearing off the heir-at-law as well as the next

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(*y*) *Post*, pp. 928, 929; and see Rule 109, N-C. B.

(*z*) *Barnett*, [1898] P. 145. On the application of one of the co-heiresses of the deceased for administration, it was held that the consent of the other co-heiresses must be applied for: *Wright* (May 31, 1903).

(*a*) *Vide post*, pp. 324—326.

(*b*) Instructions under the Land Transfer Act, 1897 (*post*, p. 929), No. 7; *vide ante*, pp. 313, 318.

(*c*) *I.e.*, renounce, or be cited.

(*d*) Instructions under the Land Transfer Act, 1897 (*post*, p. 929), No. 8.

(*e*) *Ibid.*, No. 8.

distribution (not next of kin) or to representative of next of kin.

of kin (*f*); nor to the representative of a next of kin, without clearing off the heir-at-law (*g*).

Who are "next of kin."—It now becomes necessary to ascertain who are the "next and most lawful friends" of the intestate, and his "next of kin," entitled to the grant of letters of administration under the statutes.

Those blood relations of the deceased who at the time of his death are within the nearest degree of relationship to him, are his "next of kin."

Of the blood relations of the deceased, those persons who at the time of his death are within the nearest degree of relationship to him are his next of kin, to whom, or to one of whom, the Court is, under the statute, to commit the administration of his estate, to wit:

1. *The child or children* of the deceased (*h*).

2. *The grandchild or grandchildren* of the deceased, who dies without child (*h*).

3. *The great-grandchild or great-grandchildren* of the deceased, who dies without child or grandchild, and so on until all lineal descendants are exhausted (*i*).

4. *The father* of the deceased, who dies without issue (*k*).

5. *The mother* of the deceased, who dies without issue or father (*l*).

6. *The brothers* $\overset{\textit{and}}{\textit{or}}$ *sisters* of the deceased, who dies without issue, father or mother (*m*).

7. *The grandparent or grandparents* of the deceased, who dies without issue, parent, brother or sister (*n*).

(*f*) Instructions under the Land Transfer Act, 1897 (*post*, p. 929), No. 11.

(*g*) *Ibid.*, No. 12.

(*h*) Though the parents of the deceased are as near akin to him as his children, for they are both in the first degree, in our law children are preferred to parents, and so are the lineal descendants of the deceased to the remotest degree: 2 Black. Comm. 504; *Carter* v. *Crawley*, (1675) Sir T. Raym. at p. 500; *Evelyn* v. *Evelyn*, (1753) Ambl. 192.

(*i*) See note (*h*), *supra*.

(*k*) Both father and mother are in equal degree of kindred, but since the father is entitled to the whole personal estate, he is preferred to the mother: see *Blackborough* v. *Davis*, (1701) 1 P. Wms. at p. 51; *Ratcliff's Case*, (1592) 3 Co. Rep. 40 a.

(*l*) *Ratcliff's Case, loc. cit.* The mother is entitled to administration in priority to brothers and sisters: *Blackborough* v. *Davis, loc. cit.*

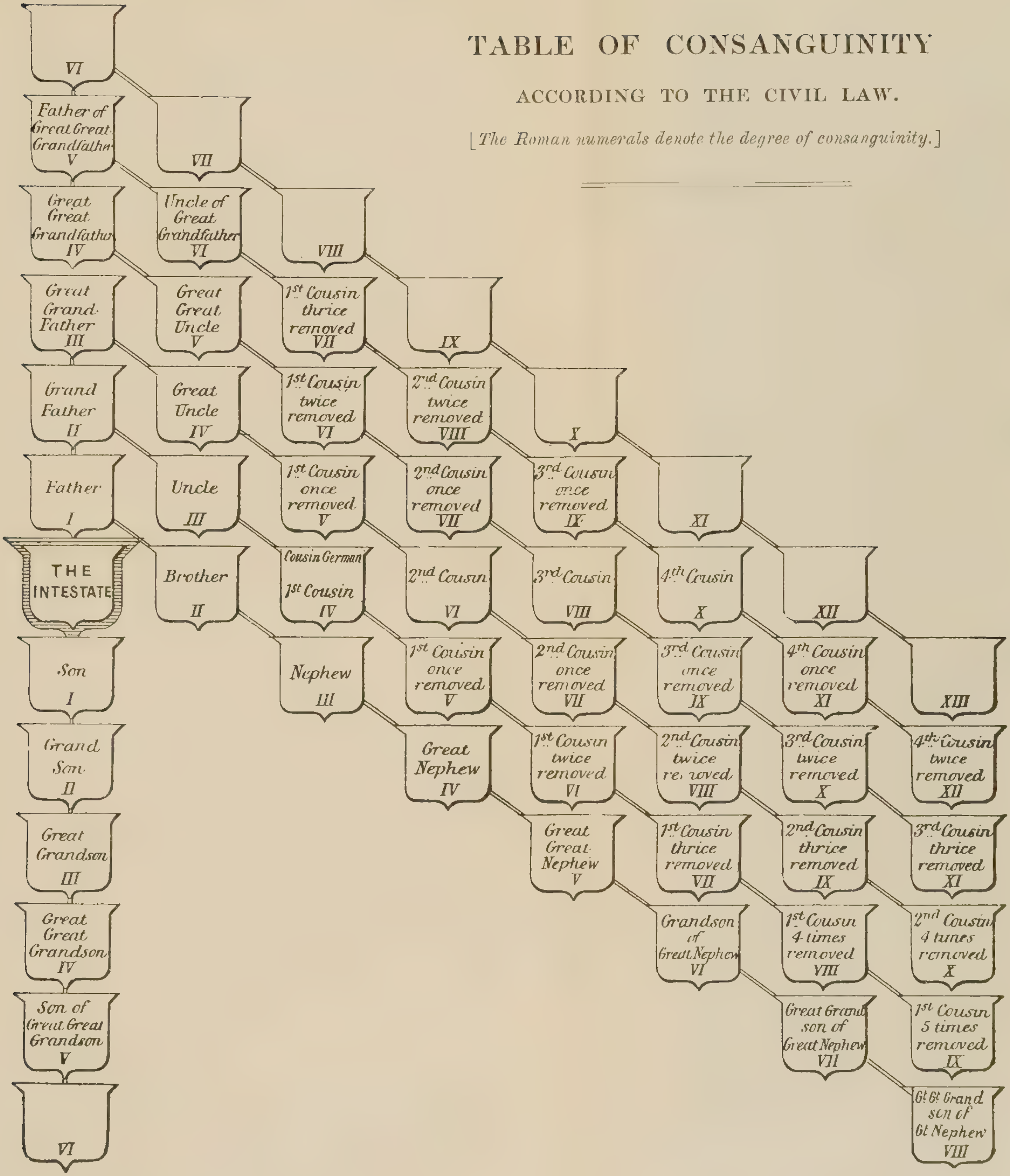
(*m*) Brothers or sisters of the deceased are entitled to administration to the exclusion of his grandfather or grandmother: *Evelyn* v. *Evelyn*, (1753) Ambl. 192, S.C. 3 Atk. 762.

(*n*) Grandparents are entitled to administration to the exclusion of uncles and aunts: *Blackborough* v. *Davis*, (1701) 1 P. Wms. 41.

TABLE OF CONSANGUINITY

ACCORDING TO THE CIVIL LAW.

[*The Roman numerals denote the degree of consanguinity.*]


VI
Father of Great Great Grandfather V
Great Great Grandfather IV
Great Grand Father III
Grand Father II
Father I
THE INTESTATE
Son I
Grand Son II
Great Grandson III
Great Great Grandson IV
Son of Great Great Grandson V
VI
VII
Uncle of Great Grandfather VI
Great Great Uncle V
Great Uncle IV
Uncle III
Brother II
VIII
1st Cousin thrice removed VII
1st Cousin twice removed VI
1st Cousin once removed V
Cousin German 1st Cousin IV
Nephew III
IX
2nd Cousin twice removed VIII
2nd Cousin once removed VII
2nd Cousin VI
1st Cousin once removed V
Great Nephew IV
X
3rd Cousin once removed IX
3rd Cousin VIII
2nd Cousin once removed VII
1st Cousin twice removed VI
Great Great Nephew V
XI
4th Cousin X
3rd Cousin once removed IX
2nd Cousin twice removed VIII
1st Cousin thrice removed VII
Grandson of Great Nephew VI
XII
4th Cousin once removed XI
3rd Cousin twice removed X
2nd Cousin thrice removed IX
1st Cousin 4 times removed VIII
Great Grandson of Great Nephew VII
XIII
4th Cousin twice removed XII
3rd Cousin thrice removed XI
2nd Cousin 4 times removed X
1st Cousin 5 times removed IX
Gt Gt Grand son of Gt Nephew VIII

To face p. 322.

8. *The uncles, aunts, nephews, nieces, great-grandfathers and great-grandmothers* of the deceased, who dies without issue, parent, brother, sister, or grandparent (*o*).

9. *The great-uncles, great-aunts, cousins german* (*p*), *great-nephews, great-nieces, and great-great-grandparents* of the deceased, who dies without issue, parent, brother, sister, grandparent, uncle, aunt, nephew, niece, or great-grandparent, and so on, until the collateral relations of the deceased to the remotest degree are exhausted; all being equally entitled to a grant who stand in the same degree.

Relations on the mother's side equally entitled with those on the father's side.

Half-blood and females not excluded.

Primogeniture gives no right to preference.

Persons who are in the nearest degree of kindred to the deceased at the time of his death are equally his next of kin, and therefore members of the class from whom his administrator or administrators are to be selected, whether they are relations on the side of his mother or of his father (*q*); whether relations of the whole or of the half-blood (*r*); whether male or female (*s*). Primogeniture gives no *right* to preference in the grant of administration (*t*).

By stat. 21 Hen. VIII. c. 5, where there are several next of kin in equal degree, the Court may grant administration to any one or more of them in its discretion.

Where several Next of Kin claim the Grant.—The statute 21 Hen. VIII. c. 5, s. 2, further provides: "Where divers persons claim the administration as next of kin, which be equal in degree of kindred to the . . . person deceased, and where any person only desireth the administration, as next of kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary be at his election and liberty to accept any one or more making request, where divers do require the administration."

Joint grant to any number of the next of kin, not exceeding three.

Joint Grant to two or more of the Next of Kin.—The Court may, in its discretion, make a joint grant of administration to two or more of the next of kin, but it is contrary to the practice

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(*o*) See *Burton* v. *Sharp*, (1700) cit. 1 Lord Raym. 686.

(*p*) *I.e.*, sons and daughters of an uncle or aunt.

(*q*) *Moor* v. *Barham*, (1723) cited 1 P. Wms. 53.

(*r*) 2 Black. Comm. 505; *Smith* v. *Tracy*, (1677) 1 Ventr. 323; wherefore a brother of the half-blood excludes an uncle of the whole blood: *Collingwood* v. *Pace*, (1675) 1 Ventr. at p. 424; and the Court grants administration to the sister of the half- or the brother of the whole blood at its discretion: *Brown* v. *Wood*, (1648) Aleyn, 36. *Vide post*, p. 325.

(*s*) *Brown* v. *Wood*, (1648) Aleyn, 36. *Vide post*, p. 326.

(*t*) *Warwick* v. *Greville*, (1809) 1 Phill. at p. 125. *Vide post*, p. 325.

of the Court to join more than three persons in an administration (*u*).

The Court prefers a sole to a joint administration, and will not force a joint administration on unwilling parties.

The Court never forces a joint administration on unwilling parties, because if the administrators were at variance, that might almost put an end to the administration. Further, the Court prefers a sole to a joint administration, because it is infinitely better for the estate; co-administrators must join and be joined in every act, and this is not only inconvenient to themselves, but, what is of more consequence, is inconvenient to those who have demands on the estate either as creditors, or as entitled in distribution (*x*).

The persons who are to be joined as administrators must consent.

Therefore, before a joint administration will be granted, the persons who are to be joined as administrators must consent (*y*); and in the absence of such consent the Court will grant administration to one of the claimants, in accordance with the rules stated in the succeeding paragraphs.

Joint grant to next of kin and heir-at-law.

If the assets include real estate a joint grant may, since the Land Transfer Act, 1897, be made to one or more of the next of kin and the heir-at-law (*z*).

Where, of several next of kin, one alone applies for grant, Court may require notice to the others.

Grant to one alone of several Next of Kin.—Where there are several next of kin, and only one applies for the grant, the Court will grant administration to him *priori petenti*, without requiring the consent or renunciation of the other next of kin; but the Court may require notice to be given to them, if it thinks fit (*a*). Where two or more of the intestate's next of kin contend for the grant the Court is guided by the following principles and rules of practice in making its election.

Where there are several next of kin in equal degree, the Court may grant to any at its discretion.

The statute leaves it to the Court to grant letters of administration to the next of kin; none has a legal preference; the selection rests with the discretion of the Court. That discretion, however, is not to be arbitrarily or

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(*u*) *Blakelock,* (1828) 1 Hagg. 682.

(*x*) *Warwick* v. *Greville,* (1809) 1 Phill. at p. 126. See *Dampier* v. *Colson,* (1812) 2 Phill. at p. 55; *Leggat* v. *Leggat,* (1753) 1 Lee, 348; *Coe* v. *Hume,* (1833) 4 Hagg. 398; *Bell* v. *Timiswood,* (1812) 2 Phill. 22; *Coppin* v. *Dillon,* (1833) 4 Hagg. at p. 376; *Iredale* v. *Ford,* (1859) 1 S. & T. at p. 307.

(*y*) See the cases cited in the preceding note.

(*z*) Tristram & Coote, p. 188.

(*a*) See Rule 28, N-C. B. This rule is not, in practice, invariably enforced: *vide post,* p. 458.

capriciously assumed, but to be a legal discretion governed by principle and sanctioned by practice; in exercising it the Court is not to be guided by the wishes or feelings of the parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property (*b*).

In the exercise of its discretion the Court must look to the benefit of the estate.

The first duty of the Court, then, is to place the administration in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors or in making distribution: the primary object is the interest of the property (*c*).

In the absence of material objection, the Court grants administration to him whom the majority of the persons interested desire.

Where two or more of the next of kin claim the grant, and there is no material objection on the one hand, or reason for preference on the other, the Court, in its discretion, will place the administration in the hands of the person to whom the majority of interests are desirous of entrusting the estate (*d*). This rule weighs very strongly with the Court, but is not invariably followed (*e*).

Whole blood preferred to half-blood.

When the contest for an administration is between one of the whole blood and one of the half-blood, the whole blood is preferred, even though the majority of those interested in distribution concur in the half-blood, unless material objections can be proved against him of the whole blood (*f*).

Primogeniture.

Primogeniture gives no right; but if the claims of the applicants are precisely equal, if the scale is exactly poised, being the elder would incline the balance, but it would not weigh against the wish of the majority of the interests (*g*).

(*b*) *Warwick* v. *Greville,* (1809) 1 Phill. at pp. 124, 125.

(*c*) *Ibid.*

(*d*) *Per* Sir John Nicholl in *Budd* v. *Silver,* (1813) 2 Phill. 115. See *Elwes* v. *Elwes,* (1728) 2 Lee, 573; *Cartright's Case,* (1680) 1 Freem. 258; *Iredale* v. *Ford,* (1859) 1 S. & T. 305; *Warwick* v. *Greville,* (1809) 1 Phill. 123; *Coppin* v. *Dillon,* (1833) 4 Hagg. at p. 376; *Mercer* v. *Morland,* (1758) 2 Lee, 499.

(*e*) *Wetdrill* v. *Wright,* (1814) 2 Phill. at p. 248; *Sawbridge* v. *Hill,* (1871) 2 P. & D. 219; *Stainton,* (1871) 2 P. & D. 212.

(*f*) *Mercer* v. *Morland,* (1758) 2 Lee, 499; *Webb* v. *Griffin,* (1727) 2 Lee, at p. 500; *Stratton* v. *Linton,* (1861) 31 L. J. P. 48, where the guardian of a minor next of kin of the whole blood was preferred. But see Tristram & Coote, p. 192, where an unreported case (*Marsden* v. *Simmons,* 1896) is cited to the contrary.

(*g*) *Per* Sir John Nicholl in *Warwick* v. *Greville,* (1809) 1 Phill. at p. 125; *Coppin* v. *Dillon,* (1833) 4 Hagg. at p. 376; *Cardale* v. *Harvey,* (1752) 1 Lee, at pp. 179, 180.

Male preferred to female applicant.

To the same extent, a male is preferred to a female applicant, as more likely to be acquainted with and able to conduct business (*h*), but not if the majority of the interests concur in the female applicant (*i*); and the latter, if with the consent of the male she is *prior petens*, is preferred to the male, even if he afterwards opposes her application (*k*). On the same principle, one of the next of kin who is accustomed to business will, *cæteris paribus*, be preferred to others without such experience (*l*).

Person accustomed to business preferred.

When none of these considerations apply, the Court will grant administration to the person whose application was the earlier, on the principle "*qui prior est tempore potior est jure*" (*m*).

Prior petens.

Material Objections.—Where material objections exist against the appointment of one of the applicants as administrator, the Court will exclude the objectionable applicant and grant administration to the other claimant.

Next of kin a bankrupt,

The fact that one of two applicants for administration had been twice a bankrupt, and had paid no dividend under his last bankruptcy, was held sufficient ground for his exclusion in favour of the other next of kin in whom the majority of the interests concurred (*n*).

or has an interest incompatible with due administration.

Again, one of the applicants may have an interest incompatible with the due administration of the estate; thus it was held good reason for passing over one of the applicants for administration, that a question was likely to arise between the estate of the deceased and a son of this applicant respecting the validity of a gift, the suggestion being that the claims of the estate might not be strongly asserted by the father against his son (*o*).

Next of kin also creditor.

On somewhat similar grounds, the fact that one of the next of kin has a disputed claim, as creditor, against the property

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(*h*) *Chittenden* v. *Knight*, (1758) 2 Lee, 559; *Iredale* v. *Ford*, (1858) 1 S. & T. 305.

(*i*) *Iredale* v. *Ford*, (1858) 1 S. & T. 305.

(*k*) *Cordeux* v. *Trasler*, (1865) 4 S. & T. 48.

(*l*) *Williams* v. *Wilkins*, (1812) 2 Phill. 100.

(*m*) *Cordeux* v. *Trasler*, (1865) 4 S. & T. 48.

(*n*) *Iredale* v. *Ford*, (1859) 1 S. & T. 305; *Bell* v. *Timiswood*, (1812) 2 Phill. 22.

(*o*) *Budd* v. *Silver*, (1813) 2 Phill. 115.

of the deceased, is rather adverse than favourable to his preference as administrator (*p*).

When administration granted to one, others in equal degree of kindred have no right to administration during his lifetime.

When administration has been granted to one or more of the next of kin, others in the same degree of relationship have, during the lifetime of the administrator, no title to a grant (*q*). But upon the death of the administrator, or the survivor of the administrators, a next of kin who has even renounced (*r*) his title to the original grant may come in and take administration *de bonis non* (*s*).

Next of kin excluded when they have no interest.

It is an established rule of the Court that the right to the administration of the effects of an intestate follows the right to the property therein (*t*). In certain early cases it has been held that the rule permits the exclusion even of the next of kin of an intestate, if he has no interest in the property, notwithstanding the express provisions of the statute of Henry VIII., on the ground that in such a case the next of kin is excluded by the spirit, though contrary to the letter of the Act (*u*).

In *West* v. *Willby* (*x*) Sir John Nicholl said: "The principle is clear that the next of kin, when he has no interest, may be excluded, and the administration granted to a person who has an interest in the effects"; and the learned judge quoted an old case before the Delegates (*y*) where the facts were as follows:—Lord Hollis died intestate; Bridges claimed administration as next of kin; the effects were vested by Act of Parliament in the Duke of Newcastle to pay the debts of the deceased: it was held that the next of kin was excluded, and administration was granted to the Duke of Newcastle.

In *Young* v. *Peirce* (*z*), where a deceased intestate left two

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(*p*) *Webb* v. *Needham,* (1823) 1 Add. 494.

(*q*) Wms. on Exors. 337, citing Toller, 98.

(*r*) Provided that he can get the leave of the Court to retract his renunciation: *vide post,* p. 509.

(*s*) *Skeffington* v. *White,* (1828) 1 Hagg. at p. 702.

(*t*) *Withy* v. *Mangles,* (1843) 10 Cl. & Fin. at p. 248; *Gill,* (1828) 1 Hagg. at p. 342; *Wetdrill* v. *Wright,* (1814) 2 Phill. at p. 248; *Elwes* v. *Elwes,* (1728) 2 Lee, at p. 575.

(*u*) *Withy* v. *Mangles,* (1843) 10 Cl. & Fin. at p. 248; *West* v. *Willby,* (1820) 3 Phill. at p. 381.

(*x*) (1820) 3 Phill. at p. 381.

(*y*) *Bridges* v. *The Duke of Newcastle* (1712).

(*z*) (1689) 1 Freem. 496.

sons, one of whom, for valuable consideration, released all his right to the personal estate, on the death of the other son, it was held that his executor and universal legatee was entitled to administration of the intestate's estate in preference to the surviving son, who had released his interest.

Estate insolvent.

If the estate is insolvent, it may be said that the next of kin has no interest (*a*); and the Court has special powers in dealing with such cases under sect. 73 of the Court of Probate Act, 1857 (*b*).

If the next of kin die before administration is granted, his representative is entitled to the grant.

Grant to Representatives of Deceased Next of Kin.—On the principle that the right to administration of the effects of the deceased follows the right to the property therein, it has long been held that under the statutes the Court is bound only to grant the administration to such person as is next of kin *at the intestate's death*, and not to one who is not entitled to the beneficial interest in the effects, though, by the death of intermediate persons, he may have become next of kin at the time the grant is required (*c*). Accordingly it is the established rule that if all who were next of kin at the time of the death of the intestate are dead, then the personal representative of such next of kin, being entitled to the beneficial interest, is also entitled to the administration, whether original or *de bonis non;* with this limitation, however, in both cases, that a person who at the time of the intestate's death was entitled in distribution (though not next of kin) is preferred to the personal representative of the deceased next of kin (*d*).

But a person originally entitled in distribution preferred to representative of deceased next of kin.

The ground of making the grant to the personal representatives of those who were next of kin at the time of the intestate's death, in preference to those who have become next of kin at the time of the grant, is that the former are

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(*a*) *Haynes* v. *Matthews*, (1859) 1 S. & T. at p. 462.

(*b*) *Vide post*, pp. 409, 414; but, unless the Court sees fit to exercise its special powers under that section, the next of kin, though the estate is deeply insolvent, is entitled to a grant in preference to a creditor: *vide post*, p. 333.

(*c*) 2 Hagg. App. 150; *Savage* v. *Blythe*, (1796) 2 Hagg. App. 150; *Almes* v. *Almes*, (1796) 2 Hagg. App. 155; and see the learned reporter's note, 2 Hagg. App. p. 156.

(*d*) 2 Hagg. App. 157.

possessed of the beneficial interest in the intestate's effects; and that interest, by the Statute of Distributions, vests in them immediately on the intestate's death, and is consequently transmitted to their representatives, although no administration had been taken out during the lifetime of such distributees (*e*).

Where representatives of deceased next of kin are co-executors.

Where the representatives of a deceased next of kin are co-executors, any one of them may take the grant of administration to the deceased whom their testator was entitled to represent; but co-administrators must all join in taking out such a grant (*f*). But the grant may be made to one of two or more co-administrators if the others renounce, or have been cited and failed to appear (*g*).

Where co-administrators.

SUB-SECTION 4.—*Grant to Persons entitled in Distribution to the Personal Estate.*

Where all next of kin are dead, grant to persons originally entitled in distribution (though not next of kin).

Persons originally entitled in distribution, though not next of kin—*e.g.*, sons and daughters of a deceased brother of the intestate, who leaves a brother him surviving—are, by the practice of the Court, preferred to the representatives of the deceased next of kin, on the ground that the right of a party originally entitled is preferred to that of a party having a derivative interest (*h*). Accordingly, if all the next of kin are dead, the grant will be made to such persons. But the matter is in the discretion of the Court (*i*), who may prefer the representatives of the next of kin, if they have a greater interest in the estate (*k*). If the widow, next of kin, and all persons entitled in distribution are dead, administration will be granted, subject to the right of the heir-at-law, if any, to the legal personal representative of any one of them (*l*).

(*e*) 2 Hagg. App. 157.

(*f*) *Nayler,* (1851) 2 Rob. at p. 410.

(*g*) *Hancock* v. *Lightfoot,* (1864) 3 S. & T. 557; *Crook,* cited *ibid.*, p. 558, where a grant was made to one of three administrators without notice to the others, of whom one was a lunatic and the other resident abroad.

(*h*) *Carr,* (1867) 1 P. & D. at p. 292. *Vide ante,* p. 328.

(*i*) *Carr, loc. cit.*

(*k*) *Savage* v. *Blythe,* (1796) 2 Hagg. App. 150; *Almes* v. *Almes,* (1796) 2 Hagg. App. 155.

(*l*) *Vide ante,* p. 328.

So if next of kin, etc., renounce.

If the widow, next of kin, and heir-at-law (where there is real estate) have renounced, or have been cited, and have failed to appear, administration will be granted to any person entitled in distribution to the intestate's personal estate. Thus, on the renunciation of the mother of an intestate, the grant may be made to a brother, or to the son of a deceased brother, entitled in distribution to the personal estate.

Who are entitled in distribution to the personal estate of an intestate.

Statutes of Distribution.

It is necessary very briefly to summarise the rules for the distribution of an intestate's personal estate. The statutes which regulate its distribution are 22 & 23 Car. II. c. 10; 29 Car. II. c. 3; 1 Jac. II. c. 17; and 53 & 54 Vict. c. 29.

1. *The husband*, if he survives his intestate wife, is entitled to the whole of her personal estate.

2. *The wife*, who survives her intestate husband:

(a) If there are descendants, is entitled to *one third* of his personal estate, and the descendants to the remainder, which is shared among them in the same way as the whole estate would have been shared had the wife not survived.

(b) If there are no descendants, is entitled to *one half* of his personal estate, and the next of kin to the other half, which they share in the same way as the whole estate would have been shared had the wife not survived.

If the husband has died since September 1st, 1890, *without issue*, the wife is (under the Intestates Estates Act, 1890) entitled to the whole of his estate, provided the net value of his real and personal estate does not exceed £500. If it exceeds £500, she has a charge upon the whole estate for £500, with interest at the rate of four per cent. until payment, in addition to her share in the balance of the estate. The Act applies only where the husband dies wholly intestate.

If there are no next of kin, as where the intestate was a bastard, one half goes to the wife, the other half to the Crown.

3. *Children.*—If there is no wife or husband (as the case may be), the children are entitled to the whole of the personal estate in equal shares, the children or remoter issue of a deceased child sharing with them *per stirpes*.

4. *Grandchildren.*—Failing children: the grandchildren are entitled to the whole of the personal estate, which is divided among them *per stirpes* and not *per capita*, great-grandchildren and more remote descendants taking with them *per stirpes.* Failing grandchildren: the above rule applies to more remote descendants.

5. *The father.*—Failing widow and lineal descendants: the father is entitled to the whole personal estate.

6. *The mother.*—Failing father: the mother takes all; but if there be brothers, sisters, or nephews and nieces (being children of brothers or sisters who died in the lifetime of the deceased), she shares the estate with them, the nephews and nieces taking their parents' share *per stirpes.* No other relations share with the mother.

7. *Brothers and sisters.*—Failing mother: brothers and sisters share equally, nephews and nieces (being children of brothers and sisters who died in the lifetime of the deceased) taking with them *per stirpes.*

8. *Grandfathers and grandmothers.*—Failing brothers and sisters: grandfathers and grandmothers share equally. If only one, that one takes all.

9. *Nephews, nieces, etc.*—Failing grandparents: nephews and nieces share together with uncles, aunts, great-grandfathers, and great-grandmothers equally, they being all in the third degree, and so on with other kindred according to their degree; all those in the same degree taking an equal share *per capita*, those in the nearer, excluding those in the more remote degree (*m*).

If person entitled to a grant dies, and his representative renounces, grant may be made to next of kin or residuary legatee of *jus habens*,

Grant to a Person having a Derivative Interest.—If the representative of the person solely entitled to a grant refuses to take out a grant to the estate of the original intestate, a grant may be made to a person having an indirect or derivative interest in the intestate's estate, as being next of kin or residuary legatee of the intestate's husband, widow, or next of kin (*n*).

Thus administration of a wife's estate may be granted to the residuary legatee of her husband, on the husband's

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(*m*) See Table of Consanguinity, facing p. 322, *ante.*

(*n*) *Blagrave,* (1828) 2 Hagg. 83. And see *Allen,* (1864) 3 S. & T. 559.

executor, who has proved his will, renouncing administration to the estate of the wife (*o*).

or to creditor of *jus habens.*

On the same principle, where a person, being the sole party interested in, and the sole party entitled to represent the estate of a deceased person, died without taking a grant to such person, and his personal representative had filed a renunciation and consent, the Court, under sect. 73 of the Court of Probate Act, 1857, granted administration to a creditor of the party so originally interested and entitled (*p*).

Again, where the deceased died a spinster and intestate, leaving a brother (her only next of kin), who had since died, and of his will his widow and universal legatee had taken probate as executrix, administration was granted to a son of the deceased brother on the renunciation of his executrix (*q*).

On renunciation and consent of person solely entitled to the grant, it may be made to his next of kin as having a *spes successionis.*

Grant to Persons having a Spes Successionis.—On the renunciation and consent of the sole party interested in and entitled to represent the estate of the deceased person, the grant may be made to the next of kin of that party, on the principle that his next of kin has indirectly a *spes successionis* to the property of the deceased (*r*).

On this principle, on the renunciation and consent of the father (sole next of kin) of an intestate, administration may be granted to the father's son, daughter, or grandchild (*s*).

So, on the renunciation and consent of the brother of the intestate, who was the sole next of kin and only person entitled to the personal estate of the deceased, administration was granted to a son of that brother, *i.e.*, the nephew of the deceased (*t*).

Wife has no *spes successionis* through her husband. *Semble*, since the Married Women's Property

A wife has no *spes successionis* through her husband, and on his renunciation the grant will not be made to her. Prior to the Married Women's Property Act, 1882, a husband was

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(*o*) *Vizer*, (1853) unreported, quoted Tristram & Coote, 72.

(*p*) *Fraser*, (1867) 1 P. & D. 327; *vide post*, p. 420.

(*q*) *Blagrave*, (1828) 2 Hagg. 83.

(*r*) See *Johnson*, (1862) 2 S. & T. 595; *Williams*, (1870) 2 P. & D. at p. 82; *Trigg*, [1901] P. 42.

(*s*) Tristram & Coote, 73.

(*t*) *Keane*, (1828) 1 Hagg. 692; *Johnson*, (1862) 2 S. & T. 595; *Williams*, (1870) 2 P. & D. 81. A similar grant was made to the son of two cousins german (only next of kin of deceased): *Williams* (May 13th, 1890).

entitled to take out administration in right of the wife, to her next of kin deceased intestate, and her renunciation in favour of a third person, *e.g.*, a creditor of the deceased, could not deprive the husband of this right (*u*). It appears to be doubtful how far this right, which was based on the *jus mariti*, rather than on a *spes successionis* (*x*), has been affected by the statute above referred to.

Act, 1882, the husband has no *spes successionis* through the wife.

Sub-Section 5.—*Grant to a Creditor.*

If the widow of an intestate, his next of kin (*y*), and all persons entitled in distribution, together with the representatives of any of such persons who have died subsequently to the deceased, have renounced, or have been cited to accept a grant and have failed to appear, the grant may be made to a creditor of the intestate.

Creditor is entitled to grant, if none of the kindred will take administration.

Administration is only granted to a creditor failing any other representative, in which case, there being nobody to sue, the creditor, unless he is himself appointed administrator, and so enabled to pay himself, must of necessity lie out of his debt (*z*). But where a person whose duty and interest it is to take a grant is ready and willing to undertake the administration, he or she it is that is entitled to the grant, and not the creditor (*a*). The claim of a creditor, then, can only avail when all persons entitled to a grant renounce, and the estate is likely to be unadministered (*b*). And since a creditor has a right to administration not by the statute, but only by the practice of the Court, if circumstances show that the creditor is not a proper person, the Court may, it seems, refuse to grant administration to him (*c*).

But where a person whose duty and interest it is to take the grant is willing to undertake it, a creditor has no right.

Grant to creditor refused if not a proper person.

(*u*) *Haynes* v. *Matthews*, (1859) 1 S. & T. 460.

(*x*) Tristram & Coote, p. 74.

(*y*) If the deceased left real estate, his heir-at-law must also be cleared off. A person representing a next of kin, *e.g.*, guardian of a minor, is preferred to a creditor: *John* v. *Bradbury*, (1866) 1 P. & D. 245.

(*z*) *Webb* v. *Needham*, (1823) 1 Add. at p. 497. See *Elme* v. *Da Costa*, (1791) 1 Phill. at p. 177.

(*a*) *Webb* v. *Needham*, (1823) 1 Add. at p. 498; *Graham* v. *Maclean*, (1841) 2 Curt. at p. 663; *Dimes* v. *Cornwell*, (1850) 2 Rob. at p. 143.

(*b*) *Haynes* v. *Matthews*, (1859) 1 S. & T. at p. 462. The Court has, however, special powers under s. 73 of the Court of Probate Act when the estate is insolvent, and the next of kin have therefore no interest: *vide post*, p. 414; and see *Farrands*, (1876) 1 P. D. 439.

(*c*) *Menzies* v. *Pulbrook*, (1841) 2 Curt. at p. 850.

Before administration granted to him, creditor cannot deny interest, or oppose a will.

A creditor who applies for administration cannot deny the interest of a next of kin or question his fitness to be appointed administrator (*d*), unless, indeed, the estate is insolvent and the next of kin has no interest (*e*); nor can a creditor oppose a will (*f*): for if a will is put forward for probate, or a next of kin claims the administration, then a person offers to make himself the representative of the deceased, and that is all a creditor can require (*g*).

Secus where a creditor has obtained administration.

But when a creditor has obtained administration the case is different; he has a right to maintain it against the executor or next of kin, and, if the grant to him is sought to be revoked, he may deny the interest of the applicant, or oppose the will propounded (*h*); indeed he has the same right as the next of kin to oppose a will (*i*).

Creditor entitled, even though his right of action be statute barred.

Who are Creditors.—A person is entitled to a grant of administration as creditor of an intestate, although his right of action for his debt is barred by the Statute of Limitations (*k*).

Surety who pays off debt of principal.

A surety who, after the death of the principal, pays off the debt, is entitled, as a creditor, to pray administration to the estate of the principal (*l*).

Creditor in equity.

Administration has been granted to a person, as creditor, who has merely an equitable claim against the estate of the deceased; as where, on the direction of a testator, his executor or administrator has carried on the testator's business after his death and has incurred debts to the applicant, who is entitled in equity to claim against the estate of the testator to the extent that the testator has authorised it to be used in the business (*m*).

Guardians of union or

Guardians of the union or parish wherein a pauper has died,

(*d*) *Dabbs* v. *Chisman*, (1810) 1 Phill. at p. 159; *Haynes* v. *Matthews*, (1859) 1 S. & T. 460.

(*e*) *Menzies* v. *Pulbrook*, (1841) 2 Curt. at p. 850; *Haynes* v. *Matthews*, (1859) 1 S. & T. at p. 462; see *Furlonger* v. *Cox*, (1811) cit. 3 Phill. 381; *West* v. *Willby*, (1820) 3 Phill. 374.

(*f*) *Elme* v. *Da Costa*, (1791) 1 Phill. at p. 177; *Menzies* v. *Pulbrook*, (1841) 2 Curt. at p. 850.

(*g*) *Elme* v. *Da Costa*, (1791) 1 Phill. at p. 177.

(*h*) *Dabbs* v. *Chisman*, (1810) 1 Phill. at p. 159; *Elme* v. *Da Costa*, (1791) 1 Phill. at p. 177; *Menzies* v. *Pulbrook*, (1841) 2 Curt. at p. 851.

(*i*) *Dabbs* v. *Chisman*, (1810) 1 Phill. at p. 160, note (*c*).

(*k*) *Coombs*, (1866) 1 P. & D. 193; *Coombs* v. *Coombs*, (1866) 1 P. & D. 288.

(*l*) *Williams* v. *Jukes*, (1864) 34 L. J. P. 60.

(*m*) *Fairland* v. *Percy*, (1875) 3 P. & D. 217.

are entitled under 12 & 13 Vict. c. 103, ss. 16, 17, to reimburse themselves out of his effects in respect of the expenses incurred by them in his burial and maintenance; they have been regarded as his creditors to this extent, and, as such, their nominee is entitled to administration (*n*).

parish wherein pauper intestate has died.

Creditors of executrix who intermeddles without probate and dies possessed of property of testator.

Where an executrix, who, without having taken probate, had intermeddled in the estate of her testator, died possessed of property belonging to him, after citation of her next of kin and their non-appearance, it was held that the representative of the testator was entitled as a creditor to a grant of administration to her estate (*o*).

Where intestate is assignee in bankruptcy, and is alleged to have misappropriated bankrupt's effects, his co-assignee not a creditor.

Assignee of the intestate's partner.

A person who was joint assignee with the deceased of the estate of a bankrupt, and alleged that the deceased had applied to his own use £500 of the bankrupt's effects, was held not to be himself a creditor to the deceased's estate, though a trustee for the bankrupt's creditors (*p*); and where a surviving partner has assigned his share in the profits of the partnership, it was said that the assignee was not thereby constituted creditor of the estate of a deceased partner, who had died leaving the partnership accounts unsettled (*q*).

Mother of intestate, creditor for moneys paid to advance him in his profession.

The mother of an intestate, who had expended £900 in the purchase for him of two commissions in the army, was granted administration to his estate as creditor, after citation of the father (*r*).

Creditor for funeral expenses.

An undertaker, who applies for a grant as creditor for the funeral expenses, must show the circumstances under which the expenses were incurred and by whose authority he undertook the funeral, for, as a general rule, the person who gave the order for the funeral is responsible for the expenses. But, in a proper case, the grant may be made to the undertaker as creditor (*s*).

(*n*) *Windeatt* v. *Sharland,* (1871) 2 P. & D. 217, 266. See *Findlay,* (1863) 3 S. & T. 265; *Eccles,* (1889) 15 P. D. 1; *Hockin,* (1895) 73 L. T. 316; *Everley,* [1892] P. 50; *vide post,* p. 415; and for form of nomination, App. VII., Form 64; of citation, App. VII., Form 92.

(*o*) *Mellor,* (1883) 8 P. D. 108.

(*p*) *Snape* v. *Webb,* (1757) 2 Lee, 411.

(*q*) *Cawthorn* v. *Chalie,* (1824) 2 Sim. & Stu. 127.

(*r*) *Aitkin* v. *Ford,* (1829) 3 Hagg. 193.

(*s*) *Newcombe* v. *Beloe,* (1867) 1 P. & D. 314; *Fowler,* (1852) 16 Jur. 894.

Receiver appointed by Court of Chancery.

In *In the Goods of Mayer* (*t*), proceedings in Chancery had been taken, by persons having claims against the estate of an intestate, against his widow, who was alleged to have possessed herself of part of the estate, but had not taken out administration. After citation and non-appearance of the widow, next of kin, and all persons entitled in distribution, the Court made a general grant of administration to the receiver appointed by the Court of Chancery with authority to collect, get in, and receive the estate and to apply to the Court of Probate for administration.

Intestate a bankrupt—grant to his trustee in bankruptcy.

Where the intestate has died a bankrupt, or where the estate is insolvent, on the renunciation of his next of kin, and of the heir-at-law (where there is real estate), the Court will grant administration to his trustee in bankruptcy or to the official receiver of his estate (*u*). These persons are not indeed creditors of the deceased, but they represent his creditors, and are the persons in whom the whole property of the bankrupt vests by Act of Parliament; they represent the estate, and are enabled to act in all respects on behalf of the estate (*x*). But they are not entitled to a grant unless the next of kin and heir-at-law renounce their statutory rights, or be cited and fail to appear (*y*); the Court has, however, special powers under sect. 73 of the Court of Probate Act, 1857, where the estate is insolvent (*z*).

Husband of intestate a bankrupt—grant to his trustee in bankruptcy.

If the husband of an intestate wife is a bankrupt, on the renunciation of the husband and of the heir-at-law (where there is real estate), the grant may be made to the official receiver or the husband's trustee in bankruptcy (*a*).

(*t*) (1873) 3 P. & D. 39. As to a grant to an official manager of a joint-stock company, in the course of liquidation, to the estate of a deceased contributory, see Tristram & Coote, p. 77.

(*u*) *Belcher* v. *Maberly,* (1840) 2 Curt. 629. The Bankruptcy Act, 1869, abolished the official assignees and substituted for the creditor's assignees a trustee to be appointed by the creditors, *i.e.*, the trustee in bankruptcy. As to the "official receiver," see the Bankruptcy Act, 1883; see *Thacker,* [1900] P. 15; *Knapp,* (1890) 63 L. T. 252; *Renninson,* (1894) 1 Manson's Reports, 475.

(*x*) *Drew* v. *Long,* (1854) 1 Spinks' Ecc. & Adm. at p. 400.

(*y*) *Ibid.* at p. 397; but see *Morgan,* (1896) 75 L. T. 190.

(*z*) *Post,* p. 414.

(*a*) *Turner,* (1886) 12 P. D. 18. The trustee is not entitled to a grant

Next of kin of intestate a bankrupt—grant to his trustee in bankruptcy.

If the sole next of kin, being the only person entitled to the estate of the deceased intestate, is a bankrupt, the Court, on his renunciation and consent, will grant administration to his trustee in bankruptcy (*b*).

Creditor of intestate a bankrupt—grant to his trustee in bankruptcy.

It seems that where a creditor of the deceased has become a bankrupt, a grant may be made to the trustee in bankruptcy of the creditor (*c*). And where a creditor had obtained administration of the estate of an intestate, and died a bankrupt without having fully administered, leaving his debt still unsatisfied, the Court granted administration *de bonis non* to the person to whom his trustee in bankruptcy had assigned the unsatisfied debt, limited to the interest in the intestate's estate so assigned (*d*).

Person who has bought up debt after death of debtor.

Subject to the above exceptions, it is the established practice of the Court to refuse to decree administration of an intestate's estate to a person who has bought up a debt after the death of the intestate (*e*). "But this practice is not inconsistent with a grant being made to a creditor of the party beneficially entitled to an interest in the estate of the deceased, who has assigned it, by way of mortgage or otherwise, to the parties seeking the grant" (*f*).

Married woman intestate: Creditor for ante-nuptial debt, for post-nuptial debt.

Administration to the estate of an intestate wife may be granted to her creditor for an ante-nuptial debt, after citation of the husband (*g*), or to her creditor for a debt incurred since her marriage, provided her husband and heir-at-law (where there is real estate) have first been cited or have renounced.

in priority to the husband, for the husband's right to administer to his wife's estate is not such a right as will vest in his trustee in bankruptcy: *ibid.* See *Conolly,* (1896) 74 L. T. 461; *Causton,* [1906] P. 124; *Morgan,* (1896) 75 L. T. 190.

(*b*) *Cope,* (1890) 15 P. D. 107; *Astbury,* (1899) 80 L. T. 296.

(*c*) *Downard* v. *Dickinson,* (1864) 3 S. & T. 564; see *Coles,* (1863) 3 S. & T. 181.

(*d*) *Burdett,* (1876) 1 P. D. 427.

(*e*) *Baynes* v. *Harrison,* (1856) 1 Dea. & Sw. 15; *Downard* v. *Dickinson,* (1864) 3 S. & T. at p. 566; *Depit* v. *Delerieleuse,* (1861) 2 S. & T. 131; *Day* v. *Thompson,* (1863) 3 S. & T. 169; *Coles,* (1863) 3 S. & T. 181; but see *Cosh,* (1909) 25 T. L. R. 785.

(*f*) Wms. on Exors., p. 353, citing *Godfrey,* (1861) 2 S. & T. 133; *Coles,* (1863) 3 S. & T. 181; *Downard* v. *Dickinson,* (1864) 3 S. & T 564. And see *Almes* v. *Almes,* (1796) 2 Hagg. App. 155; *Dodgson,* (1859) 1 S. & T. 259; *Quilliam,* (1898) 79 L. T. 472.

(*g*) *Hudleston* v. *Hudleston,* (1852) 2 Rob. 424.

Grant to executors of creditor.

A grant may be made to the executors of a creditor, on the renunciation of the next of kin or residuary legatee (*h*).

Administration granted to married woman as creditor—on her death, her husband not entitled as creditor, but only as representative of wife.

Where a woman, who had taken administration to the estate of the deceased as a creditor, married, and died without having satisfied her debt, it was held that, as the debt had not been reduced into possession, her husband was not entitled in his own right as a creditor, but only as the representative of his wife, to take administration *de bonis non* of the estate of the deceased (*i*).

Where two or more creditors contend, Court has a discretion.

Judgment creditor preferred.

Specialty creditor.

Creditor for largest amount preferred,

or nominee of majority in value of creditors.

Preference of Creditors inter se.—Where two or more creditors of the deceased apply for a grant, the Court may make the grant to any one of them in its discretion. A judgment creditor has been preferred, as being a creditor of a superior nature to all the rest (*k*); but the priority of specialty debts over debts by simple contract has been abolished by the statute 32 & 33 Vict. c. 46. Other things being equal, the Court will grant administration to the creditor with the largest claim against the estate (*l*), or to the nominee of the majority in value of the creditors (*m*); and on this principle the Court has preferred, even to a judgment creditor, a simple contract creditor having a larger debt (*n*).

Grant to a creditor refused if not proper person.

But since a creditor has no right by the statute, and is entitled to the grant only by the practice of the Court, there can be no doubt that the Court may refuse to grant administration to him, if circumstances show that he is not a proper person, and may make a grant to another creditor in his stead (*o*).

Joint grant to several creditors.

The Court does sometimes grant administration to more creditors than one, but it prefers that one should be fixed upon (*p*).

Practice.

The practice where a creditor applies for a grant will be found in a later chapter (*q*).

(*h*) *Jones* v. *Beytagh*, (1821) 3 Phill. 635.

(*i*) *Risdon*, (1869) 1 P. & D. 637.

(*k*) *Carpenter* v. *Shelford*, (1758) 2 Lee, 502.

(*l*) *Kearney* v. *Whitaker*, (1756) 2 Lee, at p. 325.

(*m*) *Smithson*, (1866) 15 L. T. 296.

(*n*) *Ernest* v. *Eustace*, (1856) 1 Dea. & Sw. 271.

(*o*) *Menzies* v. *Pulbrook*, (1841) 2 Curt. at p. 850.

(*p*) *Harrison* v. *All Persons in General*, (1815) 2 Phill. 249.

(*q*) *Post*, pp. 469—471.

SUB-SECTION 6.—*Grant to the Crown.*

Administration to an intestate bastard,

If the intestate was a bastard, and died without lawful issue or widow him surviving, the Court will grant letters of administration to his *personal* estate (*r*) to the nominee of the Crown (*s*), who is entitled to the estate as *ultimus hæres* (*t*).

or other person without known kindred.

The nominee of the Crown is entitled to a grant in respect of the personal estate of an intestate who, though not a bastard, dies without known relation, widow, or husband: provided that his or her "next of kin (if any) and all persons having or pretending to have any interest in the personal estate" have been cited by advertisement as required by Rule 76, N.-C. B.

Where bastard leaves a widow but no children.

Where a bastard or other person having no known relations dies intestate, leaving a widow but no children, subject to the right of the widow under the Intestates Estates Act, 1890, the Crown is entitled to a moiety of the estate (*u*).

Where bastard without children disposes of part of his property by will.

Where a bastard having no relations makes a will disposing of a part only of his or her property, the Crown has a right to a grant "save and except" (*v*), or to a *cæterorum* grant (*w*), and the legatees have a right to a grant of administration with the will annexed, limited to the property disposed of by the will (*x*).

Treasury Solicitor Act, 1876.

Grants of administration to nominees of the Crown are regulated by the Treasury Solicitor Act, 1876 (*y*), whereby the

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(*r*) Not of *real* estate, for, as the Land Transfer Act, 1897, does not bind the Crown, the real estate vests in the King without a grant, whether in his right as Sovereign (*Hartley,* [1899] P. 40), or as Duke of Lancaster (*Best,* [1901] P. 333).

(*s*) *I.e.*, to the Solicitor to the Treasury, as nominee of the Sovereign as King; or, if the deceased died domiciled in the Duchy of Lancaster, to the Solicitor to the Duchy of Lancaster, as nominee of the Sovereign as Duke of Lancaster (*Dyke* v. *Walford,* (1846) 5 Moo. P. C. 434); or, if the deceased died domiciled in the Duchy of Cornwall, to the Solicitor to the Duchy of Cornwall, as nominee of H.R.H. the Prince of Wales as Duke of Cornwall (*Solicitor of the Duchy of Cornwall* v. *Canning,* (1880) 5 P. D. 114).

(*t*) *Jones* v. *Goodchild,* (1729) 3 P. Wms. 33; *Rutherford* v. *Maule,* (1832) 4 Hagg. 213; *Dyke* v. *Walford,* (1846) 5 Moo. P. C. 434; and see *Bell,* (1908) 52 Sol. Jo. 600.

(*u*) *Cave* v. *Roberts,* (1836) 8 Sim. 214.

(*v*) *Vide post,* p. 406.

(*w*) *Vide post,* p. 406.

(*x*) *Rhoades,* (1866) 1 P. & D. 119.

(*y*) 39 & 40 Vict. c. 18. See also Intestates Estates Act, 1884 (47 & 48 Vict. c. 71).

Sect. 1. Treasury Solicitor constituted a corporation sole.

Sect. 2. Grant of administration to Solicitor of Treasury.

Treasury Solicitor is constituted a corporation sole (*z*), and it is provided, in effect, that where the Crown becomes entitled to the personal estate of an intestate, and the Court has power to grant administration to a nominee of the Crown, and the Crown nominates for that purpose the Treasury Solicitor, the Court may grant such administration for the use of the Crown to the Treasury Solicitor (by his official name) and his successors, or to some person nominated by the Treasury Solicitor (*a*).

The grant devolves to his successors in office.

The administration, when granted to the Treasury Solicitor, vests in the Treasury Solicitor for the time being, notwithstanding any change in the person who is Treasury Solicitor, without any further grant, subject to any limitation contained in the grant and to the power of the Court to revoke the administration (*b*).

Treasury Solicitor does not give bond, but is subject to liabilities and duties imposed by bond.

Where administration is granted to the Treasury Solicitor (*c*), or to the solicitor for the Duchy of Lancaster (*d*), he shall, notwithstanding that he does not give the bond which, if such administration had been granted to him as a private individual, he would be required by law to give (*e*), be subject, as regards the administration, to the liabilities and duties imposed by such bond.

Grant to solicitor for Duchy of Cornwall.

Where a deceased died in Cornwall, intestate, without known relations, the Court granted letters of administration to the solicitor for the Duchy of Cornwall for the use of H.R.H. the Prince of Wales as Duke of Cornwall, without prejudice to the rights of the Crown (*f*).

(*z*) 39 & 40 Vict. c. 18, s. 1.

(*a*) *Ibid.* s. 2. The Treasury Solicitor may be nominated as administrator in a particular case or class of cases, or in all cases, and his nomination may be limited as the Sovereign may deem fit. The Treasury Solicitor may be authorised to nominate some other person to take out administration in any particular case or class of cases: *ibid.*

(*b*) *Ibid.* s. 2. Grants made to the solicitors to the Duchies of Cornwall and Lancaster do not devolve on their successors in office, and a further grant would be necessary on the death of the particular grantee, if any estate remained to be administered: Tristram & Coote, 81.

(*c*) 39 & 40 Vict. c. 18, s. 2.

(*d*) 15 & 16 Vict. c. 3, s. 2, re-enacted 39 & 40 Vict. c. 18, s. 9.

(*e*) See the Court of Probate Act, 1857, s. 81.

(*f*) *Solicitor of Duchy of Cornwall* v. *Canning*, (1880) 5 P. D. 114.

SUB-SECTION 7.—*Who is capable of being Administrator.*

Besides material objections to fitness,

It has been seen that the Court has no power to inquire into the fitness of a person appointed executor and to exclude him from office on any ground other than some legal disability recognised by the common law (*g*). It has, however, sufficiently appeared in the course of the preceding sub-sections of this chapter that a person whose title to a grant of administration depends not upon the statute, but upon the practice of the Court, or whose appointment is in the discretion of the Court, may be excluded from the administration on the ground of some material objection to his fitness.

a person otherwise entitled to the grant may be debarred by some legal disqualification.

A person who would otherwise be entitled to a grant of administration may be incapable of acting as administrator on account of some legal disqualification.

Lunatic.

If the person solely entitled to a grant of administration is a lunatic, the administration is committed to another for his use and benefit, in accordance with rules presently to be considered (*h*).

Minor.

If the person solely entitled to administration is a minor, administration is committed to another for his use and benefit until he attains the age of twenty-one years. In one case, indeed, the Court granted administration, limited to the receipt of dividends in the English Funds, to a minor residuary legatee, the wife of a minor, both domiciled in Portugal, on proof that by the law of Portugal she was competent to administer although within age (*i*). But in a later case (*k*) Sir C. Cresswell refused to grant letters of administration with the will annexed to a minor, who had been appointed administrator by the Court of the testatrix's domicil, on the ground that by so doing the Court would be acting in contradiction to the law of this country, by granting administration to a person under a disability, who cannot by the law of this country take upon himself the liabilities which the law casts upon an administrator—for example, cannot execute a bond.

(*g*) *Ante*, p. 254.

(*h*) *Vide post*, pp. 374 *et seq.*

(*i*) *Countess da Cunha*, (1828) 1 Hagg. 237.

(*k*) *H.R.H. the Duchess d'Orléans*, (1859) 1 S. & T. 253.

Alien.

Even before the Naturalization Act, 1870, if a person entitled to a grant of administration was an alien, that was no disability (*l*).

Married woman.

The fact that the person entitled to a grant of administration was a married woman was no disqualification, even before the Married Women's Property Act, 1882 (*m*). Administration was committed to her alone, not jointly with her husband (*n*); the general rule was, however, that a married woman could not take administration without her husband's consent (*o*).

Since the Married Women's Property Act, 1882, a married woman may be appointed administratrix without any consent on the part of her husband, and may act in that office as if she were a *feme sole* (*p*).

Formerly, on renunciation of married woman (person solely entitled to administration), grant made to husband.

By the old practice, if the person solely entitled to a grant of administration was a married woman, and she renounced her right, the grant was made to her husband; for, it was said, the husband has an interest, the grant must follow the interest, and the wife cannot by renouncing deprive her husband of his right to the grant (*q*). It is, however, doubtful whether the grant would be so made since the Married Women's Property Act, 1882.

Public Trustee may be administrator.

Public Trustee Act, 1906 (6 Edw. VII. c. 55).

By the Public Trustee Act, 1906, sect. 6, (1) "If, in pursuance of any rule under this Act, the Public Trustee (*r*) is authorised to accept by that name probates of wills or letters of administration, the Court having jurisdiction to grant probate of a will or letters of administration may grant such probate or letters to the Public Trustee by that name, and for that purpose the Court shall consider the Public Trustee as in law entitled equally with any person or class of

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(*l*) Com. Dig. Administrator (B.) 6.

(*m*) Com. Dig. Administrator (B.) 6.

(*n*) *Brown* v. *Wood*, (1648) Aleyn. 36.

(*o*) Bac. Abr. Exors. (F.); *Lover* v. *Lover*, (1842) 6 Jur. 156. See *Hardinge*, (1840) 2 Curt. 640; *Bubbers* v. *Harby*, (1842) 3 Curt. 50.

(*p*) The husband need no longer join in the administration bond: *Ayres*, (1883) 8 P. D. 168.

(*q*) *Vanthienen* v. *Vanthienen*, (1730) Fitz-Gibb. 203; *Wenham* v. *Wenham*, (1848) 6 N. C. 17; *Haynes* v. *Matthews*, (1859) 1 S. & T. 460.

(*r*) The office of Public Trustee was created by the statute 6 Edw. VII. c. 55, which provides that the Public Trustee shall be a corporation sole (s. 1 (2)).

persons to obtain the grant of letters of administration, save that the consent or citation of the Public Trustee shall not be required for the grant of letters of administration to any other person, and that, as between the Public Trustee and the widower, widow or next of kin of the deceased, the widower, widow or next of kin of the deceased shall be preferred, unless for good cause shown to the contrary" (*s*).

SUB-SECTION 8.—*General.*

In concluding this subject, reference must be made to certain rules of law and practice which have not admitted of convenient notice under any of the preceding sub-sections.

Administration to the estates of domiciled foreigners.

The rules as to grants of administration to the estates of persons who die domiciled in a foreign country have been discussed in an earlier chapter (*t*).

Next of kin cannot be compelled to take out administration, though he has intermeddled with the effects.

A person who is entitled to a grant of administration cannot be compelled to take a grant, even though he may have intermeddled with the effects in a manner which, had he been appointed executor, would have rendered him compellable to take probate (*u*).

Citation of person having a prior right requisite before grant to another.

Finally, although this subject is treated at length in a later chapter, it is convenient here to state that it has become an established maxim of the Court that where any party has a prior right to the administration, the Court requires him to be cited or to renounce before administration will be granted to any other person. Such citation answers two purposes: it either compels a representation to be taken by those who are primarily entitled to it, or, where they do not take it, the process provides a substitute for a voluntary renunciation on their part (*v*).

Rule relaxed in certain cases.

The Court will not relax this rule merely by reason that the party entitled to administration has in fact no interest in

(*s*) For the practice when the Public Trustee applies for a grant, see "Instructions with regard to Applications by the Public Trustee," *post*, p. 932.

(*t*) *Ante*, pp. 23—25, 37.

(*u*) *Ackerley* v. *Oldham*, (1811) 1 Phill. 248; *Ackerley* v. *Parkinson*, (1815) 3 M. & S. 411; *Fell*, (1861) 2 S. & T. 126; *Davis*, (1860) 4 S. & T. 213.

(*v*) 4 Burn. E. L. 367, 9th ed.; Wms. on Exors., pp. 228, 358; *Le Briton* v. *Le Quesne*, (1756) 2 Lee, 261; *Barker*, (1837) 1 Curt. 592;

the estate of the deceased; but in certain cases, especially where the person entitled in priority was so entitled by the practice of the Court and not by statute, the Court has relaxed the rule, and granted administration to one with an inferior title, without requiring the renunciation or citation of those with a superior right (*x*).

Person entitled to a grant in priority to applicant presumed to be dead.

Where the special circumstances justify the conclusion that the person who would be entitled in priority to the applicant may reasonably be presumed to be dead, the Court may, under sect. 73 of the Court of Probate Act, 1857, grant administration to the applicant without requiring citation of that person, upon the applicant swearing that he believes himself to be the next of kin of the deceased (*y*).

Section 2.

GRANTS OF ADMINISTRATION *CUM TESTAMENTO ANNEXO.*

Administration *cum testamento annexo.*

When granted.

Where the deceased has left a valid will, but has appointed no executor, the Court will appoint some person to administer his estate in accordance with the provisions of his will, by a grant to such person of letters of administration *cum testamento annexo*, or, in English phrase, "with the will annexed."

Besides the case where no executor has been appointed, either in express terms or according to the tenor of the will, administration with the will annexed is granted where the appointment of executor fails for one of the following causes:—

(i.) Where the executor has died in the lifetime of the

Keene, (1859) 1 S. & T. at p. 267; *Pegg* v. *Chamberlain,* (1860) 1 S. & T. at p. 528. *Vide post,* p. 522.

(*x*) *Rogerson,* (1840) 2 Curt. 656; *Southmead,* (1842) 3 Curt. 28; *Widger,* (1842) 3 Curt. 55; *Burchmore,* (1873) 3 P. & D. 139; *Gardiner,* (1884) 9 P. D. 66; *Webb,* (1888) 13 P. D. 71. These were grants for the use and benefit of the person entitled, without citation of or notice to the persons to whom such grants are committed by the practice of the Court. *Hardinge,* (1840) 2 Curt. 640, citation of husband of sole next of kin dispensed with. In *Teece,* [1896] P. 6, administration of a small estate was granted, under s. 73, to a creditor, without citation of the next of kin, on proof that they had received notice of the application. See *Morgan,* (1896) 75 L. T. 190. And under special circumstances, the Court has dispensed with citation of persons primarily entitled, in grants under s. 73 of the Court of Probate Act, 1857; *vide* post, pp. 412—414.

(*y*) *Vide post,* p. 417.

testator or after his death, without having proved the will (*z*).

(ii.) Where the executor has renounced, or has failed to enter an appearance to a citation to accept or refuse probate (*a*).

(iii.) Where the executor is a minor, a lunatic, or resident without the jurisdiction, in which cases administration *cum testamento annexo* is granted to another for the use and benefit of the executor until his disability ceases (*b*).

(iv.) Where the Court, in the exercise of the discretion conferred on it by sect. 73 of the Court of Probate Act, 1857, passes over an executor who was resident out of the United Kingdom at the testator's death (*c*).

(v.) Where the will of a married woman (a foreigner), which appoints an executor, is admitted to probate as a valid exercise of a power of appointment, but is not duly executed in accordance with the law of her domicil at death (*d*).

(vi.) Where the will of a foreigner domiciled abroad contains the appointment of an executor, but the powers granted by the law of the country of domicil to the person so appointed, fall short of the powers of an executor according to English law (*e*).

(vii.) Where the appointment of executor is to take effect at a given period after the death of the testator and no executor is appointed to act in the meantime (*f*).

(viii.) Where a corporation aggregate is appointed executor, administration with the will annexed for the use and benefit of the corporation is granted to its syndic or attorney (*g*).

(*z*) Administration with the will annexed is also granted where the executor, having proved the will, dies intestate, leaving part of the estate unadministered; but as this is a species of grant *de bonis non*, it is treated under that head: *vide post*, p. 358.

(*a*) The Court will not grant administration *cum testamento annexo* with the consent of the executor, but only on the executor's renunciation of probate, or after citation has been served on him, upon his non-appearance within the prescribed time: *Garrard* v. *Garrard*, (1871) 2 P. & D. 238. A person entitled to probate as executor will not, as a general rule, be allowed to take administration with the will annexed: *Bullock*, (1845) 1 Rob. 275; *Richardson*, (1859) 1 S. & T. 515; *Morrison*, (1861) 2 S. & T. 129; *Terry*, (12th June, 1884).

(*b*) *Vide post*, Chap. X., s. 1, sub-ss. 1, 2, 3; s. 3, sub-s. 3.

(*c*) *Vide post*, pp. 410, 411.

(*d*) *Vide ante*, p. 94.

(*e*) *Vide ante*, p. 24.

(*f*) *Graysbrook* v. *Fox*, (1565) 1 Plowd. at pp. 279, 281.

(*g*) *Hunt*, [1896] P. 288; and see *Darke*, (1859) 1 S. & T. 516.

In what ways the office of administrator *cum testamento annexo* differs from that of executor.

The office of administrator *cum testamento annexo* differs but little from that of executor (*h*); he is, however, obliged to give bond with security for the due discharge of his duties, an obligation from which an executor, as the person appointed by the testator himself, is exempt. And it must be borne in mind that, though the executor of an executor represents the original testator, the executor of an administrator *cum testamento annexo* does not (*i*). The will to which the administration is annexed is proved in the same way as one of which probate is granted to an executor.

Who is appointed administrator *cum testamento annexo*.

Stat. 21 Hen. VIII., c. 5.

The statute 21 Hen. VIII, c. 5, s. 2, enjoins the Ordinary, where the executors named in any testament refuse to prove the said testament, to grant the administration of the goods of the testator to the widow, or to the next of kin, or to both, as by the discretion of the said Ordinary shall be thought good.

Extensive construction of the statute.

Practice to grant administration to person who has beneficial interest,

both in cases within the statute and in cases not within the statute.

Nevertheless, it has been repeatedly laid down that the principle and object of the statute is to vest the right to administration in the person who is possessed of the beneficial interest in the estate, and, therefore, where the next of kin or widow has no interest in the property, he or she is by the spirit, though contrary to the letter of the statute excluded, and the administration granted to the person who has the interest in the estate (*k*); the rule being that the right to the administration follows the right to the property (*l*). And since this paramount principle was held to prevail even in a case where the executor appointed by will renounced, where the statute expressly enjoins the Ordinary to grant administration to the widow or next of kin, *a fortiori* was that the case in the many instances which were not within the statute, where the Ordinary was left to the exercise of his own discretion in appointing an administrator *cum testamento annexo*, and

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(*h*) 2 Black. Comm. 503; 4 Burn. E. L. 370, 9th ed.

(*i*) *Vide ante*, p. 267.

(*k*) 2 Hagg. App. 149; *West* v. *Willby*, (1820) 3 Phill. at p. 381; *Wetdrill* v. *Wright*, (1814) 2 Phill. at p. 248; *Martindale*, (1858) 1 S. & T. 8; *Pine*, (1867) 1 P. & D. 388; *Homan*, (1883) 9 P. D. 61. *Vide ante*, p. 327.

(*l*) *Gill*, (1828) 1 Hagg. 341.

where no person had such a legal right to preference as could be enforced at common law (*m*).

Residuary legatee preferred to next of kin.

Accordingly, in all cases where a grant of administration *cum testamento annexo* becomes necessary, the residuary legatee, if the residue is disposed of by the will, is, on the ground of his interest, preferred to the next of kin (*n*). "The residuum being disposed of to another," said the Court in *Thomas* v. *Butler* (*o*), "to what purpose should the next of kin have administration, when no benefit can accrue to him by it? And it is reasonable that he should have the management of the estate, who is to have what remains of it after the debts and legacies paid."

By Land Transfer Act, 1897, where assets include real estate, rights and interests of persons interested in real estate to be regarded.

The Land Transfer Act, 1897, s. 2, sub-s. 3, provides: "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to a grant with the next of kin." It follows that where the deceased died on or since the 1st January, 1898, the residuary devisee is equally entitled to a grant of administration *cum testamento annexo* with the residuary legatee, the heir-at-law equally with the next of kin, and a devisee equally with a legatee. In applying the rules stated in the succeeding subsections to cases of deaths occurring before the 1st January, 1898, or of deaths occurring after that date where the deceased died possessed of no real estate, references to the heir-at-law or to persons interested in the real estate are to be ignored.

SUB-SECTION 1.—*Grant to the Residuary Legatee or Devisee.*

Where residue is disposed of, administration *cum testamento annexo*

Where the residue is disposed of by the will (*p*), administration *cum testamento annexo* is granted to the

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(*m*) *Rex* v. *Betteswortb,* (1740) 2 Str. 956; *Ewing,* (1881) 6 P. D. at p. 24.

(*n*) 2 Hagg. App. 149; *Isted* v. *Stanley,* (1580) 3 Dyer, 372; *Day* v. *Chatfield,* (1683) 1 Vern. 200; *Gill,* (1828) 1 Hagg. 341; *Atkinson* v. *Barnard,* (1815) 2 Phill. at p. 317.

(*o*) (1672) 1 Ventr. at p. 219.

(*p*) As to what form of disposition will suffice to constitute the beneficiary residuary legatee or devisee, see the following cases, in which granted to residuary legatee or devisee,

universal (*q*) or residuary legatee (*r*). Since the Land Transfer Act, 1897, the title of a residuary devisee to a grant is equal to that of a residuary legatee (*s*).

even if no prospect of there being any residue.

It is said that the residuary legatee, even where there is no prospect of any residue, is entitled to the administration in preference to the next of kin (*t*), and to specific legatees (*u*), for the following reasons:—First, the residuary legatee is the testator's choice; he is the next person in the testator's election to the executors (*v*). Secondly, an allegation that there is no residue should not be allowed, for that might be offered in every case, and involve delay and expense in deciding (*x*). But in *In the Goods of Wilde* (*y*), where, on an application for a grant of administration *de bonis non*, it appeared that the residuary legatee resident abroad had had notice by letter, and had no beneficial interest, there being no residue, it was held that the grant might be made to

Sed quære.

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the words were held to constitute a sufficient disposition of the residue—"The whole *residue of money* except" etc.: *White*, (1882) 7 P. D. 65. and cases there cited; *Bramley*, [1902] P. 106; but see *Ludlow*, (1858) 1 S. & T. 29; *Aston*, (1881) 6 P. D. 203, and cases there cited; *O'Loughlin*, (1870) 2 P. & D. 102. "*All other things*": *Cadge*, (1868) 1 P. & D. 543. "*All other chattels*": *Sharman*, (1869) 1 P. & D. 661. "*All my property*," followed by an enumeration of properties which did not include the whole estate: *Goodyar*, (1858) 1 S. & T. 127. "*All my furniture, pictures and other effects*": *Jupp*, [1891] P. 300. A gift of "all my property to A. and B., and in case of the demise of either to the survivor for life," held to give A. and B. a life interest only and the residue not disposed of: *Watson* v. *Watson*, (1881) 7 P. D. 10. A gift of "all my property to A. for life, and then to my legal heirs," held sufficient to constitute the heir residuary legatee: *Dixon*, (1878) 4 P. D. 81.

(*q*) The universal legatee and devisee is not, as such, entitled to a grant of probate as executor according to the tenor: *Oliphant*, (1860) 1 S. & T. 525; nor has the rule been altered by the Land Transfer Act, 1897: *Pryse*, [1904] P. 301. But where the universal legatee had been appointed executrix under an earlier will, administration with a later will annexed was granted to her, on her giving her personal bond, without being required to find securities: *Allen*, [1893] P. 184.

(*r*) *Vide ante*, pp. 346, 347.

(*s*) *Ante*, p. 347.

(*t*) *Thomas* v. *Butler*, (1672) 1 Ventr. 217.

(*u*) *Atkinson* v. *Barnard*, (1815) 2 Phill. 316.

(*v*) *Atkinson* v. *Barnard*, (1815) 2 Phill. at pp. 317, 318.

(*x*) *Thomas* v. *Butler*, (1672) 1 Ventr. at p. 218; *Atkinson* v. *Barnard*, (1815) 2 Phill. at p. 317.

(*y*) (1887) 13 P. D. 1.

a specific legatee, without requiring the residuary legatee to be cited or to renounce. And in *In the Goods of Pool* (z), where, owing to the amount of an annuity given to the widow being left blank, it was uncertain whether the gift of the residue had any force and effect, administration was granted to the widow in preference to the persons named residuary legatees in the will.

Residuary legatee in trust.

A residuary legatee in trust is entitled to administration *cum testamento annexo* (a), and, as will appear, is usually preferred to others who are beneficially entitled to the residue.

Preference *inter se* of residuary legatees and devisees.

Where several are interested in the residue, the Court may grant the administration to any one or more of them in its discretion (b).

1. Residuary legatee and devisee in trust preferred.

The ordinary practice is to grant administration with the will annexed to the residuary legatee and devisee *in trust*, if any (c).

Grant to trustee substituted by residuary legatee or devisee in trust.

Where the residuary legatee and devisee in trust has, under the will, power to appoint a trustee in his stead, the grant may be made to the trustee so nominated by the residuary legatee and devisee in trust, on the renunciation of the latter (d).

2. Grant to beneficial residuary legatee or devisee for life.

Where there is no residuary legatee or devisee in trust, the grant is made to the person or persons who have the beneficial interest in the residuary estate under the will (e).

(z) (1866) 1 P. & D. 206.

(a) *Hutchinson* v. *Lambert,* (1825) 3 Add. 27. The three decisions of Sir George Lee to the contrary must, it is submitted, be regarded as overruled. They are: *Coussmaker* v. *Chamberlayne,* (1755) 2 Lee, 243; *Boddicott* v. *Dalzeel,* (1756) *ibid.* 294; *Fawkener* v. *Jordan,* (1756) *ibid.* 327; see Wms. on Exors. 372, note (o).

(b) *Taylor* v. *Shore,* (1670) T. Jones, 161.

(c) *Hutchinson* v. *Lambert,* (1825) 3 Add. 27. See *Stainton,* (1871) 2 P. & D. 212.

(d) *Cresswell* v. *Cresswell,* (1824) 2 Add. 342. But not until the trust properties are actually vested in the substituted trustee, unless all persons beneficially interested in the trust property consent: *ibid.*; but see *Woodfall* v. *Arbuthnot,* (1873) 3 P. & D. 108, where a grant was made to trustees substituted by the Court of Chancery for the residuary legatee in trust under the will, although there had been no actual assignment to them of the trust estate, which vested in them by operation of statute. The deed of nomination must be produced when the grant is applied for: Tristram & Coote, p. 56.

(e) *Hutchinson* v. *Lambert,* (1825) 3 Add. 27; *Bigg* v. *Keen,* (1752) 1

The residuary legatee or devisee for life is preferred to the person who is to take the beneficial interest in the residue upon his or her death (*f*): but if the residuary legatee or devisee for life die or renounce, or be cited to accept a grant and enter no appearance, the grant is made to the person who is to take the beneficial interest in the residue upon his or her death (*g*); *i.e.*, to the "substituted" residuary legatee or devisee.

3. Grant to "substituted" residuary legatee or devisee.

Grant where one residuary legatee takes portion of residue absolutely, another takes life interest in remaining portion.

If there be a residuary legatee or devisee who takes one portion of the residue absolutely, and another who takes a life interest in the remaining portion of the residue, the grant will be made to either of them indifferently, according to priority of application (*h*).

Where there is a lapse of a share of the residue.

If the residue is given to two persons, and the share of one of them has lapsed to the testator's next of kin or heir-at-law, the grant is made either to the remaining residuary legatee or devisee, or to the next of kin or heir-at-law, according to priority of application (*i*).

Residue given to testator's children, not to vest till they attain 21.

Where the residue is given to the testator's children, but is not to vest in them until they attain the age of twenty-one, though the income is in the meantime to be applied for their maintenance and support, the grant is made to their guardian for their use and benefit, in preference to the person who is to take the residue in the event of their death before attaining the age of twenty-one (*k*).

Where several persons

Where there are several persons equally interested in the

Lee, 124; *Pryse,* [1904] P. 301. Where a testatrix bequeathed the residue of her property to A. B. "to be disposed of as she shall think fit at her discretion for the benefit of the Roman Catholic Convent of St. Edward," A. B. having died in the lifetime of the testatrix, administration (will) was granted to the Reverend Mother of the convent as residuary legatee: *M'Auliffe,* [1895] P. 290. See *Walsh* v. *Gladstone,* (1843) 1 Phillips, 290.

(*f*) *Brown* v. *Nicholls,* (1851) 2 Rob. 399. But the Court will depart from this rule when, were it followed, a question of construction of the will would, in effect, be determined; and will in these circumstances make such grant as will leave the question open: *ibid.*

(*g*) Whether under the original will, or as appointees under a power of appointment conferred by the will: *Martindale,* (1858) 1 S. & T. 9; *Pine,* (1867) 1 P. & D. 388.

(*h*) Tristram & Coote, 57.

(*i*) *Ibid.*

(*k*) Tristram & Coote, 58.

residue, the grant is made to the one who first applies, without the consent of, or notice to the others (*l*).

equally interested:

Residuary legatees and residuary devisees are, since the Land Transfer Act, 1897, equally entitled to a grant (*m*).

Residuary devisee equally entitled with residuary legatee.

Where there is a residuary devisee in trust, he should be cleared off (*i.e.*, renounce or be cited) before a grant is made to the residuary legatee, and where there is a residuary legatee in trust, he should be cleared off before a grant is made to a residuary devisee (*m*).

Residuary devisee (or legatee) to be cleared off before grant to next of kin (or heir).

If there be no executor or residuary legatee, a grant is not made to a next of kin without clearing off the residuary devisee; and if there be no executor or residuary devisee, a grant is not made to the heir-at-law without clearing off the residuary legatee (*n*).

Next of kin also residuary legatee.

If the same person be both next of kin and residuary legatee, the grant will, it seems, be made to him in preference to other residuary legatees (*o*), but the residuary devisee must be cleared off.

Joint grant to two or more residuary legatees:

In trust.

Where there were several residuary legatees in trust, it was formerly the practice of the Court to grant administration to them jointly, and not to one or some of them, unless the other or others renounced. The present practice is stated to be to grant the administration to one of them, if he applies alone, without requiring the renunciation of the others (*p*).

Beneficial residuary legatees.

A joint grant may be made to two or more residuary legatees, or to a residuary legatee for life and the person who is to take the residue beneficially upon his death; but if others are interested in the residue a joint grant will not, in ordinary

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(*l*) Where, of four residuary legatees, one was the testator's next of kin and the other three were minors, the Court granted administration (will) to the next of kin, in spite of the fact that he had unsuccessfully opposed the will, in preference to the guardian of the three minor residuary legatees, on the ground that there was in fact no residue and the next of kin had a larger interest in the specific legacies than the minors: *Sawbridge* v. *Hill*, (1871) 2 P. & D. 219.

(*m*) Additional Instructions to the Officers of the Probate Registries under the Land Transfer Act, 1897 (*post*, p. 928), Nos. 2, 3.

(*n*) *Ibid.* No. 5.

(*o*) *Linthwaite* v. *Galloway*, (1757) 2 Lee, 414; see *Sawbridge* v. *Hill*, (1871) 2 P. & D. 219, *supra*, note (*l*).

(*p*) Tristram & Coote, 186.

circumstances, be made unless they are all of full age, and consent (*q*).

Grant to Representative of Residuary Legatee or Devisee.—

Representative of residuary legatee preferred to next of kin or specific legatees.

Where the person beneficially entitled to the residuary estate dies, having acquired a vested interest either through having survived the testator or under sect. 33 of the Wills Act, 1837, his legal personal representative is entitled to the grant in preference to the testator's next of kin (*r*), or to legatees (*s*).

Secus, representative of residuary legatee or devisee in trust.

But the personal representative of a residuary legatee or devisee *in trust* is not entitled to a grant, for he has no beneficial interest in the residue (*t*).

All living persons interested in the residue renounce or are cited.

A grant will not be made to the representative of a deceased residuary legatee without clearing off all living persons who are interested in the residue, including the residuary devisee, if any.

Where share of residue has lapsed.

And where a share of the residue has lapsed, the representative of the residuary legatee of the unlapsed share is not entitled to a grant unless the next of kin and all persons entitled in distribution (or the heir-at-law if the lapsed share consists of realty) to the lapsed share are cleared off.

Assignee of residuary legatee.

On the principle that the right to administration follows the right to the property, grants of administration with the will annexed have been made, on the renunciation of the residuary legatee, to the person to whom the residuary legatee had assigned the whole of his right and interest in the residuary estate (*u*).

Grant to next of kin of residuary

On a somewhat similar principle, on the renunciation and consent of the sole person entitled to the residue, a grant may

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(*q*) *Vide ante*, pp. 318, 324.

(*r*) *Wetdrill* v. *Wright*, (1814) 2 Phill. 243; *Jones* v. *Beytagh*, (1821) 3 Phill. 635. The representative of a residuary legatee *for life* is not entitled to a grant: *Wetdrill* v. *Wright*, *loc. cit.*; *Thomas* v. *Baker*, (1753) 1 Lee, 341; *Ditchfield*, (1870) 2 P. & D. 152. But a grant was made to such a person under exceptional circumstances: *Jackson*, [1892] P. 257.

(*s*) *Thirlwall*, (1848) 6 N. C. 44; *Isted* v. *Stanley*, (1580) 3 Dyer, 372; *Richardson* v. *Seise*, (1700) 12 Mod. 306; *Rous* v. *Noble*, (1691) 2 Vern. 249.

(*t*) *Hutchinson* v. *Lambert*, (1825) 3 Add. 27; *Coussmaker* v. *Chamberlayne*, (1755) 2 Lee, 243.

(*u*) *Pine*, (1867) 1 P. & D. 388; *vide ante*, p. 337; and see *Mayhew* v. *Newstead*, (1837) 1 Curt. 593.

be made to his next of kin, as having a *spes successionis* to the property (*x*).

legatee, on his renunciation and consent.

So the husband of a residuary legatee, who has died intestate, is entitled to a grant *de bonis non* to the estate of the original testator (*y*).

Grant to husband of residuary legatee.

SUB-SECTION 2.—*Grant to Husband or Widow, Next of Kin or Heir-at-Law of the Testator.*

Where the Residue is disposed of.—If the will disposes of the residue, but all persons interested therein under the will renounce, the grant is made to the husband or widow, or, failing them, to the testator's next of kin, in accordance with the statute 28 Hen. VIII., c. 5 (*z*). But these persons, where they have no interest in the property, may be excluded, and the grant made to one who has an interest, *e.g.*, a legatee or creditor (*a*).

Where the residuary legatees and devisees renounce, administration *cum testamento annexo* granted to husband or widow, or, failing them, to next of kin.

Where the Residue is not disposed of.—If the residue is not disposed of by will, or the residuary bequest totally fails, administration with the will annexed is granted to the husband or widow, or, failing them, to the testator's next of kin or heir-at-law (if there is real estate) (*b*). In such a case there is an intestacy as to the residuary estate, and those who would take on an intestacy are entitled to a grant of administration *cum testamento annexo*, in accordance with the rules set forth in the preceding section, in the following order: (1) The widow (*c*) or husband (*d*); (2) the testator's next of

Grant where residue not disposed of, or residuary bequest or devise fails, to husband or widow; failing them, to testator's next of kin or heir-at-law.

(*x*) *Vide ante*, pp. 331, 332; *Hinckley*, (1828) 1 Hagg. 477.

(*y*) *Richardson* v. *Seise*, (1700) 12 Mod. 306; *Rous* v. *Noble*, (1691) 2 Vern. 249.

(*z*) 4 Burn, E. L., p. 370, 9th ed.; *West* v. *Willby*, (1820) 3 Phill. at p. 381.

(*a*) *Furlonger* v. *Cox*, (1811) cit. 3 Phill. 381; *Mayhew* v. *Newstead*, (1837) 1 Curt. 593; and *vide post*, p. 354. Where the residue is disposed of, the practice is to make the grant indifferently to the next of kin or a specific legatee, according to priority of application, provided, of course, that the executors and residuary legatees have renounced or been cited: *vide post*, p. 472.

(*b*) *Kooystra* v. *Buyskes*, (1821) 3 Phill. 531.

(*c*) In a contest for administration (will) the Court preferred the next of kin to the widow, as it appeared that the former, as legatee, had a larger interest: *Homan*, (1884) 9 P. D. 61.

(*d*) A husband has, since the Married Women's Property Act, 1882, a right to a grant of administration with the will of his deceased wife annexed by virtue of his *jus mariti* only in cases of partial intestacy of kin (*e*) or heir-at-law (if there is real estate); (3) persons entitled in distribution; (4) representatives (*f*) of the widow, next of kin, or persons entitled in distribution (*g*).

Partial lapse of residue.

Where there has been a partial failure of the residuary bequest, the testator's widow or husband or next of kin are equally entitled to a grant with the persons interested in the unlapsed residue of the personalty, the residuary devisee, if there is real estate, being first cleared off.

SUB-SECTION 3.—*Grant to Legatee.*

On renunciation of residuary legatee and devisee, grant to specific legatee.

Where the Residue is disposed of.—Where the residue is disposed of by the will, after renunciation or citation of the residuary legatee and devisee, the grant may be made to a specific legatee. It was formerly the practice to require notice to be given to the next of kin (*h*).

Residue not disposed of: Grant to specific legatee on renunciation or citation of all persons interested on intestacy.

Where the Residue is not disposed of.—If the residue has lapsed, or is not disposed of in the will, the grant will be made to a legatee, on the renunciation or citation of the testator's husband or widow, next of kin, heir-at-law (where there is real estate), and all persons entitled in distribution (*i*). A grant limited to the amount of his legacy will not, as a general

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the wife, when he has an interest in the estate, *i.e.*, his right is now on the same footing as the right of her next of kin. Administration (will) to the estate of a married woman is now granted on the same principles as obtain in the cases of men—the administrator with the will takes a general grant, which covers all the testatrix's estate which vests in her personal representative, whether disposed of by the will or not: *vide ante*, p. 93.

(*e*) A legatee preferred to the next of kin, who was of great age: *Hinckley*, (1828) 1 Hagg. 477.

(*f*) Representatives of next of kin granted administration (will) after citation of residuary legatee: *Ley*, [1892] P. 6. But as a rule, where the residue is disposed of, representatives of next of kin, etc., are not entitled to a grant.

(*g*) Where there were no known relatives of the testator, and no residuary legatee was appointed, the Court, under special circumstances, granted administration (will) to a stranger: *Jackson*, [1892] P. 257. As to the right of the Crown in such a case, *vide ante*, p. 339.

(*h*) *Kooystra* v. *Buyskes*, (1821) 3 Phill. 531. But the present practice appears to be to make the grant indifferently to the legatee or next of kin, according to priority of application: *vide post*, p. 472, and *ante*, p. 353; and for form of citation, see App. VII., Form 99.

(*i*) *Kooystra* v. *Buyskes*, (1821) 3 Phill. 531; see *Hinckley*, (1828) 1 Hagg. 477. A legatee for life is usually preferred to a legatee substituted: *Brown* v. *Nicholls*, (1851) 2 Rob. 399. *Vide ante*, p. 350.

rule, be made to a specific legatee, for the Court prefers to make a general grant after citation of the next of kin (*j*).

Limited grant to legatee.

SUB-SECTION 4.—*Grant to Creditor.*

Residue disposed of.

Where the residue is disposed of by will, the grant may be made to a creditor, on the renunciation or after citation of the executor, the residuary legatee, and residuary devisee.

Residue not disposed of, or lapsed.

If the residue has lapsed, or is not disposed of by will, the grant is made to a creditor on the renunciation or after citation of the executor, the testator's husband or widow, next of kin, heir-at-law, (where there is real estate), and all persons entitled in distribution (*k*).

The principle upon which a grant is made to a creditor has been fully discussed in the preceding section, where a statement of what persons are regarded as creditors will be found (*l*).

Testator a bankrupt; grant to his trustee in bankruptcy.

Where the testator has died a bankrupt, the Court may grant administration with the will annexed to his trustee in bankruptcy, on the renunciation or citation of the executor, residuary legatee and devisee (*m*).

Residuary legatee a bankrupt.

So where the residuary legatee or devisee is a bankrupt, his trustee in bankruptcy is entitled to the grant, on the renunciation of the residuary legatee and devisee (*n*).

Sect. 73 of the Court of Probate Act, 1857.

The Court has under sect. 73 of the Court of Probate Act, 1857, special powers with reference to grants of administration *cum testamento annexo*. These powers are discussed in a later chapter.

(*j*) *Watts,* (1860) 1 S. & T. 538. But see *Watson,* (1858) 1 S. & T. 110; *Baldwin,* [1903] P. 61; *Hampson,* (1865) 1 P. & D. 1. *Vide post,* pp. 393 *et seq.*

(*k*) *Kooystra* v. *Buyskes,* (1821) 3 Phill. 531; *Snape* v. *Webb,* (1757) 2 Lee, 411. Unless the next of kin has no interest in the property, a creditor cannot be allowed to contest the right of administration: *vide ante,* p. 334; and see *Furlonger* v. *Cox,* (1811) cit. 3 Phill. at p. 381. A residuary legatee, who had renounced, was allowed to retract his renunciation and claim the administration in preference to a creditor, although the estate was alleged to be insolvent: *Waters,* (1850) 2 Rob. 142. A husband may take administration (will) as creditor, although he has signed a renunciation executed by his wife as residuary legatee: *Biggs,* (1868) 1 P. & D. 595.

(*l*) *Vide ante,* pp. 333 *et seq.*

(*m*) Cf. *ante,* p. 336.

(*n*) *Vide ante,* p. 336; *Mayhew* v. *Newstead,* (1837) 1 Curt. 593.

Section 3.

GRANTS OF ADMINISTRATION *DE BONIS NON.*

Administration *de bonis non,*

Hitherto the subject has been confined to cases of original grants of administration. It now becomes necessary to consider the principles which guide the Court in cases where the person whom it has constituted personal representative of the deceased dies without having fully administered the deceased's estate. It will hereafter appear that, in such an event, there are cases in which the office of personal representative to the deceased devolves without the necessity of any further grant. But there are cases in which, on the death of the personal representative of the deceased without having fully administered, it is necessary for the Court to commit administration afresh of the goods of the deceased not administered by the former personal representative. Such a grant is called a grant of administration *de bonis non administratis,* or, as the phrase is usually abbreviated, *de bonis non.*

with the will annexed,

Administration *de bonis non* may be granted on the death of an executor or administrator with the will annexed. The administration is then a species of administration with the will annexed; to give the full description, it is a grant of administration *cum testamento annexo de bonis non administratis.* To avoid the tedious repetition of this ponderous phrase, the term may be abbreviated: administration (will) *de bonis non.*

on intestacy.

Or administration *de bonis non* may be granted on the death of the administrator of an intestate; the administration is then a species of administration on intestacy.

These two species of grants *de bonis non* will be dealt with separately. There are, however, certain preliminary observations which apply to both.

The right to administration follows the right to the property.

There has already been occasion to point out that the Court has always strongly held that the right to the administration is transmissible, and almost universally accompanies the right to the property (*o*). Where, therefore, the Court has a discretion, it is the settled practice to grant the administration,

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(*o*) *Ante,* pp. 327, 328, 346; and see 2 Hagg. App. at p. 149.

whether original or *de bonis non*, to the person who is possessed of the beneficial interest in the estate. But in all that regards the obligation of the statutes of 31 Edw. III., c. 11, and 21 Hen. VIII., c. 5, on the Court, in the grant of administration no distinction exists between an original and a *de bonis non* administration; in other words, where a person would have had a statutable right to an original administration, he has the same right to a *de bonis non* grant (*p*).

Administration *de bonis non* granted to the person entitled to the beneficial interest in the estate.

Indeed it does not seem possible, either in principle or reason, to distinguish between the first and any subsequent grant, in this or in any other respect (*q*). To state fully the rules which guide the Court in granting administration *de bonis non*, therefore, would be to repeat the two preceding sections of this chapter. This is not considered necessary, but in the succeeding sub-sections an attempt will be made to state shortly when the necessity for a grant *de bonis non* arises, and to emphasise such of the rules previously laid down which are of special importance in connection with this species of grant.

The statutes and rules with regard to original grants of administration equally apply to grants of administration *de bonis non.*

SUB-SECTION 1.—*Grants* de bonis non *on the death of an executor or administrator with the will.*

When granted.—Where the sole executor appointed by the testator renounces probate or dies *before* proving the will, the grant is of original administration with the will annexed, and not *de bonis non*, even though the executor may have intermeddled with the estate (*r*).

Administration (will) *de bonis non*, not necessary on death of executor without proving will; nor on death of one of several executors;

If several executors are appointed, and one dies without having proved the will, the other or others are entitled to probate, and no grant of administration is necessary. And where one of several executors dies after probate has been granted, his office survives to his co-executors who have proved the will (*s*).

(*p*) 2 Hagg. App. 157; *Kindleside* v. *Cleaver*, (1745) 1 Hagg. 345, 2 Hagg. App. 169; *Walton* v. *Jacobson*, (1765) 1 Hagg. 346.

(*q*) 2 Hagg. App. 157.

(*r*) *Wankford* v. *Wankford*, (1700) 1 Salk. 299, at p. 308; Bac. Abr. Exors. B. 2. The executor of an executor who dies without proving the will does not represent the original testator: *vide ante*, p. 265.

(*s*) *Ante*, p. 266.

nor where the sole, or sole surviving, executor dies after probate obtained, having appointed an executor who proves his will.

Where the sole executor, or the sole survivor of the executors who have proved the will, dies after probate, having made a will appointing his own executor, the entire representation of the original testator is transmitted to the last-named executor, without the necessity of any fresh grant (*t*). But where such sole executor, or sole surviving executor, dies after probate, intestate, or leaving a will which contains no appointment of executors, no interest is transmissible to his administrator; and if the estate of the original testator has not been fully administered, administration (will) *de bonis non* becomes necessary.

Thus, administration (will) *de bonis non* is granted on the death of an executor only—

But where the sole, or sole surviving, executor dies after probate obtained, and appoints no executor, administration (will) *de bonis non* is necessary, if estate not fully administered.

1. Where the sole acting executor dies after probate, leaving part of the estate unadministered, and without having appointed an executor who proves his will; or

2. Where the survivor of the acting executors dies under similar circumstances; or

3. Where the remote sole acting executor to whom the representation of the estate of the original testator has been transmitted *per catenam* dies, after probate, leaving part of the estate of the original testator unadministered, and without having appointed an executor who proves his will.

4. Where the survivor of the remote acting executors to whom the representation of the estate of the original testator has been transmitted *per catenam* dies under similar circumstances.

Administration (will) *de bonis non* on death of administrator with the will,

Where, of several co-administrators with the will, one dies, his office survives to the surviving co-administrators, and no fresh grant is necessary (*u*).

(*t*) *Vide ante*, pp. 265 *et seq.*, where this subject is fully discussed. But if the original testator died abroad, or in the colonies, and his executor proves the will there, and then dies, having appointed his own executor, who proves the latter will in England, the last-named executor does not represent the original testator, and administration (will) *de bonis non* must be taken out: *Twyford* v. *Trail,* (1834) 7 Sim. 92; *Gaynor,* (1869) 1 P. & D. 723.

(*u*) Com. Dig. Administrator B. 7; *Eyre* v. *Shaftesbury,* (1722) 2 P. Wms. at p. 121; *Jacomb* v. *Harwood,* (1751) 2 Ves. Sen. at p. 268; *Adams* v. *Buckland,* (1705) 2 Vern. 514; *Hudson* v. *Hudson,* (1735) Cas. t. Talb. 127.

necessary where the sole, or sole surviving, administrator dies, leaving part of the estate unadministered.

But where the sole, or sole surviving administrator with the will dies, leaving part of the estate unadministered, the Court must grant administration (will) *de bonis non* to another, for an administrator cannot transmit his office either to his executor or administrator (*v*).

To whom granted.

To whom granted.—Where administration (will) *de bonis non* becomes necessary, the grant is made to the residuary legatee or devisee, or his representative (*x*), and on their renunciation to the testator's next of kin, a legatee or a creditor (*y*), in accordance with the rules which govern original grants of administration with the will annexed.

Representative of bare executor has no right.

The representative of a bare executor has no right to a grant *de bonis non*, but where the executor was also beneficial residuary legatee, his representative is, in accordance with the principles already laid down, entitled to the grant (*z*).

Grant to legatee.

The Court has, under special circumstances, granted administration (will) *de bonis non* to a legatee without requiring the citation of the representatives of the residuary legatee (*a*).

Original grant to creditor or legatee.

Where the original grant was made to a creditor or legatee, who dies without having satisfied his debt or legacy, administration *de bonis non* may be granted to his representative, or to another creditor or legatee.

Administration (will) *de bonis non* to his representative, or another creditor or legatee.

Persons entitled to the original grant, who have been cited and have failed to appear, may, on the death of the original

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(*v*) Bac. Abr. Exors. B. 2. *Vide ante*, p. 267, note (*h*).

(*x*) *Vide post*, p. 361. And for a case of a grant to an assignee of the residuary legatee, see *Campion*, [1900] P. 13.

(*y*) *Vide post*, p. 362.

(*z*) *Vide ante*, p. 352. And see as to the representative of a bare executor, Tristram & Coote, p. 139, n. In *Ditchfield*, (1870) 2 P. & D. 152, administration (will) *de bonis non* was granted to the limited representative of the residuary legatee.

(*a*) *E.g.*, where the estate had been administered except as to one legacy: *King*, (1883) 8 P. D. 162; and where it appeared that the residuary legatee had no beneficial interest, and had received notice of the application: *Wilde*, (1887) 13 P. D. 1. And the Court may grant administration *de bonis non* limited to the amount of the legacy, without requiring the representative of the residuary legatee to be cited: *Steadman*, (1828) 2 Hagg. 59; *Biou*, (1843) 3 Curt. 739; *Watson*, (1858) 1 S. & T. 110; *Agnese*, [1900] P. 60, where a limited grant was made to the trustee in bankruptcy of a *cestui que trust*; but such grants are unusual. As a general rule the Court prefers to make a general grant after citation: see *Watts*, (1860) 1 S. & T. 538; *Somerset*, (1867) 1 P. & D. 350. *Vide post*, pp. 393 *et seq.*

administrator, come in and claim administration *de bonis non* (*b*). Therefore, where the original grant was made to a creditor or legatee after *citation* of the residuary legatee and devisee, these persons or their representatives must again be cited before administration *de bonis non* is granted to the representative of the original administrator, or to another creditor or legatee (*c*).

Persons entitled in priority to creditor or legatee must again be cited.

SUB-SECTION 2.—*Grant* de bonis non *on the Death of an Administrator on Intestacy.*

Administration *de bonis non* on intestacy: when necessary.

Where of several co-administrators on intestacy one dies, his office survives to his co-administrators, and no fresh grant is necessary (*d*).

But where the sole, or sole surviving administrator dies, leaving part of the estate unadministered, the Court must grant administration *de bonis non* to another, for an administrator cannot transmit his office either to his executor or administrator (*e*).

Grants *de bonis non* are are made in accordance with same rules as govern original grants.

To whom granted.—There has already been occasion to observe that the statutes of Edward III. and Henry VIII. are equally binding upon the Court, whether the grant of administration is original or *de bonis non* (*f*). Accordingly, where a grant *de bonis non* becomes necessary, the Court is governed in all respects by the same rules as apply to original grants.

Court only bound to grant administration to those who were next of kin at time of intestate's death,

But it must be borne in mind that the Court is bound only to grant the administration to such person as is next of kin at the intestate's death, and not to one who is not entitled to the

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(*b*) *Skeffington* v. *White,* (1828) 1 Hagg. at pp. 702, 703. *Vide post,* p. 509.

(*c*) If the residuary legatee or devisee has actually renounced his right to the original grant, no further citation is necessary; but the representative of a deceased renunciant is not bound by the renunciation and must be cited: see Tristram & Coote, pp. 140, 208; and *vide post,* p. 504.

(*d*) Com. Dig. Administrator B. 7; *Eyre* v. *Shaftesbury,* (1722) 2 P. Wms. at p. 121; *Jacomb* v. *Harwood,* (1751) 2 Ves. Sen. at p. 268; *Adams* v. *Buckland,* (1705) 2 Vern. 514; *Hudson* v. *Hudson,* (1735) Cas. t. Talb. 127.

(*e*) Bac. Abr. Exors. B. 2. Where the grant has been made to the Solicitor for the Treasury it vests in his successors in office without the necessity of any further grant: *vide ante,* p. 340.

(*f*) *Ante,* p. 357.

beneficial interest in the effects, though, by the death of intermediate persons, he may have become next of kin at the time when the grant is required (*g*).

not to those who have *become* next of kin at time grant is required.

Therefore, administration *de bonis non* is granted to the representatives of the next of kin at the time of the death, in preference to the next of kin at the time of the grant; for the reason that the former are possessed of the beneficial interest in the intestate's effects, and this interest, under the Statutes of Distribution, vests in the distributees immediately on the intestate's death, and is consequently transmitted to their representatives. Accordingly, while, on the one hand, it has always been held that a person who was next of kin at the time of the death is, under the statutes, entitled to the *de bonis non* grant in preference to the representative of the original administrator, or to the representative of any other next of kin at the time of the death, it is, on the other hand, the established practice and course of office, that if all who were next of kin at the death are dead, then the representative of such next of kin, being entitled to the beneficial interest, is also entitled to the administration *de bonis non*; with this limitation, however, that a person originally entitled in distribution is preferred to the representative of the next of kin (*h*).

If all who were next of kin at the time of the death are dead, their representatives are entitled to the grant,

but a person originally entitled in distribution is preferred.

According to modern practice, where the husband has been appointed administrator, his representative is entitled to the grant *de bonis non* in preference to the next of kin of the intestate wife (*i*).

Grant to representatives of the husband.

Where an intestate had died leaving no known relations, and his estate had been partly administered by his widow, the

Grant of administration *de bonis non* to nominee of the Duchy of Lancaster.

(*g*) 2 Hagg. App. 150; *Savage* v. *Blythe*, (1796) 2 Hagg. App. 150; *Almes* v. *Almes*, (1796) 2 Hagg. App. 155.

(*h*) 2 Hagg. App. 156, 157; *Savage* v. *Blythe*, (1796) 2 Hagg. App. 150; *Almes* v. *Almes*, (1796) 2 Hagg. App. 155. The discretion of the Court is, however, very large. It has held itself not obliged to make the grant to the largest interest: *Cardale* v. *Harvey*, (1752) 1 Lee, 177. A person *originally* in distribution is preferred to the representative of the next of kin on the ground that a direct interest is preferred to a derivative: *Middleton*, (1828) 2 Hagg. 60; *Stables*, (1831) 3 Hagg. 560. But the rule is not absolute, and may be departed from in the discretion of the Court: *Carr*, (1867) 1 P. & D. 291; *Kinchella*, [1894] P. 264.

(*i*) *Ante*, p. 316.

Court granted administration *de bonis non* to the nominee of the Duchy of Lancaster (*k*).

Original grant to creditor—grant *de bonis non* to his representative or to another creditor.

Where a creditor administrator dies leaving his debt still unsatisfied, his representative (*l*) or another creditor may take administration *de bonis non*. But the next of kin, even though they have been cited and failed to appear on the occasion of the original grant, may come in and claim the grant *de bonis non* on the death of the creditor administrator (*m*). Accordingly, where the original grant was made to a creditor after citation of the next of kin, the next of kin or their representatives must again be cited before administration *de bonis non* is granted to the representative of the original administrator or to another creditor (*n*).

But the next of kin must again be cited.

If the next of kin at the time of the death are all dead, the next of kin at the time of the grant must be cited.

If all who were next of kin at the death of the intestate are dead, and a creditor who has obtained administration has died leaving goods unadministered, no administration *de bonis non* will be granted without citing those who are next of kin at the time when the grant is required (*o*).

(*k*) *Avard*, (1886) 11 P. D. 75.

(*l*) Persons entitled to represent the original administrator must be appointed his personal representatives before they are entitled to the grant *de bonis non*: *Fairland* v. *Percy*, (1875) 3 P. & D. 217; *Risdon*, (1869) 1 P. & D. 637.

(*m*) *Skeffington* v. *White*, (1828) 1 Hagg. at pp. 702, 703. *Vide post*, p. 509.

(*n*) If the next of kin have *renounced* their right, no further citation is necessary, but the representatives of a deceased next of kin who has renounced must be cited: *post*, p. 504.

(*o*) *Skeffington* v. *White*, (1829) 2 Hagg. 626 (judgment of the Delegates reversing the decision of Sir John Nicholl at 1 Hagg. 699). See *Sowerby*, (1841) 2 Curt. 852; 4 Burn, E. L. 373, 374, 9th ed.

CHAPTER X.

OF LIMITED ADMINISTRATIONS.

In what ways administration may be limited.

THE administrations which have formed the subject of discussion in the preceding chapter extend to the whole estate of the deceased and endure until the death of the grantee. There are, however, other forms of administration which are limited either in respect of the time for which they endure, or of the property to which they extend, or of the purposes for which they may be exercised.

Limited administration not granted unless every person entitled to a general grant has consented, or been cited.

With regard to these limited administrations two rules have been framed, which, though not absolutely binding upon the Court, are followed strictly in the majority of instances: First, limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear (*a*); second, no person entitled to a general grant of administration will be permitted to take a limited grant, except under the direction of the judge (*b*).

These administrations, not being within the statutes, are in the discretion of the Court.

These temporary administrations, though not within the statutes of Edward III. and Henry VIII., are held to be within the equity of those statutes for the ease and convenience of the subject (*c*); since they are not within the statutes, the Court is left to its discretion in the choice of an administrator, and need not grant them to the next of kin (*d*), but, as will appear, the discretion of the Court is exercised in accordance with settled rules of practice.

(*a*) Rule 29, N.-C. B.

(*b*) Rule 30, N.-C. B.

(*c*) *Walker* v. *Woollaston,* (1731) 2 P. Wms. at p. 589. And, further, as to the power of the Court to make these grants, see *Davis* v. *Chanter,* (1848) 2 Phillips, at p. 550; *Maclean* v. *Dawson,* (1859) 1 S. & T. at pp. 431, 432.

(*d*) 4 Burn, E. L. 375, 9th ed., citing *Briers* v. *Goddard,* (1615) Hob. 250; *Thomas* v. *Butler,* (1673) 1 Ventr. 219.

Section 1.

ADMINISTRATIONS LIMITED IN RESPECT OF THE TIME FOR WHICH THEY ENDURE.

Administrations which, though extending to the whole property of the deceased, are limited as to time.

First as to administrations limited in respect of the time for which they endure, *i.e.*, those which, though extending to the whole of the estate of the deceased, are to terminate at the expiration of a certain time, or on the happening of some event other than the death of the grantee.

Grants for the use and benefit *jus habentium*.

The necessity for grants of this description arises chiefly in cases where the person entitled to the grant of administration is precluded from acting personally, by reason of his residence out of the jurisdiction, his minority, lunacy, or other disability. In such cases the Court will grant administration to another for the use and benefit of the person entitled to the grant, limited until such time as his disability ceases.

Of this kind are the limited grants dealt with in the four succeeding sub-sections. They are sometimes known as grants for the use and benefit *jus habentium*.

SUB-SECTION 1.—*Administration to an Attorney for the Use of Persons Abroad.*

Sole executor or person solely entitled to administration (will) resident abroad: grant to his attorney, for his use and benefit.

Where the sole executor, or the person solely entitled to a grant of administration with the will annexed, is resident out of the jurisdiction of the Court (*e*) at the time of the testator's death, administration with the will annexed for his use and benefit may be granted to his attorney, acting under a power of attorney, limited until he shall himself apply for and

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(*e*) Where the person solely entitled to a grant is resident in this country, and able to take it himself, the Court will not decree it to his attorney for his use and benefit: *Burch,* (1861) 2 S. & T. 139. The person entitled should take a general grant, and then should authorise an attorney to act for him in administering the estate: *Hale,* (1874) 3 P. & D. at p. 209; *Goldsborough,* (1859) 1 S. & T. at p. 297. Administration may be granted to an attorney who is himself resident out of the jurisdiction, if the sureties to the bond are resident within the jurisdiction: *Leeson,* (1859) 1 S. & T. 463; and the rule that the sureties must be resident within the jurisdiction may be relaxed in a proper case: *Reed,* (1864) 3 S. & T. 439, and *vide post,* p. 463. But if the principal and attorney reside in the same place out of the jurisdiction, it is said that the Court will not make a grant to the attorney: Direction of Sir John Dodson, 1857, cited Tristram & Coote, p. 100.

obtain probate or administration with the will annexed, as the case may be (*f*).

Grant to attorney of one of several executors.

A similar grant may be made to the attorney of one of two executors, who are both resident abroad, for the use and benefit of that executor, limited until such time as he or the other executor shall duly apply for and obtain probate (*g*); or to the attorney of all the absent executors, for their use and benefit, similarly limited. Where two executors, resident abroad, have appointed separate attorneys, a joint grant may be made to the two attorneys, for the use and benefit of the executors during their joint lives, limited until such time as either executor shall duly apply for and obtain probate (*h*).

To attorney of all the executors.

Joint grant to two attorneys of two absent executors.

On grant to attorney of executor of executor, chain of representation not broken.

It is said that a will proved by the attorney of an executor is the same thing as if actually proved by the executor himself, and therefore where a grant has been made to the attorney of an executor, and the executor dies, having appointed executors who prove his will, the chain of representation is not broken (*i*).

Administration to attorney does not expire automatically on executor's return from abroad, but ceases on executor applying for and obtaining probate.

The administration so granted does not expire automatically on the executor's return from abroad. Formerly it was necessary for him to take out process against the administrator to show cause why it should not be revoked (*k*). But now all such grants *durante absentia* to attorneys are limited "for the use and benefit of —— resident at ——, and until the executor (or party entitled to administration) shall duly apply for and obtain probate (or administration)" (*l*). Where the executor

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(*f*) See Rule 32, N.-C. B.; *Clare* v. *Hedges*, (1695) 1 Lutw. 342, cited 2 P. Wms. at p. 579; *Slaughter* v. *May*, (1705) 1 Salk. 42; *Barker*, [1891] P. 251. All grants to attorneys are expressed to be for the use and benefit of the person entitled: *Cassidy*, (1832) 4 Hagg. 360; *Anstruther* v. *Chalmer*, (1826) 2 Sim. at p. 5; but these words do not exclude the claim of other persons to share in the personal estate: *Anstruther* v. *Chalmer*, (1826) 2 Sim. at p. 5; and the attorney administrator is liable to be sued in respect of the estate by the parties beneficially interested in it: *Chambers* v. *Bicknell*, (1843) 2 Hare, 536; *Re Dewell*, (1858) 4 Drew. 269, at p. 272; *Re Rendell*, [1901] 1 Ch. 230. As to the further limitation until the person entitled shall duly apply for and obtain a grant, see *Cassidy*, (1832) 4 Hagg. 360; as to its effect, see *Re Rendell*, [1901] 1 Ch. 230, and the cases above cited.

(*g*) See *Black*, (1887) 13 P. D. 5.

(*h*) *Pipon* v. *Wallis*, (1753) 1 Lee, 402.

(*i*) *Bayard*, (1849) 1 Rob. 768; *Murguia*, (1884) 9 P. D. 236.

(*k*) *Pipon* v. *Wallis*, (1753) 1 Lee, 402.

(*l*) *Cassidy*, (1832) 4 Hagg. 360.

himself desires probate, the Court is bound to grant it to him (*m*), and the grant to the attorney is thereupon declared to have ceased and expired (*n*).

Grant to attorney of person entitled to administration with will annexed,

A grant of this description may be made to the attorney of the person entitled to a grant of administration with the will annexed, *e.g.*, to the attorney of the sole residuary legatee, or one of several residuary legatees, without notice to the other residuary legatees, all of whom are resident abroad.

or on intestacy.

Administration, similarly limited, may be granted to the attorney of the person entitled to administration on intestacy, provided that the latter is resident out of this country (*o*).

To attorney of all of the next of kin, or of one of the next of kin.

Attorney of guardian of minor next of kin.

So administration may be granted to the attorney of all the next of kin, provided they are resident abroad, for their use and benefit, until they themselves shall apply for a grant; or to the attorney of one of several next of kin, without notice to the others; but it is said that a joint grant will not be made to two attorneys appointed separately by two next of kin (*p*). A grant may be made to the attorney of the guardian of minor next of kin, for the use and benefit of the minors until one of them attains twenty-one, or the guardian himself applies.

Formal power of attorney under seal not required.

General power of attorney sufficient.

Where power of attorney contains power of substitution, grant to substitute

The Power of Attorney.—It is not essential that there should be a formal power of attorney under seal. A memorandum (*q*) or letter (*r*) in the handwriting of the person entitled to the grant has been accepted as sufficient. The applicant need not be constituted attorney for the express purpose of taking the grant; a general power of attorney executed before the death of the testator has been held sufficiently wide to justify the Court in making the grant (*s*). If the power of attorney contains a power of substitution, and the attorney exercises it, the grant may be made to the substitute (*t*).

(*m*) *Pipon* v. *Wallis*, (1753) 1 Lee, 402.

(*n*) *Cassidy*, (1832) 4 Hagg. 360; *Webb* v. *Kirby*, (1856) 7 De G. M. & G. at p. 381.

(*o*) It is said that if the effects are under £20, such administration may be granted whether he is so resident or not: Toller, 108; but see *Burch*, (1861) 2 S. & T. 139; and see Rule 32, N.-C. B.

(*p*) Tristram & Coote, 101.

(*q*) *Elderton*, (1832) 4 Hagg. 210.

(*r*) *Ormond*, (1828) 1 Hagg. 145.

(*s*) *Barker*, [1891] P. 251; and see *Lucas* v. *Lucas*, (1729) 2 Lee, 576; but see *Reitz*, (1831) 3 Hagg. 766.

(*t*) *Palliser* v. *Ord*, (1724) Bunbury's Exch. Rep. 166.

Where constituent entitled to general grant, limited grant not made to attorney, unless as an indulgence where the power of attorney is limited.

Where a person is authorised by a simple power of attorney to take out administration, the Court will decree to him such administration as it would have granted to the person who conferred the power, if he had applied for it himself. Where the power is for a general grant, a limited grant will not be made (*u*). But where the power of attorney is limited to the administration of a specific part of the estate, it is stated (*x*) that, on good reasons being shown, the grant may be limited accordingly. The general rule, however, would seem to be that if the constituent is entitled to a general grant, his attorney should take a grant of the whole estate (*y*).

Attorney must take usual administrator's oath and execute bond.

An attorney must take the usual administrator's oath and subscribe to the usual conditions of the administration bond (*z*).

It should be noticed that the person entitled to a grant may in all cases himself take out administration, and then appoint an attorney to act on his behalf (*a*).

Termination of office.

Administration to attorney ceases on constituent taking grant.

Termination of Office. — This species of administration, being limited until the executor or party entitled to administration shall duly apply for and obtain a grant, does not expire automatically on the constituent's return from abroad, but ceases upon a grant being made to him (*b*).

Death of constituent.

The power of such an administrator is wholly determined by the death of the constituent (*c*), and administration *de bonis non* must be taken out, unless the constituent was an executor and has appointed an executor who proves his will (*d*).

Death of attorney administrator.

If the attorney administrator dies during the lifetime of his principal, the administration ceases, and a grant *de bonis non* is made, after notice to the principal (*e*).

(*u*) *Per* Sir C. Cresswell, *Goldsborough,* (1859) 1 S. & T. 295, at p. 297.

(*x*) Tristram & Coote, pp. 102, 122.

(*y*) *Ibid.*

(*z*) *Goldsborough,* (1859) 1 S. & T. 295. For forms of oath, see App. VII., Forms 162, 163, 207—211.

(*a*) *Goldsborough,* (1859) 1 S. & T. 295; *Hale,* (1874) 3 P. & D. at p. 209.

(*b*) *Pipon* v. *Wallis,* (1753) 1 Lee, 402; *Cassidy,* (1882) 4 Hagg. 360. *Vide post,* p. 391.

(*c*) *Webb* v. *Kirby,* (1856) 7 De G. M. & G. 376.

(*d*) *Suwerkrop* v. *Day,* (1838) 8 A. & E. 624; *Bayard,* (1849) 1 Rob. 768; *Murguia,* (1884) 9 P. D. 236.

(*e*) *Barton,* [1898] P. 11. *Vide post,* p. 391.

Joint grant to two attorneys —death of one of them.

Where two attorneys have jointly been appointed to administer, on the death of one of them, the other is allowed to take a grant under the original power of attorney, on swearing that his principal is still abroad and has not revoked the power (*f*).

SUB-SECTION 2.—*Administration* durante minore ætate.

Sole executor or person solely entitled to administration (will), a minor.

Administration *durante minoritate* granted to his guardian.

If the sole executor (*g*), or the person solely entitled to administration with the will annexed, be within age, administration *durante minore ætate*, as it is called, is granted to his guardian for his use and benefit until he shall attain the age of twenty-one years (*h*).

All the executors minors.

Several executors, one under age.

Several executors, some minors, others of full age but abroad.

A similar grant will be made where there are several executors, all of whom are minors; in such a case, he that first comes of age may prove the will, and the administration ceases (*i*). But where there are divers executors, and one of them is under age, no administration *durante minore ætate* ought to be granted, unless all of full age renounce, for those of full age may prove the will (*k*). And it is said (*l*) that where one executor is abroad, and the other executors are minors, the Court will not grant administration for the use and benefit of the minor executors, unless the absent executor renounces or except in special circumstances under sect. 73 of the Court of Probate Act, 1857.

(*f*) Tristram & Coote, 102.

(*g*) Formerly an infant was considered capable of acting as executor on attaining the age of seventeen: Godolph., Part II., c. 9, s. 2; Swinb., Part V., s. 1, pl. 6; but the statute 38 Geo. III., c. 87, s. 6, enacts: "Where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him." And s. 7 provides that the administrator so appointed shall have the same powers as an administrator *durante minore ætate* of the next of kin.

(*h*) A minor, even if entitled to the grant and competent to take it by the law of the testator's or intestate's domicil, cannot, it seems, be appointed administrator in England: *H.R.H. the Duchess d'Orléans*, (1859) 1 S. & T. 253; *Meatyard*, [1903] P. at p. 129; though in an early case such a grant was made: *Countess da Cunha*, (1828) 1 Hagg. 237.

(*i*) 4 Burn, E. L. 385, 9th ed.

(*k*) *Pigot and Gascoigne's Case*, (1572) cit. Brownl. 46; *Foxwist* v. *Tremain*, (1670) 1 Mod. 47; but see Bac. Abr. Exors. B. 1.

(*l*) Tristram & Coote, 102.

Where the sole next of kin is a minor, administration will be granted to his guardian for his use and benefit until he attains the age of twenty-one. And where there are several next of kin, some of whom are minors and some of full age, although it is the practice to grant administration to those of full age in preference to the guardian of the minors, yet the guardian of the minors may be preferred, if the interest of the minor preponderates over that of the major next of kin (*m*). And the rule is the same where the residuary legatees are some of them minors, and some of full age (*n*).

Sole next of kin a minor, administration *durante minoritate* granted to his guardian.

Several next of kin, some minors, some of full age.

Residuary legatees, some of full age, others under age.

Subject to this exception, the guardian of minors is not entitled to a grant for their use and benefit without clearing off all persons of full age equally entitled with such minors, whether as interested in real or personal estate (*o*). The guardian of an infant heir-at-law is, however, entitled to a grant in priority to the representative of a deceased husband.

Guardian of infant heir-at-law.

To whom granted.—The Court has a discretionary power to grant administration *durante minore ætate* to such person as it shall think fit (*p*). For this kind of administration has frequently been held not to be within the statutes (*q*), and no one has such a right to the grant as could have been enforced at common law (*r*).

The grant is in the discretion of the Court.

In the exercise of its discretion, the Court grants administration *durante minore ætate* to the guardian of the minor or infant, appointed in accordance with certain well-recognised rules.

The grant is made to the guardian of the minor or infant.

With regard to the appointment of guardian, a distinction exists between minors (persons over seven but less than twenty-one years of age) and infants (children less than seven years old) (*s*).

(*m*) *Cartright's Case,* (1678) 1 Freem. 258. See *Sawbridge* v. *Hill,* (1871) 2 P. & D. 219; *Burgess,* (1863) 4 S. & T. 188.

(*n*) *Sawbridge* v. *Hill,* (1871) 2 P. & D. 219; *Cooke,* (1859) 1 S. & T. 267.

(*o*) Additional instructions under the Land Transfer Act, 1897 (App. IV.), No. 13.

(*p*) *West* v. *Willby,* (1820) 3 Phill. 374, at p. 379; *Quick* v. *Quick,* (1864) 33 L. J. P. 177. This discretionary power is recognised by the statute 38 Geo. III., c. 87, s. 6; *vide ante,* p. 368, note (*g*).

(*q*) *West* v. *Willby,* (1820) *loc. cit.*; *Rex* v. *Bettesworth,* (1734) 2 Str. 956.

(*r*) *Smith's Case,* (1731) 2 Strange, 892.

(*s*) Toller, 100.

Minors elect their guardian.

Guardian is assigned to infants.

The minor himself nominates his guardian, who then is admitted in that character by the Court (*t*), but to an infant a guardian must be assigned by order of one of the registrars, unless he has a testamentary guardian or a guardian appointed by the Court of Chancery (*u*).

Minor must elect his next of kin, unless good ground of objection is shown, or the next of kin renounces.

Where there are several next of kin.

It must not, however, be supposed that a minor is free to elect whom he pleases to be his guardian for the purpose of taking a grant *durante minore ætate.* The next of kin of the minor has, by the practice of the Court, a preferential right to be appointed guardian for this purpose; and the minor is under an obligation to elect him, unless, indeed, the next of kin renounces his right (*x*). Even if the next of kin renounces, the minor will usually be required to elect his next nearest relative as guardian. But where there are several next of kin, the minor may elect any one of them to be his guardian, and the Court, although not bound by his choice, will usually grant the administration to the guardian so elected (*y*).

The father.

The father, as next of kin and natural guardian of the minor or infant, is entitled to be elected or assigned as his guardian for the purpose of taking administration *durante minore ætate* in preference to all others; but the Court may pass him over for good cause shown (*a*).

Guardian appointed by father under 12 Car. II., c. 24.

If the father is dead, and he has appointed a guardian of the minor or infant by deed or will under 12 Car. II., c. 24, the guardian so appointed is entitled to the grant (*b*).

The mother.

No election or assignment of

Since the Guardianship of Infants Act, 1886, the mother is, on the death of the father, constituted guardian either alone or jointly with the guardian appointed by him, and no election

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(*t*) *Rich* v. *Chamberlayne,* (1752) 1 Lee, 134; Rule 33, N.-C. B.

(*u*) Rule 34, N.-C. B.

(*x*) The Court may, in its discretion, pass over the next of kin: *vide post,* pp. 371, 372; and if ground of objection exists, the minor is not obliged to elect his next of kin, but may elect a more distant relation or a stranger: *ibid.*

(*y*) *Vide post,* p. 373; and see *Quick* v. *Quick,* (1864) 33 L. J. P. 177.

(*a*) *Lovell* v. *Cox,* (1818) cit. 3 Phill. 379; *Hay,* (1865) 1 P. & D. 51; see *Weir,* (1862) 2 S. & T. 451; *Stephenson,* (1866) 1 P. & D. 287. *Vide post,* p. 372.

(*b*) *Morris,* (1862) 2 S. & T. 360. See *Parnell,* (1872) 2 P. & D. 379, where it was held that the statute sanctions the father in giving authority to a surviving guardian to nominate a guardian in the place of one who has died.

or assignment of the mother as guardian to take or to renounce a grant is necessary (*c*).

mother as guardian required.

Guardian appointed by Chancery Division.

If a guardian of the estate of the minor has been appointed by the Chancery Division, administration *durante minore ætate* will be granted to him (*d*).

Guardian appointed by Scotch, Irish, or foreign Court.

Administration *durante minore ætate* may be granted to the guardian appointed by a foreign Court (*e*), or by the Courts of Scotland or Ireland (*f*).

Minor a married woman.

Where the minor is a married woman, her husband, if of full age, has a right to be elected her guardian and to take the grant, for her use and benefit, during her minority (*g*).

If there be no father, mother, or statutory guardian, etc., next of kin of minor or infant entitled.

If there be neither father, mother, statutory guardian, nor guardian appointed by the Court of Chancery, the next of kin of the minor or infant is entitled to be appointed his guardian, and to take the grant for his use and benefit (*h*), and, as a general rule, the Court will not make the grant to another unless the next of kin has renounced his right, or has been cited and failed to appear (*i*).

Joint grants of administration *durante minore ætate.*

A joint grant may be made to two or more next of kin (not exceeding three), and, for good cause shown, a joint grant may be made to a next of kin and a more distant relative or stranger, or, on the renunciation of the next of kin, to a distant relative and a stranger (*k*).

(*c*) 49 & 50 Vict. c. 27. The statute provides that, on the death of the father of an infant, the mother if surviving shall be guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father (s. 2). The mother may by deed or will appoint guardians of the infant, and where guardians are appointed by both parents, they are to act jointly (s. 3 (1)).

(*d*) See Rule 34, N.-C. B.; but see *Brotherton* v. *Harris*, (1755) 2 Lee, 131.

(*e*) *Sartoris*, (1838) 1 Curt. 910.

(*f*) *Johnston*, (1832) 4 Hagg. 182; *Jones*, (1859) 28 L. J. P. 80. The order must be duly authenticated by the seal of the Court: *Jones*, *loc. cit. in notis.*

(*g*) Toller, 92. See *Countess da Cunha*, (1828) 1 Hagg. 237; *sed vide ante*, p. 368, note (*h*).

(*h*) Toller, 100; *Ewing*, (1828) 1 Hagg. 381.

(*i*) In a proper case the rule may be relaxed; see *Ewing*, (1828) 1 Hagg. 381; *Widger*, (1842) 3 Curt. 55; *Weir*, (1862) 2 S. & T. 451; *Hagger*, (1863) 3 S. & T. 65; *Burchmore*, (1873) 3 P. & D. 139; *Gardiner*, (1884) 9 P. D. 66; *Webb*, (1888) 13 P. D. 71.

(*k*) Tristram & Coote, 109. For affidavit to lead grant, and order assigning guardians, see App. VII., Forms 44, 48.

The Court may pass over the next of kin, if unfit, and grant administration *durante minoritate* to another.

But the Court may, in its discretion, pass over the next of kin. For the Court will judge of the fitness of the person who seeks to be appointed guardian, and refuse to grant guardianship to an improper person (*l*) even though he be next of kin (*m*).

Father of minor passed over.

So the father of a minor executrix and residuary legatee was passed over, and administration granted to the trustees named in the will (*n*). And where the father of the minor was resident in New Zealand, and had been divorced from his wife, and had admitted in the divorce proceedings such recklessness and extravagance as unfitted him for an office of trust, the grant was made to the maternal grandmother, without citation of the father (*o*). Where the grandfather, to whom, as next of kin of the minors, the grant would naturally pass, was superannuated, being eighty years old, the grant was made to the uncle (*p*); and where, of the three next of kin of the minor, one was in India, another was not in independent circumstances, and the third renounced, the Court granted administration *durante minore ætate* to a stranger, elected by the minor as her guardian (*q*). In a case where an intestate left a widow and an infant son, and the widow took out administration, but soon after became lunatic, Sir George Lee, without revoking the administration granted to the widow, assigned, upon the renunciation of his grandmother, the infant's aunt to be his guardian, and granted administration to her for the use and benefit of the widow and infant during the incapacity of the widow, and until the infant should attain his majority, if the widow should not sooner recover her senses (*r*).

Next of kin of minor of great age; abroad; not in independent circumstances. Grant made to stranger. Administration for the use and benefit of lunatic widow and infant next of kin.

Court may disregard the election of the

As has been seen, where there are several next of kin, the minor may elect one of them to be his guardian; but the

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(*l*) *Fawkener* v. *Jordan*, (1756) 2 Lee, 327, at p. 330.

(*m*) *Quick* v. *Quick*, (1864) 33 L. J. P. 177. The Court may, in its discretion, pass over the next of kin, even where no suggestion of impropriety is made against him: *Lovell* v. *Cox*, (1818) cit. 3 Phill. 379; *Quick* v. *Quick*, *ubi supra*.

(*n*) *Lovell* v. *Cox*, (1818) cit. 3 Phill. 379.

(*o*) *Hay*, (1865) 1 P. & D. 51; *Weir*, (1862) 2 S. & T. 451; *Stephenson*, (1866) 1 P. & D. 287.

(*p*) *Ewing*, (1828) 1 Hagg. 381.

(*q*) *Gardiner*, (1884) 9 P. D. 66. See *Burchmore*, (1873) 3 P. & D. 139; *Webb*, (1888) 13 P. D. 71.

(*r*) *Anon.*, (1754) 1 Lee, 625.

Court is not bound by his choice, and may refuse to grant administration to the person so elected, if in the opinion of the Court he is an improper person (*s*). But if the minor is almost of full age, his choice will have great weight with the Court (*t*).

minor, if he elects an improper person.

If the next of kin renounce, the grant may be made to a more distant relative or a stranger (*u*).

If next of kin renounce, grant to more distant relative or stranger.

Administration *durante minore ætate* may be granted to creditors to the exclusion of the guardian of the minor, if the estate is insufficient to pay the debts (*x*). But the guardian of an infant, sole next of kin of an intestate, is entitled to take administration to his estate in preference to creditors, where the estate is solvent (*y*). In *In the Goods of Peck* (*z*), a creditor was appointed guardian to minors, who had no known relations, for the purpose of taking out administration to the estate of their father, who had died intestate and insolvent.

Administration *durante minoritate* granted to creditor.

It remains to add that the administrator *durante minore ætate* of the executor of an executor is *loco executoris*, and represents the first testator (*a*).

Administrator *durante minoritate* of executor of executor represents the original testator.

Administration granted during the minority of one infant ceases on his attaining the age of twenty-one years (*b*), and probate or administration is granted to him if the estate has not been completely administered.

Administration *durante minoritate* ceases on infant attaining age of twenty-one years.

Administration granted during the minority of several infants determines upon the coming of age of any one of them; thus, if there are several infant executors, he who first attains the age of twenty-one proves the will (*c*).

If several infants.

If the guardian dies during the minority of all the infants,

Death of guardian.

(*s*) *West* v. *Willby,* (1820) 3 Phill. at p. 380.

(*t*) *Ibid.*

(*u*) See *Gardiner,* (1884) 9 P. D. 66; *ante,* p. 372.

(*x*) *West* v. *Willby,* (1820) 3 Phill. at p. 380.

(*y*) *John* v. *Bradbury,* (1866) 1 P. & D. 245.

(*z*) (1858) 1 S. & T. 141.

(*a*) *Anon.*, (1675) Freem. 288.

(*b*) The Court has refused to limit the grant "until the minor shall attain the age of twenty-one years and apply for and obtain a grant": *Loftus,* (1864) 3 S. & T. 307; *vide post,* p. 391.

(*c*) 4 Burn, E. L. 385, 9th ed.; *vide post,* p. 391.

the administration *durante minore ætate* ceases, and a second or *cessate* grant is made to a new guardian.

Death of infant.

If the sole infant, or all the infants for whose use and benefit the administration has been granted, die under age, the grant to the guardian ceases, and administration *de bonis non* to the estate of the testator or intestate is taken out.

SUB-SECTION 3.—*Administration for the Use and Benefit of a Lunatic.*

Administration for the use and benefit of a lunatic;

The subject turns to the third species of special administration for the use and benefit of the person entitled to the grant, namely, administration for the use and benefit of a lunatic, until such time as he shall become of sound mind. Such administration, sometimes called administration *durante corporis aut animi vitio* (*d*), is granted where the executor or person entitled to letters of administration is of unsound mind at the death of the deceased, or where the executor or administrator becomes of unsound mind after a grant has been made to him. It is convenient to consider these two cases separately, but before doing so the principle upon which grants of this description are made, must be stated.

where executor or person entitled to administration is or becomes of unsound mind.

Practice of Ecclesiastical Courts.

It was the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so had not been found a lunatic by inquisition. When such a case occurred, the Ecclesiastical Court required affidavits, stating the fact of lunacy, and that no inquisition had been had and no committee appointed. The Court then granted administration to the next of kin of the lunatic pending the lunacy, and it required sureties in double the amount of the property, and such sureties to justify (*e*).

That practice followed by Court of Probate, and Probate Division.

Such was the practice of the Ecclesiastical Court, and that practice has been followed in all material respects by the Court of Probate and by the Probate Division, its successors.

(*d*) Oughton, 1 Ord. Jud. 324, n.

(*e*) *Evelyn*, (1833) 2 My. & K. at p. 4, where the Lord Chancellor laid down the practice from a communication made to him by Dr. Lushington.

If such grants were not made, the property might not be administered at all or might be administered by a creditor; or the parties might be compelled, in cases where it is neither necessary nor expedient, to apply for commissions in lunacy, in order to get a committee appointed who might take the administration (*f*).

Reason for these grants.

The right of the Court to grant this species of administration has been recognised in many early cases, particularly in *Hills* v. *Mills* (*g*) and the cases there cited.

1. *Where the executor or person entitled to administration is of unsound mind at the death of the testator or intestate.*

Where there are several executors, and one is a lunatic.

If there are several executors, and one of them is a lunatic, it would seem that no administration *durante animi vitio* ought to be granted, if others exist who are able and willing to prove the will (*h*). And it is stated that where, of two executors, one is a lunatic and the other is abroad, administration may be granted to the attorney of the latter until the absent executor shall apply for probate, or the lunatic recover and obtain a grant (*i*).

Two executors, one lunatic, the other abroad.

Sole executor a lunatic.

Grant to committee of his estate.

Where the sole executor is a lunatic so found by inquisition, and there is a committee of his estate, administration with the will annexed is granted to the committee for the use and benefit of the lunatic until he shall become of sound mind (*k*).

Grant to person appointed under the Lunacy Act, 1890.

Where the lunatic is not so found by inquisition, but, under sect. 116 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), a person has been appointed with general authority over the lunatic's property, such a person is treated in the same way as if he were a committee of the lunatic's estate; but if the person appointed under sect. 116 has conferred upon him only

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(*f*) *Evelyn,* (1833) 2 My. & K. at p. 4.

(*g*) (1686) 1 Salk. 36; and see *Evans* v. *Tyler,* (1849) 2 Rob. 128.

(*h*) See *Hardstone,* (1828) 1 Hagg. 487; and cf. *Pigot and Gascoigne's Case,* (1572) cit. Brownl. 46, *ante,* p. 368.

(*i*) Tristram & Coote, 111.

(*k*) *Cooke,* [1895] P. at p. 69; *Phillips,* (1824) 2 Add. at p. 336 *in notis.* The grant may be made to a Scotch curator, or the committee appointed by a foreign Court: Tristram & Coote, 110. With the consent of the committee of the estate of a lunatic executor, a grant for his use and benefit was made to the committee of his person, who was also sole next of kin of the lunatic: *Scarlett,* (1872) 27 L. T. 215. If there are two committees, both must take the grant, or one must renounce: Tristram & Coote, 110.

specified powers, falling short of general powers, such person is not to be considered to be in the same position as a committee of the lunatic, and is not entitled to the grant (*l*).

Where there is no committee, administration for the use of lunatic executor granted to residuary legatee or devisee.

Where there is no committee or person in the position of a committee, or where the committee renounces and consents, or is cited and fails to appear (*m*), administration with the will annexed is granted to the residuary legatee or devisee for the use and benefit of the lunatic executor until he shall become of sound mind (*n*). If the residuary legatee and devisee renounce, the grant similarly limited is made to the wife (or husband) of the lunatic executor, or, failing them, to his next of kin or heir-at-law, where the assets include real estate.

Where there is no committee, and the residue is not disposed of.

If the residue is not disposed of by the will, the grant for the use and benefit of the lunatic executor is made to the husband or wife, or, failing them, to the next of kin or heir-at-law, where there is real estate, of the lunatic.

Where the person entitled to administration (will) is a lunatic.

Where there is no executor, and the person entitled to administration with the will annexed—*e.g.*, the residuary legatee—is a lunatic, administration with the will annexed is granted for his or her use and benefit to the committee of the lunatic's estate (*o*), or, failing a committee, to the lunatic's husband, wife, next of kin, or heir-at-law, if there is real estate. But it must be noticed that a grant will not be made for the use of a lunatic unless all other persons equally entitled with the lunatic, whether as having an interest in real or personal estate, renounce or are cited and fail to appear (*p*).

Where the person solely entitled to administration (intestacy) is a lunatic.

Where the person solely entitled to a grant of administration on intestacy is a lunatic, administration for his or her use and benefit is granted to the lunatic's committee, or, in

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(*l*) *Cooke*, [1895] P. at p. 69.

(*m*) *Milnes*, (1826) 3 Add. 55.

(*n*) *Ibid.*; *Rodnall* v. *Webb*, (1826) 3 Add. 56 *in notis*. Where an executor was *incapacitated through illness*, the Court made a grant of administration (will) to a residuary legatee for life for the use and benefit of the executor till his recovery: *Ponsonby*, [1895] P. 287; and see *Crump*, (1821) 3 Phill. 497.

(*o*) As to the position of a person appointed under s. 116 of the Lunacy Act, 1890, *vide ante*, p. 375.

(*p*) Additional Instructions under the Land Transfer Act, 1897 (*post*, p. 929), No. 14.

the absence of a committee, to the husband, wife, or next of kin of the lunatic, or to the lunatic's heir-at-law, where there is real estate (*q*). But, as above stated, a grant will not be made to a person for the use and benefit of a lunatic without clearing off all other persons equally entitled with the lunatic, whether as having an interest in real or personal estate (*r*).

Widow of intestate a lunatic; grant for her use and benefit.

If the widow of an intestate is a lunatic and there is a committee, the practice is to make the grant to the committee of the widow for her use and benefit, without requiring notice to be given to the next of kin of the intestate. The Court may, however, where the next of kin or heir-at-law of the intestate appears and shows sufficient reason, pass over the widow altogether and commit the administration to him. But, unless good cause is shown, the committee of the widow is preferred, as the widow herself would be, to the next of kin or heir-at-law of the intestate (*s*). Where there is no committee, the grant may be made to the next of kin of the widow for her use and benefit, or, if they desire it, the next of kin or heir-at-law of the intestate may take an absolute grant in their own right and not for the widow's use and benefit. For the fact that the widow is a lunatic is sufficient cause for preferring the next of kin (*t*).

Or next of kin, etc., of intestate may take an absolute grant.

Sole next of kin or heir-at-law a lunatic.

Where the sole next of kin or heir-at-law is a lunatic, the grant may be made to his committee for his use and benefit, or, failing a committee, to his next of kin or heir-at-law (*u*).

Grant to creditor or stranger.

Where the committee, next of kin, and heir-at-law of the lunatic renounce, or have been cited and fail to appear, administration for the lunatic's use and benefit may be granted to a creditor (*x*) or to a stranger in blood (*y*). Thus administration with the will annexed *de bonis non* was granted to the executors

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(*q*) See *Cooke,* [1895] P. 68; *Phillips,* (1824) 2 Add. 336, n.

(*r*) Additional Instructions under the Land Transfer Act, 1897 (*post,* p. 929), No. 14; and see *Spencer,* (1897) unreported; *Judd,* (1904) unreported, quoted Tristram & Coote, pp. 111, 112.

(*s*) *Alford* v. *Alford,* (1857) 1 Dea. & Sw. 322.

(*t*) *Williams,* (1830) 3 Hagg. 217.

(*u*) *Cooke,* [1895] P. 68.

(*x*) *Penny,* (1846) 1 Rob. 426. For cases in which administration has been granted to creditors of the lunatic under s. 73, *vide post,* p. 415.

(*y*) *Hastings,* (1878) 4 P. D. 73; *Joseph,* (1838) 1 Curt. 907.

of the deceased administratrix for the use and benefit of the testator's sole next of kin, who was a lunatic, and in this case the Court dispensed with citation of the lunatic's next of kin, who were thirty in number and resident in various places, some in America (*z*).

Special powers of the Court under s. 73 of the Court of Probate Act, 1857.

The Court has special powers under sect. 73 of the Court of Probate Act, 1857, in making grants of this description under special circumstances. The cases in which these powers have been exercised are collected in a subsequent chapter (*a*).

Where person primarily entitled to a grant is a lunatic, his next of kin must be cited before the grant is made to another.

It is important to notice that where the person primarily entitled to a grant of administration is a lunatic, before granting administration to a person with an inferior right, *e.g.*, a creditor, the Court requires citation, not only of the lunatic, but also of the next of kin of the lunatic, in order that they may take administration for his use and benefit if they think proper. If such next of kin are unknown, they must be advertised for (*b*).

2. *Where the executor or administrator becomes a lunatic after a grant has been made to him.*

Where the sole executor becomes a lunatic after probate granted.

Where a sole executor becomes a lunatic after probate has been granted to him, the Court will grant administration for his use and benefit to the committee of his estate until he shall become of sound mind (*c*).

Where there is no committee, or with the consent or after citation of the committee, administration with the will annexed for the use and benefit of the lunatic executor is granted to the residuary legatee or devisee under the will (*d*).

Where there are several executors, all of whom prove the will, and one subsequently becomes a lunatic.

Where of several executors, all of whom have proved the will, one subsequently becomes of unsound mind, the Court will, on the application of the others, revoke the grant and make a fresh grant of probate to the applicants, reserving

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(*z*) *Southmead*, (1842) 3 Curt. 28.

(*a*) *Post*, p. 415.

(*b*) *Windeatt* v. *Sharland*, (1871) 2 P. & D. 217. This rule may be relaxed in special circumstances under s. 73 of the Court of Probate Act, 1857; *vide post*, p. 415. For form of citation, see App. VII., Form 92; and of affidavit as to advertisement for next of kin, App. VII., Form 39.

(*c*) *Phillips*, (1824) 2 Add. at p. 336, n. As to the position of a person appointed under s. 116 of the Lunacy Act, 1890, *vide ante*, p. 375.

(*d*) *Milnes*, (1826) 3 Add. 55; *Rodnall* v. *Webb*, (1826) 3 Add. 56 *in notis*; *Crump*, (1821) 3 Phill. 497.

power to the lunatic, in case he shall become of sound mind and apply, to join in the probate (*e*).

Where sole administrator becomes a lunatic.

Where the sole administrator, or administrator with the will, becomes a lunatic after a grant has been made to him, a grant for his use and benefit is made to his committee, or, failing him, to one who has an equal right with the administrator to the original grant, or, failing him, to the next of kin of the lunatic administrator (*f*).

Where administration granted to widow of intestate, who subsequently becomes a lunatic.

Where administration had been granted to the intestate's widow, who subsequently became insane, administration for the use and benefit of the widow during her lunacy was granted to a son of the intestate, the original grant being impounded in the registry, to be redelivered out in case of her recovery (*g*).

Practice in such a case where the next of kin is a minor.

Where an intestate left a widow and an infant son, and the widow took out administration, but subsequently became a lunatic, the Court, without revoking the administration granted to the widow, assigned the infant's aunt to be his guardian, and granted administration to her for the use and benefit of the widow and infant, during the incapacity of the widow and the minority of the infant, if the widow should not sooner recover her senses (*h*).

Where administration has been granted to next of kin who subsequently becomes a lunatic.

The practice as to administration where a grant has been made to a next of kin, and such next of kin becomes insane, is as follows (*i*) :—

First, where the lunatic has been so found by inquisition, and there is a committee of the property, the grant is made to such committee for the use of the lunatic so long as he shall remain a lunatic. The first grant is not, in such case, impounded (*k*).

Secondly, where there is no committee and no person in the

(*e*) *Shaw*. [1905] P. 92; *Sowerby*, (1891) 65 L. T. 764; *Marshall*, (1836) 1 Curt. 297, where there were two executors, one of whom alone proved the will, and subsequently became lunatic.

(*f*) *Vide ante*, p. 376.

(*g*) *Binckes*, (1836) 1 Curt. 286.

(*h*) *Anon.*, (1754) 1 Lee, 625.

(*i*) *Cooke*, [1895] P. at p. 69.

(*k*) For the position of a person appointed under s. 116 of the Lunacy Act, 1890, *vide ante*, p. 375; *Cooke*, [1895] P. at p. 69; *Leese*, [1894] P. 160.

position of a committee (*l*), the grant is made to another of the next of kin of the deceased for the use of the lunatic next of kin, so long as he shall remain a lunatic, and the precaution in that case is taken of having the first grant impounded (*m*).

It is not the practice to inquire whether the lunatic is likely to recover, and, in the event of its appearing that he is not likely to recover, to revoke the old grant, and to make an absolute grant to the other next of kin (*n*).

Thirdly, if there are no other next of kin of the intestate, the grant is made to the next of kin of the lunatic for his use and benefit (*o*).

Where one of several co-administrators becomes a lunatic.

Where administration, whether with the will annexed or on intestacy, has been granted to two or more administrators, and one of them subsequently becomes insane, on the application of the others the Court will revoke the original letters of administration, on their being brought into the registry, and will grant administration afresh to the applicants (*p*).

Termination of the administration.

Death of the administrator during the lifetime of the lunatic.

Where administration has been granted for the use and benefit of a lunatic, and the administrator dies in the lifetime of the lunatic, the administration ceases, and a *cessate* grant for the use and benefit of the lunatic is made. The continued insanity of the lunatic must be proved.

Thus where administration for the use and benefit of the intestate's widow, who was a lunatic, had been granted to a creditor on the renunciation of the testator's children, and the creditor died leaving goods unadministered, the widow surviving and still lunatic, the Court refused to grant administration *de bonis non* to a son of the deceased who had retracted his renunciation, but granted administration to him for the use and benefit of the widow during her lunacy, on his giving justifying security to double the amount of the unadministered estate (*q*).

(*l*) *Vide ante*, p. 375.

(*m*) *Cooke*, [1895] P. at p. 69; *Binckes*, (1836) 1 Curt. 286.

(*n*) *Cooke*, [1895] P. at p. 70.

(*o*) *Vide ante*, p. 377.

(*p*) *Phillips*, (1824) 2 Add. 335; *Newton*, (1843) 3 Curt. 428.

(*q*) *Penny*, (1846) 1 Rob. 426.

If the lunatic, for whose use and benefit a grant has been made, recovers his senses, the grant for his use and benefit ceases, and a general grant is made to him. Satisfactory evidence of his recovery, on affidavit sworn by a medical man, must be adduced, and notice must be given to the temporary administrator. If the original grant has been impounded, it is delivered out to him under similar conditions.

Recovery of the lunatic.

If the lunatic dies, the grant for his use and benefit ceases and expires, and administration *de bonis non* to the estate of the original deceased is granted, if it has not been completely administered. (See App. VII., Form 233.)

Death of the lunatic in the lifetime of the administrator.

SUB-SECTION 4.—*Administration for the Use and Benefit of a Convict.*

Where the person entitled to the grant is a felon convict, administration for his use and benefit is granted to the person entrusted, under the provisions of the statute 33 & 34 Vict. c. 23 (*r*), with the custody and management of his property, so long as such person shall continue to have such custody.

Administration for the use and benefit of a convict.

Forfeiture Act, 1870.

SUB-SECTION 5.—*Administration* pendente lite.

Sect. 70 of the Court of Probate Act, 1857 (*s*), enacts as follows: "Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction."

Administration *pendente lite.*

Court of Probate Act, 1857, s. 70.

(*r*) Under the Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 2 (1) (e), the Public Trustee may be appointed to be the administrator of the property of a convict under this Act.

(*s*) 20 & 21 Vict. c. 77, s. 70.

Such a grant is called a grant of administration *pendente lite.*

Power of the Prerogative Court to appoint an administrator *pendente lite.*

The power of the Prerogative Court to appoint an administrator *pendente lite* where there was a controversy concerning a right to administration, never seems to have been questioned (*t*), though formerly the Courts of common law held that administration pending a suit upon a will, where there was an executor, could not be granted (*u*). But in the case of *Walker* v. *Woollaston* (*x*) the whole Court, upon consideration, held that such administration was good. The Court of Probate, in addition to the powers which it derived from the Prerogative Court, had statutory power to appoint an administrator *pendente lite* conferred on it, by the section of the Court of Probate Act, 1857, above quoted (*y*).

Power of the Court of Probate.

Administrator *pendente lite,* when appointed.

It was not the practice of the Prerogative Court to grant administration *pendente lite,* unless by consent, or on proof that such a grant was necessary for the preservation of the property (*z*). Soon after the establishment of the Court of Probate, however, Sir J. P. Wilde, in a considered judgment (*a*), said: "The rule of the Court of Chancery appears to be, that wherever there is a *bonâ fide* suit pending, the Court will appoint a receiver quite irrespective of the condition of the estate, or of the person who has the actual possession of it, on the ground that while the suit is pending there is no one legally entitled to receive or to hold the assets, or to give discharges. I wish to give notice that I shall in future assimilate the practice of this Court to that of the Court of Chancery, and that I shall grant administration *pendente lite* wherever the Court of Chancery would appoint a receiver."

(*t*) *Frederick* v. *Hook,* (1691) Carthew, 153, cited in *Walker* v. *Woollaston,* (1731) 2 P. Wms. 576, at p. 585.

(*u*) *Maskeline* v. *Harrison,* (1756) 2 Lee, 258; *Frederick* v. *Hook* (*ubi supra*); *Robin's Case,* (1601) Moo. K. B. 636; *Smyth* v. *Smyth,* (1684) 3 Keb. 54.

(*x*) (1731) 2 P. Wms. 576.

(*y*) *Tichborne* v. *Tichborne,* (1869) 1 P. & D. 730, at p. 732.

(*z*) *Sutton* v. *Smith,* (1753) 1 Lee, 207, at p. 209; *Maskeline* v. *Harrison,* (1756) 2 Lee, 258; *Northey* v. *Cock,* (1822) 1 Add. 326, at p. 330; *Young* v. *Brown,* (1827) 1 Hagg. 53; *Bellew* v. *Bellew,* (1865) 4 S. & T. 58.

(*a*) *Bellew* v. *Bellew,* (1865) 4 S. & T. 58, at p. 61.

In the Probate Division some necessity for the grant must be shown.

In the Probate Division, however, the appointment of an administrator *pendente lite* does not follow as a matter of course whenever litigation is pending. The applicant is required to show some necessity for the grant, *e.g.*, that it is necessary for the preservation of the estate, for receiving rents, payments of interest, or the dividends on shares as they become due, and that no fit and proper person is in a position to discharge these offices (*b*).

So where the deceased was in partnership with another, administration *pendente lite* was refused;

and where there was an executor willing to act.

Accordingly, when the deceased at the time of his death was in partnership with another person, the Court refused to grant administration *pendente lite* against the wish of the surviving partner, and stated that it would require very strong proof that he was dealing improperly with the property before it would accede to such an application (*c*). And where an executor, whose appointment was not in dispute, was willing to act, and was competent to discharge the functions of an administrator, the Court refused to grant administration *pendente lite* (*d*).

Administration *pendente lite* granted although receiver has been appointed by Court of Chancery.

Appointment of administrator *pendente lite* on application of person not a party to suit.

The Court will appoint an administrator *pendente lite*, if it is just and proper so to do, although a receiver may have been appointed by the Court of Chancery, in a suit pending between the same parties and affecting the same property as the suit in the Probate Division (*e*). The Court has power to appoint an administrator *pendente lite*, in contested testamentary and administration suits, on the application of a person who is not a party to such suit (*f*). Accordingly, in an administration suit, which was likely to be protracted, the Court appointed an administrator *pendente lite* at the instance of a creditor who was not a party to the suit; and the costs

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(*b*) *Horrell* v. *Witts,* (1866) 1 P. & D. 103.

(*c*) *Ibid.*

(*d*) *Mortimer* v. *Paull,* (1870) 2 P. & D. 85. And see *Wright* v. *Rogers,* (1870) 2 P. & D. 179, where, under special circumstances, administration pending suit was granted to the executors named in the will which was the subject of litigation, who were also the executors of an earlier will of the deceased.

(*e*) *Tichborne* v. *Tichborne,* (1869) 1 P. & D. 730. And see *Queen's Proctor* v. *Williams,* (1862) 2 S. & T. 353, where the Court, on consent of the parties to the suit, appointed a person who had been made the receiver of the same estate in proceedings in Chancery, to be administrator *pendente lite*; *Cleaver,* [1905] P. 319.

(*f*) *Tichborne* v. *Tichborne,* (1869) 1 P. & D. 730.

incurred by the creditor in obtaining the appointment of an administrator *pendente lite*, were allowed out of the estate (*g*).

Who is appointed administrator *pendente lite*. Court must be satisfied of his fitness, and will not, unless all parties consent, grant administration *pendente lite* to one of the litigant parties.

Unless the parties have all agreed upon a nominee, the Court must be satisfied as to the fitness of the proposed administrator; or must be placed in a condition to determine between the two, its most usual office upon such occasions, an administrator, that is, being proposed by each party (*h*).

The Court will not, unless all parties consent (*i*), place a litigant party in possession of the property by granting administration pending suit to him, but will grant it to some indifferent person to be selected by all the parties (*k*), or, if they cannot agree, by the registrar (*l*).

Semble, where a suit is pending touching the validity of a will of an executor, an administrator *pendente lite* of the estate of the original testator may be appointed.

It would seem to follow from the wording of the section, that the power of the Court to appoint an administrator *pendente lite* of the estate of a deceased person, is confined to cases where a suit is pending touching the validity of *his* will, or for obtaining, recalling, or revoking probate of *his* will, or a grant of administration to *his* estate. Doubt has, however, been cast upon this assumption by the following cases.

A married woman, under a power given to her to that effect, duly executed a will. Her husband, by his will, made her his universal legatee and sole executrix. She survived him, but did not take probate of his will nor re-execute her own. Litigation having arisen on the question whether the *wife's* executors were entitled to a limited or general grant of probate of her will, the Court appointed an administrator *pendente lite* to the estate of the *husband*, as well as one to the estate of the deceased (*m*). This case was followed by Butt, J., in a

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(*g*) *Tichborne* v. *Tichborne*, (1869) 1 P. & D. 730; *Evans*, (1890) 15 P. D. 215; *Cleaver*, [1905] P. 319.

(*h*) *Per* Sir John Nicholl in *Northey* v. *Cock*, (1822) 1 Add. 326, at p. 329.

(*i*) *De Chatelain* v. *Pontigny*, (1858) 1 S. & T. 34; *Colvin* v. *Fraser*, (1829) 2 Hagg. 613.

(*k*) *Per* Sir John Nicholl in *Northey* v. *Cock*, (1822) 1 Add. 326, at p. 330; *Young* v. *Brown*, (1827) 1 Hagg. 53, at p. 54; *Stratton* v. *Ford*, (1754) 2 Lee, 49. See also *Bond* v. *Bond*, (1753) 1 Lee, 333, where the nominee of the son was preferred to the nominee of the wife, because his interest was certain and that of the wife uncertain.

(*l*) *Whittle* v. *Keats*, (1866) 35 L. J. P. 54.

(*m*) *Dawes*, (1870) 2 P. & D. 147.

later case (*n*), where an application was made for the appointment of an administrator *pendente lite* of the estate of a husband under similar circumstances. It was argued that the Court had no power to make such a grant under sect. 70 of the Court of Probate Act, 1857, as there was no *lis pendens* touching the will of the deceased person in respect of whose estate a grant was asked. The learned judge said: "I am not altogether satisfied that when *In the Goods of Dawes* (*o*) was decided the attention of the Court was sufficiently drawn to the words of sect. 70, but I shall follow the precedent, though with doubt."

Court of Probate Act, 1857, s. 71.

Receiver of real estate *pendente lite.*

The Court of Probate Act, 1857, s. 71, provides as follows: "It shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid or any other person to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any will of such deceased person by which his real estate may be affected, and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct."

Court of Probate Act, 1858, s. 21.

Court may require security by bond from receiver of real estate.

The Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 21, further enacts: "It shall be lawful for the Court of Probate to require security by bond (*p*), in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said Court under section seventy-one of 'The Court of Probate Act,' [1857]; and the Court may, on application, made on motion or in a summary way, order one of the registrars of the Court to assign the same to some person to be named in such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said security or put the same in force in his or their own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said

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(*n*) *Fawcett,* (1889) 14 P. D. 152.

(*o*) (1870) 2 P. & D. 147; *vide ante,* p. 384.

(*p*) For form of bond, see App. VII., Forms 74, 75.

Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof."

The Court can appoint a receiver *pendente lite* only where a suit is pending touching the validity of a will by which the real estate is affected.

The language of the section confines the authority to appoint a receiver of real estate to cases in which a suit is pending touching the validity of any will of the deceased person by which his real estate is affected. Therefore the Court refused to appoint a receiver where the only litigation pending had reference to the individual appointed executor, but the validity of the will was not questioned (*q*).

If deceased died since the 1st January, 1898, grant to administrator *pendente lite* extends to real estate, unless otherwise directed.

It is stated that if the deceased died on or since the 1st January, 1898, the grant to the administrator *pendente lite* will usually, unless the order otherwise directs, include the real and personal estate, and that it is only when the death occurred before that date, or when a separate appointment of a receiver is ordered, that a formal appointment of a receiver must be obtained to enable the real estate to be dealt with (*r*).

Grant not made without notice to heir-at-law.

Where the administration *pendente lite* is to extend to the real estate, or application is made for the appointment of a receiver of the real estate, the grant will not be made unless the heir-at-law has been served with notice, and is made a party to the application (*s*).

Powers and duties of administrators and receivers *pendente lite.*

An administrator *pendente lite* has all the rights and powers of a general administrator, other than the right of distributing the residue of the personal estate, and is subject to the immediate control of the Court, and acts under its direction (*t*).

A receiver of the real estate pending suit has such power to receive all rents and profits of the real estate, and of letting and managing the same, as the Court may direct (*u*).

Payment of legacy.

The Court has no power, except with consent of all interested parties, to authorise an administrator *pendente lite* to pay an annuity, by way of maintenance, to one of

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(*q*) *Grant* v. *Grant,* (1869) 1 P. & D. 654.

(*r*) Tristram & Coote, p. 345.

(*s*) *Wiggins* v. *Hudson,* (1899) 80 L. T. 296. And see *Purdey* v. *Field,* (1864) 3 S. & T. 576 ; but see *Mathew* v. *Tooze,* (1908) 24 T. L. R. 465.

(*t*) Court of Probate Act, 1857, s. 70.

(*u*) *Ibid.*, s. 71.

the residuary legatees, even though the latter is entitled to a large sum, both under the will and on an intestacy (*x*).

Direction of the Court to be obtained.

Should any dispute or difficulty arise in the administration, the direction of the Court must be obtained. This is done by summons before the judge or a registrar. In an early case (*z*) Sir Cresswell Cresswell said: "I think that the debts should not be paid until they have passed before the registrar. The administrator *pendente lite* is, according to the terms of the decree appointing him, to administer the estate under the direction of the Court."

Payment of debts.

Administrator *pendente lite* ordered to sell property by Court of Chancery,

An administrator *pendente lite* having been appointed by the Court of Probate, a suit was instituted in the Court of Chancery to administer the estate, and an order made in such suit upon the administrator to sell certain property for the purpose of raising a fund to pay the debts due from the deceased's estate. The Court of Probate refused to interfere and to stop the sale so ordered by the Court of Chancery (*a*). Lord Penzance said (*b*): "I cannot interfere with the details of an administrator's proceedings where a suit is pending in the Court of Chancery, and the administrator is acting under the direction of that Court."

Court of Probate will not interfere.

Administrator *pendente lite* appointee of the Court, not mere agent of the parties; but the Probate Division cannot stay proceedings against him in another division.

Administrators *pendente lite* are the appointees of the Court, and are not to be considered merely as the nominees or agents of the several parties on whose recommendation they are selected (*c*). But the fact that an administrator *pendente lite* is an officer of the Court does not confer upon a judge of the Probate Division power to restrain or stay proceedings instituted against him in the Chancery Division (*d*).

(*x*) *Whittle* v. *Keats,* (1866) 35 L. J. P. 54. An administrator *pendente lite* was, under special circumstances, authorised to pay out of the estate a premium to a guarantee society which was willing to enter into a bond on his behalf: *Harver,* (1889) 14 P. D. 81.

(*z*) *Charlton* v. *Hindmarsh,* (1860) 1 S. & T. 519, at p. 520.

(*a*) *Tichborne* v. *Tichborne,* (1870) 2 P. & D. 41.

(*b*) *Ibid.*, at p. 43.

(*c*) *Stanley* v. *Bernes,* (1828) 1 Hagg. at p. 222.

(*d*) *Martin* v. *Toleman,* (1897) 77 L. T. 138, in which case the learned President said: "My first feeling was that an action could not be brought against an administrator *pendente lite* except by leave; but I do not, under present circumstances, propose to express any opinion on that point."

No jurisdiction to appoint administrator or receiver *pendente lite* unless *lis pendens.*

The Court has no jurisdiction to appoint an administrator or receiver *pendente lite* before a writ of summons has been issued. Until a writ has been issued there is no *lis pendens*; a caveat, warning, and appearance thereto do not in themselves constitute a *lis pendens* (*e*).

Duties commence from date of appointment.

Termination.

Where appeal.

If no appeal, duties terminate with decree.

The duties of an administrator and receiver pending suit commence from the date of the order of appointment, and if the decree in the action is appealed from, do not cease until the appeal has been disposed of (*f*). If there is no appeal, their functions terminate with the decree pronouncing in favour of a will with executors, and do not continue till the executors obtain a grant of probate (*g*). It would seem that the case is the same if there be no executors, for the functions of an administrator *pendente lite* terminate with the termination of the *lis*, though he may in some cases be right in retaining moneys received by him as administrator, until his accounts are brought in and passed (*h*).

At termination of *lis*, administrator or receiver *pendente lite* must pay over all he has received.

An administrator *pendente lite* is merely an officer of the Court, and holds the property only till the suit terminates; as soon as it is concluded he must pay over all that he has received in his character of administrator to the persons pronounced by the Court to be entitled (*i*).

Inventory and account.

The provisions with reference to the inventory and account to be filed by administrators and receivers *pendente lite* are dealt with in a later chapter (*k*).

Remuneration.

The Court may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court thinks fit (*l*).

(*e*) *Salter* v. *Salter*, [1896] P. 291.

(*f*) *Taylor* v. *Taylor*, (1881) 6 P. D. 29. Sect. 22 of the Court of Probate Act, 1858, enacts: "All the provisions contained in the 'Court of Probate Act,' [1857], respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the House of Lords under the said Act." And see *Wright* v. *Rogers*, (1870) 2 P. & D. 179.

(*g*) *Wieland* v. *Bird*, [1894] P. 262.

(*h*) *Ibid.*

(*i*) *Graves*, (1828) 1 Hagg. 313, at p. 315.

(*k*) *Post*, p. 663.

(*l*) Court of Probate Act, 1857, s. 72; *vide post*, p. 664.

SUB-SECTION 6.—*Other Administrations limited as to Time.*

Will lost and contents unknown: administration as on intestacy limited until original will found.

Where a will, in existence after the death of the testator, has been accidentally lost and its contents are totally unknown, administration as on intestacy may be granted (on justifying security) to the widow or next of kin, limited until the original will shall be found and brought into the registry (*m*).

Will and codicil, will not forthcoming and contents unknown.

And where there is a will and a codicil thereto, and the will is not forthcoming, and its contents are unknown, the Court, if not satisfied that the will was destroyed by the testator *animo revocandi*, may grant administration with the codicil annexed until the will is found (*n*).

Administration with copy, etc., of will annexed, limited until original will brought into registry.

As has been seen, where a will has been lost accidentally, and is proved never to have been revoked, probate may issue or administration with the will annexed may be granted of the will as contained in a copy or draft, or as proved by the declarations of the witnesses. In such a case the probate or administration with the will annexed is limited until the original will (or, in a case where the contents are proved by oral evidence, until the original will or a copy) shall be brought into the registry (*o*).

Administration limited until will transmitted to England.

Where the deceased, who died in England, informed his relations and friends, a day or two before his death, that he had made his will whilst in India, and that the same was then remaining there, Sir John Nicholl said: "The deceased cannot be sworn to have died intestate, having, according to his own declaration, left a will in India. An administration *pendente lite* is out of the question, as no suit in this Court . . . is pending. Nor can there be an administration as during absence out of the kingdom, or the minority of an executor, or the like, for *non constat* who the executor is, or even whether there be an executor. At the same time, an interval of considerable length must elapse

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(*m*) *Campbell*, (1829) 2 Hagg. 555.

(*n*) *Greig*, (1866) 1 P. & D. 73; *Clements*, [1892] P. 254. The doubt expressed by Sir J. P. Wilde in *Greig* as to whether a codicil can stand independently of the will is overruled. See the cases collected *ante*, p. 191, note (*k*).

(*o*) *Ante*, pp. 278, 304; *post*, p. 558.

before the deceased's will can be forwarded from India." Accordingly, under these circumstances, the Court granted administration to the deceased's agent limited for the purpose of receiving and investing the interest and dividends due, or to become due, on the deceased's stock, etc., and for otherwise protecting the property of the deceased until the last will of the deceased or an authentic copy thereof should be transmitted to this country (*p*).

Probate of part of the testamentary papers, with power reserved to prove others when they arrive in England.

Under special circumstances the Court will grant probate of certain papers forming part of the will of the deceased, the other papers or authentic copies thereof not being in this country at the time, reserving power to the executor to prove the other papers or authentic copies thereof when they arrive, and on an undertaking on his part that he will do so (*q*).

Original will in India: probate of copy thereof incorporated by reference in codicil.

Where the original will was in India, and a testator prepared a copy thereof which he referred to in a codicil, stating that the codicil was a codicil to his last will, "of which I, along with this codicil thereto, execute a copy," probate was granted of the *copy* will as incorporated in the codicil (*r*).

Will in possession of person abroad:

probate of copy limited till original transmitted to England and brought in.

So where the original will is in the possession of a person residing abroad who refuses or neglects to deliver it up, but a copy is in the possession of the executor, probate of the copy may be granted on proof that a better or more authentic copy does not exist in this country, and that it is necessary for the interests of the estate that probate be forthwith granted without waiting the arrival of the original will; the probate is limited until the original will or a more authentic copy shall be brought into and left in the principal probate registry (*s*). Administration with the will annexed similarly limited may be granted under similar circumstances.

Residuary legatee during widowhood.

A residuary legatee appointed during widowhood must take a grant of administration with the will annexed limited during widowhood (*t*).

(*p*) *Metcalfe*, (1822) 1 Add. 343. As to the later development in this case, see *Howell* v. *Metcalfe*, (1824) 2 Add. 348. And see *Brown*, (1899) 80 L. T. 360.

(*q*) *Robarts*, (1873) 3 P. & D. 110.

(*r*) *Mercer*, (1870) 2 P. & D. 91.

(*s*) Tristram & Coote, 97, 98. But see *Brown*, (1899) 80 L. T. 360.

(*t*) *Teed*, (1850) 7 N. C. 384.

SUB-SECTION 7.—*Second or* Cessate *Grants.*

Second or *cessate* grants.

Granted on the expiration of administrations limited as to time.

Oath.

Bond.

When any of these grants of administration limited for a specified time or until the happening of a specified event have been made, the administration ceases and expires upon the efflux of the time or the happening of the event referred to in the original grant, and if the estate has not been fully administered, a fresh grant of administration must be made. These grants, which are known as second or *cessate* grants, are distinguished from grants *de bonis non* as being general in their terms, and applicable to the whole of the deceased's estate, but since April the 1st, 1897, the practice has been to include only the amount of the unadministered estate in stating the amount of the estate in the oath, and the bond is given in respect of the unadministered estate alone (*u*).

Grants to attorney cease on grant made to constituent,

Grants to the attorney of an absentee executor or person entitled to administration, being limited until the constituent shall duly apply for and obtain a grant, do not come to an end automatically on the return of the constituent from abroad, but cease and expire upon a *cessate* grant being made to him (*x*).

or on death of attorney,

Where administration has been granted to the attorney of one of two next of kin, both of whom reside out of the jurisdiction, and the administrator dies leaving the estate partly unadministered, the Court, upon proof of notice to the constituent, will grant administration *de bonis non* to the attorney of the other next of kin (*y*).

or on death of constituent.

The grant to the attorney administrator ceases and expires on the death of his constituent, but the form of the subsequent grant is *de bonis non* (*z*).

Administration *durante minoritate* ceases on minor attaining twenty-one.

Administration *durante minoritate* ceases when the minor attains the age of twenty-one, and *cessate* administration is granted to him if the estate has not been fully administered. Administration during the minority of several infants ceases

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(*u*) *Vide post*, p. 483.

(*x*) *Pipon* v. *Wallis*, (1753) 1 Lee, 402; *Cassidy*, (1882) 4 Hagg. 360. *Vide ante*, p. 367. For form of oath, see App. VII., Form 160.

(*y*) *Barton*, [1898] P. 11. For form of oath, see App. VII., Form 225.

(*z*) *Ante*, p. 367, and cases there cited.

Where several minors.

upon one of them attaining his majority, and a *cessate* grant is made to him (*a*).

Death of guardian.

If the guardian dies during the minority of all the infants, a *cessate* grant is made to a new guardian (*a*).

Death of minors.

If all the minors die under age in the lifetime of the guardian, the administration determines, and a grant *de bonis non* is made (*b*).

Grants for the use and benefit of a lunatic.

The effect of the death or recovery of a lunatic for whose use and benefit administration has been granted, is discussed in an earlier section (*c*).

Administration *pendente lite.*

An administration *pendente lite* ceases on the termination of the *lis*, *i.e.*, when the final decree is pronounced. If there is an appeal, the administration continues until the appeal is disposed of (*d*).

Administration *ad litem.*

Administration limited to substantiate a suit in Chancery is not limited as to time, but as to purpose, and continues until the termination of the suit (*e*).

Administration limited until a will is brought in.

Administration limited until such time as the original will or a copy shall be brought into the registry, or transmitted to this country, ceases on the fulfilment of the contingency (*f*).

Section 2.

ADMINISTRATIONS LIMITED AS TO THE PROPERTY TO WHICH THEY EXTEND.

SUB-SECTION 1.—*Administration limited to a Particular Subject.*

Limited administrations not to be granted unless every person entitled to general grant renounces or consents.

There has already been occasion to refer to the rules of practice (*g*) which lay down that limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, and that no person entitled to a general grant of

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(*a*) *Ante*, pp. 373, 374. For forms of oath, see App. VII., Forms 159, 176, 224.

(*b*) *Ante*, p. 374.

(*c*) *Ante*, pp. 380, 381.

(*d*) *Ante*, p. 388.

(*e*) *Vide post*, p. 407 ; *Brown,* (1872) 2 P. & D. 455.

(*f*) *Howell* v. *Metcalfe,* (1824) 2 Add. 348.

(*g*) Rules 20 and 30, N.-C. B. ; *vide ante*, p. 363 ; and see *Barker*, (1837) 1 Curt. 592.

administration will be permitted to take a limited grant. It is now necessary to consider the application of these rules where administration is granted, not of the whole estate, but limited to some specific part of the property of the deceased.

Person entitled to general grant not permitted to take limited grant.

Grant to assignee of part of the deceased's estate limited to the property to which he is entitled:

Where a party applying for administration has no direct interest in the estate of the deceased, but only as assignee of part of it, he cannot obtain a grant extending to the whole of the deceased's property, but, after citation of all persons entitled to the general grant, a grant of administration limited to the particular fund to which he is entitled may be made to him (*h*). It is not, however, the function of the Court to determine the rights of persons under an assignment; therefore, if a person comes to the Court having no general interest in the estate of the deceased, he must show clearly that he has a right to some particular sum or fund, otherwise a grant limited to that sum or fund will not be made to him; he can only obtain authority to assert his right in another Court (*i*).

only made where the title of assignee is clear;

otherwise he is only entitled to a grant *ad litem*.

Grant to legatee limited to amount of his legacy.

More difficult questions arise in cases where a legatee applies for a grant limited to the amount of his legacy. As has been seen, a specific legatee, on the renunciation or after citation of the executor and residuary legatee, or of the next of kin where the residue is not disposed of, is entitled to a general grant of administration with the will annexed (*k*). If the two rules set out at the head of this sub-section are to be strictly enforced, a limited grant could never be made to a legatee, for by the first rule he must, before applying for a limited grant, cite all persons entitled to a general grant, and when this has been done, the legatee himself becomes entitled to a general grant, and is precluded from taking a limited grant by the second of these two rules. It is necessary, therefore, to inquire how far these two rules admit of modification in practice.

Effect of Rules 29 and 30, N.-C. B.

In practice these rules, in special circumstances, have been

(*h*) *Dodgson,* (1859) 1 S. & T. 259; *Burdett,* (1876) 1 P. D. 427. For forms of citation, see App. VII., Forms 93—99.

(*i*) *Burdon* v. *Morgan,* (1872) 2 P. & D. 371, by means of a grant limited to take proceedings in Chancery; *vide post,* p. 399.

(*k*) *Ante,* p. 354.

Rule 29, N.-C. B., relaxed, and limited grant made to legatee without citation of persons entitled to general grant.

relaxed, first, by allowing a specific legatee to take a limited grant without citing those entitled to the general grant, and secondly, by allowing a specific legatee to take a limited grant after citation of those entitled to the general grant in priority to himself.

Thus in *In the Goods of Watson* (*l*), where an application for administration with the will annexed was made by the sole legatee on an affidavit that the testatrix died possessed of no other property than that specifically described in the will, Sir C. Cresswell said : " You must either cite the next of kin, or you may take administration limited to the property disposed of by the will." And in *In the Goods of Baldwin* (*m*) the Court followed that case, and, without requiring citation of the next of kin, made a limited grant of administration with the will annexed, under sect. 73 of the Court of Probate Act, 1857, to the sole beneficiary named in the will (*n*).

Rule 30, N.-C. B., relaxed, and limited grant made to legatee after citation of persons entitled to general grant.

Again, in *In the Goods of Biou* (*o*) administration with the will annexed, limited to the fund appropriated for the payment of the legacies, was granted to the joint nominees of two charitable institutions, who were legatees under the will. The parties entitled to a general grant had been cited, and had not appeared. The registrar took the objection that, according to the ordinary practice, there should be a general grant, but Sir H. Jenner Fust said : " It is not advisable to encumber these hospitals with a general grant."

But these grants are entirely exceptional, and will not be made unless some very strong reason be given.

But in *In the Goods of Watts* (*p*), where an application for a grant of administration (will) *de bonis non* to a substituted universal legatee, limited to £750 stock, to which she was solely entitled, was made on an affidavit that the parties entitled to a general grant were nine in number, and their citation would entail great expense, Sir C. Cresswell said : " If you were to cite the next of kin, and they were not to appear, you would be entitled to a general *de bonis* grant. It is very inconvenient

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(*l*) (1858) 1 S. & T. 110.

(*m*) [1903] P. 61.

(*n*) And see *Steadman*, (1828) 2 Hagg. 59.

(*o*) (1843) 3 Curt. 739. For form of citation, see App. VII., Form 99.

(*p*) (1860) 1 S. & T. 538.

having divers representatives for different parts of the property"; and when his previous decision in *In the Goods of Watson* (q) was pointed out to him, the learned judge continued: "In that case, if I recollect rightly, the party was miserably poor. These grants are entirely exceptional, and should not be made unless some very strong reason be given." The application was refused.

And, *semble*, the contention that a general grant would render the applicant liable to be harassed by the deceased's creditors is not a sufficient ground.

Again, where the person entitled to the general grant of administration with the will annexed was also appointee by the same will to a fund of £2,000 in settlement, and the general estate of the testatrix, who died insolvent, did not amount to £5, Sir J. P. Wilde refused to make a grant to the appointee limited to the fund appointed, and although it was argued that by taking a general grant the administrator rendered himself liable to be harassed with actions by the testatrix's creditors, the learned judge considered that this ground was not sufficient to justify a departure from the general rule (r).

Grants limited to the property of which deceased was trustee.

No inconvenience, however, can arise from having separate representatives for different parts of the estate when the property in respect of which the limited grant is applied for is property which the deceased held as a trustee (s). And therefore it has always been held, and with reason, that where all persons entitled to represent the deceased have been cited to take out representation to his estate, and have failed to do so, in respect of property which the deceased held as trustee, the Court may grant limited administration to the *cestui que trust*, or to another trustee, or to their nominee, for the purpose either of transferring the trust property into the names of new trustees appointed in the room of the deceased, or otherwise dealing with it for the benefit of those beneficially entitled thereto, or, if the trust property is a term

Administration to *cestui que trust* or another trustee limited to trust property.

(q) (1858) 1 S. & T. 110; *vide ante*, p. 394. But under s. 73 a grant limited to the amount of his legacy has been made to a sole legatee where the will disposes of no other property and appoints no executor: *Baldwin*, [1903] P. 61; and see *post*, p. 561.

(r) *Somerset*, (1867) 1 P. & D. 350; but see *Prothero*, (1876) 3 P. & D. 209.

(s) See *Prothero*, (1876) 3 P. & D. 209.

of years(*t*), for the purpose of making an assignment of the trust term (*u*).

Administration to *cestui que trust* of trust fund limited to that fund.

So the Court will grant letters of administration to a *cestui que trust* of a trust fund, limited to that fund, where the trustee in whose name the fund stands is dead and is without a personal representative, the parties entitled to represent the deceased trustee having first been cited (*y*). Where there are several parties interested in the trust fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trustent* assent to the grant extending to their respective interests (*z*).

Where there are several *cestuis que trustent.*

Administration limited to trust term for the purpose of an assignment.

And where a term of years is vested in the deceased as a trustee, and those who are entitled to represent his estate have been cited and failed to appear (*a*), or his personal representatives are dead, a grant may be made to another trustee, or to the person in whom the beneficial interest in the term is vested, limited to the trust term and for the purpose of making an assignment (*b*). As a point of practice, it is not sufficient, in

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(*t*) Under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30, on the death of a sole trustee or mortgagee, an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, vested in such trustee or mortgagee, devolves to and becomes vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him; and, accordingly, they or he may exercise the like powers as one only of several joint personal representatives, or a single personal representative, or all the personal representatives together, to dispose of and otherwise deal with the same, as if the same were a chattel real. But the personal representative is not by this section created a trustee to perform the trusts of the instrument of trust, although the legal estate is vested in him. When there is no personal representative, a vesting order to assure the legal estate to the trustees of the trust instrument is necessary: *Re Williams' Trusts*, (1887) 36 Ch. D. 231; Encyclopedia of the Laws of England, 2nd ed., tit. Executors, p. 566.

(*u*) *Pegg* v. *Chamberlain,* (1860) 1 S. & T. 527; *Powell,* (1829) 3 Hagg. 195; *Crosley* v. *Archdeacon of Sudbury,* (1815) 3 Hagg. 197; *Fowler* v. *Richards,* (1828) 5 Russ. 39; *Keene,* (1859) 1 S. & T. 265; *Butler,* [1898] P. 9; *Ratcliffe,* [1899] P. 110; *Agnese,* [1900] P. 60; *Berry,* [1907] 2 Ir. R. 209.

(*y*) *Pegg* v. *Chamberlain,* (1860) 1 S. & T. 527; *Ratcliffe,* [1899] P. 110. For forms of citation, see App. VII., Forms 94, 98.

(*z*) *Pegg* v. *Chamberlain,* (1860) 1 S. & T. 527.

(*a*) See *Currey,* (1849) 5 N. C. 54. For form of citation, see App. VII., Form 96.

(*b*) *Powell,* (1829) 3 Hagg. 195; *Fowler* v. *Richards,* (1828) 5 Russ. 39; *Crosley* v. *Archdeacon of Sudbury,* (1815) 3 Hagg. 197; *Butler,* [1898] P. 9.

How title to trust term is to be made out.

order to make out the title to a term of years, with a view to obtaining administration limited to that trust term, to refer to deeds, deducing such title in affidavits; the deeds themselves must be brought into the registry (*c*).

And wherever there is a legal estate outstanding, the beneficial owner is entitled to a grant limited to that estate, if all persons entitled to represent the deceased renounce or are cited.

And, generally, it may be stated that whenever there is a legal interest outstanding, the beneficial owner or his representative is entitled to a grant limited to the property the legal estate in which was vested in the deceased at the time of his death, provided that all persons entitled to represent the deceased have been cited or renounce (*d*). In *In the Goods of Agnese* (*d*) A., being legal owner of certain shares, handed the certificates to C., who received the dividends as beneficial owner until he became bankrupt, after which the trustee in C.'s bankruptcy received such dividends as became payable. A. died, never having divested himself of the legal estate in the shares; and administration to his estate was granted to B., who died leaving part of the estate unadministered. Upon the application of the trustee in C.'s bankruptcy, the Court granted administration to him in respect of the unadministered estate of A., limited to the shares above mentioned.

Administration to trustee in bankruptcy of beneficial owner limited to the legal interest in certain shares.

Practice as to annexing the will to this species of grant.

With regard to these administrations limited to trust property, when the deceased died testate it was not the practice of the Prerogative Court to annex the will to the grant, as the representation in no way interfered with the administration of the deceased's own estate (*e*); and in a leading text-book on probate practice it is stated that this rule is followed by the Probate Division (*f*). But in *In the Goods of Butler* (*g*), in granting, for the purpose of a conveyance, administration limited to certain leasehold property of a testator, a question arose as to whether or not the will should be annexed to the

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(*c*) *Keene,* (1859) 1 S. & T. 265.

(*d*) *Agnese,* [1900] P. 60. Form of citation, App. VII., Form 95.

(*e*) *Fenton,* (1825) 3 Add. at p. 36, n.: "It is not the present practice of the office to annex the will to an administration limited to assign a satisfied term of years."

(*f*) Tristram & Coote, p. 125; but see *Crosley* v. *Archdeacon of Sudbury,* (1815) 3 Hagg. at p. 202, where Sir John Nicholl said: "A practice prevailed, I understand, for two years of granting such administration without the will, or even a copy of it. *Why it was discontinued I do not know.*"

(*g*) [1898] P. 9.

grant. Sir F. H. Jeune, said: "I think that the will had better be annexed to the grant. There will be a grant of administration with the will annexed, limited to the particular leaseholds, to the applicant or his nominee."

SUB-SECTION 2.—*Administration limited to Property in a Particular Place.*

Where a will is limited to property abroad.

Where a deceased left a will expressly limited to her property abroad, which was proved by the executors in the foreign Court, but died intestate as to her property in this country, administration was granted in this country to her next of kin of so much of the deceased's estate as was situate in this country and not dealt with by her will (*h*).

SUB-SECTION 3.—*Other Administrations limited to Part of the Property of the Deceased.*

Will of a married woman, a foreigner, invalid by the law of her domicil, but valid as the execution of a power.

It has been seen in an earlier chapter that the practice of granting probate of the will of a married woman limited to the property the testatrix had a right to dispose of, and had disposed of, by her will, has since the Married Women's Property Act, 1882, been discontinued (*i*). It was there pointed out that there are still cases where the Court refuses to make a general grant in respect of the wills of married women, *e.g.*, where the married woman, a foreigner, has made a will valid as the exercise of a power of appointment, but not executed in accordance with the law of the testatrix's domicil (*k*). In such a case administration with the will annexed is granted to the appointee limited to such property as the deceased had power to dispose of, and did dispose of by virtue of that power (*l*). These cases furnish a further instance of grants limited to part of the property of the deceased.

Will revoked by marriage, except as exercise of a power:

Again, where, under sect. 18 of the Wills Act, 1837, a will is revoked by marriage, but that will exercises a power of appointment of the excepted class, administration with the

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(*h*) *Mann*, [1891] P. 293; Godolph., Part II., c. 30, s. 5; Bac. Abr. Exors. C. 4; Toller, 106.

(*i*) *Ante*, p. 93.

(*k*) *Ante*, p. 94.

(*l*) *Ante*, p. 94, note (*d*).

will annexed is granted to the appointee limited to the property so appointed (*m*).

limited grant to appointee.

And where the will of a seaman or marine, though validly executed under the Wills Act, 1837, is invalid to pass "naval assets" for want of compliance with the requirements of the statute 28 & 29 Vict. c. 72, administration as on intestacy is granted to the widow or next of kin of the testator, limited to the "naval assets" which do not pass under the will (*n*).

Administration limited to naval assets.

Where a married woman has been judicially separated from her husband, or has obtained a protection order under 20 & 21 Vict. c. 85, or a separation order under the Summary Jurisdiction (Married Women) Act, 1895, and afterwards dies intestate during the lifetime of her husband, the Court may grant administration to her next of kin (or heir-at-law where there is real property) limited to such property as she has acquired or become possessed of since the separation (*o*).

Administration to next of kin of a married woman, limited to property acquired by her after judicial separation, protection or separation order;

And if the husband agrees by deed of separation that if the wife shall die intestate her next of kin shall be entitled to her property, upon her death intestate during his lifetime, administration limited to the property to which they are entitled by virtue of the deed, may be granted to her next of kin (*p*).

or by virtue of a deed of separation.

Section 3.

ADMINISTRATIONS LIMITED AS TO THE PURPOSES FOR WHICH THEY ARE GRANTED.

SUB-SECTION 1.—*Administration limited to Proceedings in Chancery.*

When it is necessary for a representative of a deceased testator or intestate to be made a party to an action pending in the Chancery Division (*q*), and all persons entitled to represent the deceased refuse to take representation to his estate, the

Administration *ad litem*.

(*m*) *Russell,* (1890) 15 P. D. 111. *Vide ante,* p. 163.

(*n*) *Vide post,* p. 454.

(*o*) *Vide ante,* p. 314, where the cases are collected.

(*p*) *Ante,* p. 315, where the cases are collected.

(*q*) A workman, injured in the course of his employment, had made no request for compensation before the death, intestate, of his employer. The next of kin of the employer refused to take out administration. The Court gave liberty to a nominee of the workman to take out a grant under sect. 78 of the Probate (Ireland) Act, 1857, for the purpose only of substantiating proceedings to be taken by the workman for the recovery of compensation: *Byrne,* (1910) 44 Ir. L. T. 98.

Court may grant administration to the nominee of a party to the proposed or pending action "limited for the purpose only of his becoming and being made a party to a certain cause or suit now depending, or about to be instituted, in the Chancery Division of this Court, between ———, Plaintiffs, and ———, Defendants, and to supply, substantiate, and confirm the proceedings already had, or which may be hereafter had, in the said cause or suit, or in any other matter, cause, or suit which may be commenced in the same or any other Division of the Court between the aforesaid or any other parties, touching the matters which are the subjects of the said cause or suit, and until a final order or decree shall be made therein, and the same carried into execution, and the execution thereof fully completed" (*q*).

Now seldom necessary.

R. S. C., Order XVI., r. 46.

Such grants are now seldom necessary, for by R. S. C., Order XVI., r. 46, if in any cause or matter or other proceeding it appears that any deceased person who was interested in the matter in question has no legal personal representative, the Court has power to appoint some person to represent his estate, or may proceed in the absence of any person representing his estate (*r*).

Administration *ad litem* granted after citation of persons entitled to a general grant on mere averment of interest.

The Probate Division has full power to grant administration so limited (*s*); the grant is made only after citation of the persons entitled to the general grant, or on their renunciation (*t*). The Court will make such grants on a mere averment of interest, without in any way considering the merits of the case (*u*).

Again, if a person comes before the Probate Court having no general interest in the estate of the deceased, if he shows clearly that he has a right to some particular sum or fund, the Court may grant to him administration limited to that particular sum or fund. But if his right be doubtful, the

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(*q*) *Clough* v. *Dixon*, (1841) 10 Sim. 564; *Davis* v. *Chanter*, (1848) 2 Phillips, 545; *Maclean* v. *Dawson*, (1859) 1 S. & T. at p. 431. See App. VII., Form 252.

(*r*) As to the limitations of this rule, see note thereon in the Annual Practice.

(*s*) *Davis* v. *Chanter*, (1846) 2 Phillips, at p. 549; *Maclean* v. *Dawson*, (1859) 1 S. & T. at p. 431.

(*t*) See *Dodgson*, (1859) 1 S. & T. 259; *Williams*, (1870) 2 P. & D. 81; but see *Burdon* v. *Morgan*, (1872) 2 P. & D. at p. 374. For form of citation, see App. VII., Form 97.

(*u*) *Maclean* v. *Dawson*, (1859) 1 S. & T. 425.

Court will only give him authority to assert it in another Court, by granting to him letters of administration limited for the purpose of taking proceedings in Chancery, and (in a proper case) of receiving whatever that Court may hold him entitled to receive (*x*).

Powers of administrator *ad litem.*

The grant of letters of administration *ad litem* makes the grantee complete representative of the estate to the extent of the authority which the letters purport to confer, and a decree obtained against such a grantee is therefore binding upon any one who may afterwards take out general administration to the estate (*y*).

Not entitled to receive the estate unless expressly authorised.

Under a similar form of letters of administration to that quoted above, it was held that the administrator *ad litem* had only authority to carry on the Chancery suit, and had no right to receive the fruits of it. Accordingly Sir C. Cresswell revoked the grant, and made a fresh grant to the same person, limited to carry on the Chancery suit and to receive the subject-matter of the suit (*z*).

SUB-SECTION 2.—*Administration* ad colligendum bona.

Administration *ad colligendum bona,* when granted by the Prerogative Court.

It is said that the Ordinary, in default of persons entitled to the administration, might grant letters *ad colligendum bona defuncti* and thereby take the goods of the deceased into his own hands, and thus assume the office of executor or administrator in respect to the collecting of them; but the grantee of such letters could not sell the effects without making himself executor *de son tort.* The Ordinary had no such authority, and therefore he could not confer it on another (*a*).

Powers of the Probate Division

These same powers, and powers more extensive than these, are exercised by the Probate Division; and the Court is

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(*x*) *Burdon* v. *Morgan,* (1872) 2 P. & D. 371, at p. 375. See *Dodgson,* (1859) 1 S. & T. 259; *Woolley* v. *Gordon,* (1820) 3 Phill. 314.

(*y*) *Davis* v. *Chanter,* (1846) 2 Phillips, 545, reversing the decision of the Vice-Chancellor at first instance (14 Sim. 212) requiring a general administration to be taken out. The Court never makes a general grant to a mere nominee of parties to a Chancery suit: *ibid.* And see *Dodgson,* (1859) 1 S. & T. at p. 260. For cases where an administrator *ad litem* does not sufficiently represent the deceased, see *Dowdeswell* v. *Dowdeswell,* (1878) 9 Ch. D. 294; *Shipton* v. *Rawlins,* (1851) 4 De G. & Sm. 477.

(*z*) *Dodgson,* (1859) 1 S. & T. 259; *Burdon* v. *Morgan,* (1872) 2 P. & D. 371, at p. 375.

(*a*) Toller, 107.

to grant administration *ad colligendum bona* to any fit person,

limited to such acts and purposes as are necessary for the preservation of the estate.

Power of sale.

accustomed, where the persons entitled to the grant are abroad (*b*) or are unknown (*c*), or refuse to come forward and accept the administration (*d*), and where the delay that must ensue before a general administration can be secured is likely to imperil the property, to grant a limited administration *ad colligendum bona* to any fit person applying for a grant, *e.g.*, a creditor (*e*) or friend (*f*) of the deceased, limited, that is to say, to the collection of the property of the deceased, to giving discharges for his debts on payment of the same, and for such further purposes for the protection and preservation of the property as the Court may direct. The administrator so constituted may be given such powers as the Court may deem fit, including, where it is for the benefit of the absent or unknown next of kin, power to dispose of the property or of any portion of it by sale (*g*).

Justification of sureties required.

In such cases, the Court will not, except in the most exceptional circumstances, dispense with justification of sureties (*h*).

Powers of the Court under s. 73 of the Court of Probate Act, 1857.

The special powers of the Court under sect. 73 of the Court of Probate Act have, to a great extent, rendered applications

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(*b*) *Gudolle,* (1835) cit. 3 S. & T. at p. 22. See *Wyckoff,* (1862) 3 S. & T. 20, where, on the authority of *Aspinall* v. *The Queen's Proctor,* (1839) 2 Curt. 241, it was suggested that the Crown ought to interpose for the protection of the property of foreigners who die in England *in itinere,* until the parties entitled come forward; *Bolton,* [1899] P. 186; *Stewart,* (1869) 1 P. & D. 727.

(*c*) *Clarkington,* (1861) 2 S. & T. 380; *Ashley,* (1890) 15 P. D. 120, where the grant was made on an affidavit by the applicant's solicitor that there was no known relations; *Schwerdtfeger,* (1876) 1 P. D. 424. And see *Roberts,* [1898] P. 149, where the heir-at-law was unknown.

(*d*) *Radnall,* (1824) 2 Add. 232. In *Brown,* (1899) 80 L. T. 360, where a will was in the possession of a foreign Court, the Court here refused to admit a notarial copy to probate, but made a grant *ad colligendum* to the applicant until the original will, or an exemplification of it, could be brought in.

(*e*) *Clarkington,* (1861) 2 S. & T. 380; *Stewart,* (1869) 1 P. & D. 727; *Ashley,* (1890) 15 P. D. 120; *Schwerdtfeger,* (1876) 1 P. D. 424; *Malkin,* (1894) 70 L. T. 811.

(*f*) *Radnall,* (1824) 2 Add. 233; *Gudolle,* (1835) cit. 3 S. & T. at p. 22; *Bolton,* [1899] P. 186. In *Roberts,* [1898] P. 149, administration *ad colligendum bona* was granted to the administratrix of the husband till the heir-at-law could be cited.

(*g*) *Schwerdtfeger,* (1876) 1 P. D. 425; *Bolton,* [1899] P. 186. The Court usually directs the balance to be paid into the registry until a general grant shall issue: *Stewart,* (1869) 1 P. & D. 727. For form of oath of administrator *ad colligendum,* see App. VII., Form 222; for form of order: App. VII., Form 253.

(*h*) *Howell* v. *Metcalfe,* (1824) 2 Add. 348.

for administration *ad colligendum bona* unnecessary in modern practice (*i*).

SUB-SECTION 3.—*Administration* durante absentia.

Administration *durante absentia.*

In a previous sub-section (*k*), it has been seen that where the executor or person entitled to administration is out of the jurisdiction, the Court has power, before probate or administration has been granted, to grant administration to his attorney for his use and benefit, limited until such time as he shall himself apply for and obtain a grant. There is, in addition, a form of limited administration, known as administration *durante absentia*, which may be granted either where the executor or person entitled to administration is abroad at the death of the deceased, or where the executor or administrator has gone abroad after the death of the deceased, and *after* probate or administration has been granted to him.

Contrasted with administration to attorney.

Power of the Ecclesiastical Courts to grant administration *durante absentia*—

If the executor or the person entitled to a grant of administration were out of the jurisdiction, the Ecclesiastical Court always claimed the power, *before* probate had been granted or letters of administration had issued, to grant a limited administration *durante absentia* to another—limited, that is to say, until such time as the grant should be made to the executor or person entitled (*l*). For, it was said, this kind of administration stood upon the same reason as an administration during the minority of an executor, namely, that there should be one to manage the estate of the testator till the person appointed by him was able (*m*).

did not extend to cases where the executor or administrator had gone abroad *after* probate or administration granted.

But where probate had once been granted, or letters of administration had issued, the Ecclesiastical Courts did not consider themselves authorised to grant a new administration on the ground that the executor or administrator had gone abroad *after* taking a grant (*n*). The consequence of this

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(*i*) See, for example, *Suarez,* [1897] P. 82; *Bateman,* (1871) 2 P. & D. 242. *Vide post,* pp. 412 *et seq.*

(*k*) *Ante,* pp. 364 *et seq.*

(*l*) Bac. Abr. Exors. (G.). See *Suarez,* [1897] P. 82; *Cholwill,* (1866) 1 P. & D. 192.

(*m*) 4 Burn, E. L. 375, 9th ed.; *Clare* v. *Hedges,* (1692) 1 Lutw. 342; S.C. cited in *Walker* v. *Woollaston,* (1731) 2 P. Wms. at p. 585; *Slaughter* v. *May,* (1705) 1 Salk. 42.

(*n*) *Per* Lord Alvanley, C.J., in *Taynton* v. *Hannay,* (1802) 3 Bos. & Pull. 26, at p. 30.

defect in their authority was that there was no person existing within the jurisdiction duly authorised to appear or to collect the debts, as there was in those cases where administration was granted *durante absentia* of an executor who had never proved the will (*o*).

Statute 38 Geo. III., c. 87, extended the jurisdiction of the Court to cases where the executor had gone abroad after probate obtained.

It was to remedy this inconvenience that the statute 38 Geo. III., c. 87, was passed, whereby it is enacted : "That at the expiration of twelve calendar months from the death of any testator (*p*), if the executors (*q*) or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of his Majesty's Courts of law and equity (*r*), it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on the affidavit (*s*) hereinafter mentioned, to grant such special administration as hereinafter is also mentioned" (*t*).

By the Court of Probate Act, 1857, s. 74, the statute is to apply to cases where administration has been granted, and the administrator is out of the jurisdiction.

It will be observed that the statute applies only to the case of executors or an executor resident out of the jurisdiction, and not to the similar absence of an administrator (*u*). But by the Court of Probate Act, 1857 (*v*), the provisions of the Act are extended to apply in like manner to all cases where letters of administration have been granted, and the person to

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(*o*) *Taynton* v. *Hannay,* (1802) 2 Bos. & Pull. at p. 30.

(*p*) The executor must be residing out of the jurisdiction at the time the application is made, but such application may be made at or *at any time after* the expiration of twelve months from testator's death : *Ruddy,* (1872) 2 P. & D. 330.

(*q*) The statute has been held to apply to an executor's executor who is residing out of the jurisdiction : *Grant,* (1876) 1 P. D. 435.

(*r*) *I.e.*, out of the reach of the process of the English Courts ; *e.g.*, an executor residing in Scotland : *Hannay* v. *Taynton,* (1800) 2 Add. 505 ; *Jouet,* (1825) 2 Add. 504. But in the case of the estate of a deceased person who died domiciled within the jurisdiction, a writ of summons can now (R. S. C., Order XI., r. 1) by order of a judge be served on an executor out of the jurisdiction.

(*s*) The place of this affidavit is now supplied by the administrator's oath.

(*t*) The section concludes, "which administration shall be written or printed upon paper or parchment stamped only with one five shilling stamp, and shall pay no further or other duty to his Majesty, his heirs or successors." This provision as to the stamp was repealed by 44 Geo. III., c. 98. It is also considered that the ordinary estate duty, if not already paid, would be payable.

(*u*) See *Harrison,* (1850) 2 Rob. 184.

(*v*) 20 & 21 Vict. c. 77, s. 74.

whom such administration shall have been granted shall be out of the jurisdiction of his Majesty's Courts of law and equity.

Under 38 Geo. III., c. 87, grants of administration in such cases were limited for the purpose of exhibiting a bill in equity.

The form of the special letters of administration mentioned in sect. 1 of the statute 38 Geo. III., c. 87, is set out in sect. 3 of the statute: they are limited for the purpose of proceedings in equity, and the affidavit to be sworn by the applicant contains an averment that the deponent is desirous of exhibiting a bill in equity for the purpose of being paid his demand out of the assets of the testator. It was accordingly held that the statute authorised a grant only in cases where there were proceedings in equity.

But by Court of Probate Act, 1858, s. 18, administration *durante absentia* may be granted, whether it be or be not intended to institute proceedings in Chancery.

But the Court of Probate Act, 1858, s. 18 (*x*), extends the provisions of 38 Geo. III., c. 87, and of the Court of Probate Act, 1857, "to all executors and administrators residing out of the jurisdiction of her Majesty's Courts of law and equity, *whether it be or be not intended to institute proceedings in the Court of Chancery*, and to all grants made before and subsequently to the passing of the last-mentioned Act"; and provides: "It shall be lawful to alter the language of the grant prescribed by the first-named statute so as to make it apply to grants made in the Court of Probate under the said last-mentioned Act."

Cases in which administration *durante absentia* has been granted.

Under these statutes grants have been made to the personal representative of a legatee, limited to deal with the sum set apart to meet the legacy (*z*); to the father and guardian of infant legatees, limited to their interest in the unadministered estate (*a*); to a residuary legatee, where it was uncertain whether there was any residue, to enable the applicant to become a party to a suit in Chancery, and to receive such amount as the Court might find to belong to such legatee (*b*); to a creditor, where the executor of an executor was out of the jurisdiction, limited to receive a specific fund (*c*); to the assignee in bankruptcy of the administrator, limited to the fund to which the assignee was entitled (*d*); to the nominees of the assignees of

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(*x*) 21 & 22 Vict. c. 95, s. 18.
(*z*) *Collier*, (1862) 2 S. & T. 444.
(*a*) *Hampson*, (1865) 1 P. & D. 1.
(*b*) *Ruddy*, (1872) 2 P. & D. 330.
(*c*) *Grant*, (1876) 1 P. D. 435.
(*d*) *Hammond*, (1881) 6 P. D. 104.

the residuary legatee (*e*). Where the original administrator of a deceased intestate could not be found and was believed to be dead, the Court, by virtue of sect. 74 of the Court of Probate Act, 1857, granted administration *de bonis non* to one of the next of kin upon her affidavit that she believed the original administrator, her brother, to be dead or beyond the seas (*f*).

Effect of return of absentee.

When administration during the absence of an executor or next of kin is granted *before* probate or administration is taken out by him, such administration ceases on his return to this country (*g*). But with regard to administration *durante absentia* granted under the statutes, *after* probate or administration granted, it has been held that if the administrator is not appointed for a limited time, but for a particular purpose, the administration does not cease until that purpose is fulfilled (*h*). For the same reason, it was held that where an administrator had been appointed under the statute 38 Geo. III., and the original executor or administrator died, the administration *durante absentia* did not thereby come to an end, nor the authority of the administrator determine (*i*).

Effect of death of absentee.

Section 4.

GRANTS *CÆTERORUM* AND "SAVE AND EXCEPT."

Grants *cæterorum*.

Whenever any of the limited administrations before referred to, which are limited to part only of the estate of the deceased, or are limited to some particular purpose, have been granted, the persons entitled to the general grant of administration may take out administration *cæterorum*—*i.e.*, administration of that part of the estate not included in the limited grant (*k*).

So where the assignee of part of the deceased's estate has obtained a grant limited to the particular fund to which he

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(*e*) *Campion*, [1900] P. 13.

(*f*) *Saker*, [1909] P. 233.

(*g*) Wms. on Exors., 407. See *Clare* v. *Hedges*, (1692) cit. *Walker* v. *Woollaston*, (1731) 2 P. Wms. at p. 585.

(*h*) *Rainsford* v. *Taynton*, (1802) 7 Ves. at p. 466.

(*i*) *Taynton* v. *Hannay*, (1802) 3 Bos. & Pull. 26, 34.

(*k*) *Harris* v. *Milburn*, (1828) 2 Hagg. 62; *Brown*, (1872) 2 P. & D. 455.

To supplement grants limited to a particular part of the deceased's estate.

is entitled, or a legatee has obtained a grant limited to the amount of his legacy, or a trustee or *cestui que trust* has obtained administration limited to property of which the deceased was a trustee, those who are entitled to a general grant, whether on intestacy or with the will annexed, may take administration *cæterorum*—administration, that is, of the rest of the deceased's estate.

Grant *cæterorum* to husband of married woman.

Under the old practice, where the will of a married woman was admitted to probate, the grant, as already stated, was limited to the property the testatrix had a right to dispose of and had disposed of by her will; and in every case the husband was entitled to administration *cæterorum* (*l*). This practice has now been discontinued, and the probate of the will of a married woman is general in form, except in a few exceptional cases mentioned in an earlier section (*m*). In the exceptional cases where the grant is limited, the husband is entitled to an administration *cæterorum* (*n*).

To supplement administration *ad litem.*

Where administration limited to proceedings in Chancery has been granted, and the persons entitled to a general grant apply, a grant *cæterorum* is made to them; the limited grant will not be revoked and a general grant made (*o*).

Not required to supplement a grant *ad colligendum bona.*

A grant *ad colligendum bona*, besides being limited to particular purposes, is usually limited until such time as a general grant shall be made, and therefore determines on a general grant being made to those entitled thereto.

Grants "save and except."

Grants "save and except."—Where a married woman had made a will, and probate thereof had been granted limited to such property as she had the right to dispose of and had disposed of by her will, the husband, as has just been stated, was entitled to administration *cæterorum*. If however, he applied for a grant before the will had been proved, the form of the grant was administration "save and except the property which the testatrix had the right to dispose of and had disposed of by her will."

To husband of married woman testatrix.

(*l*) *Vide ante*, p. 93. And see *Reay*, (1862) 4 S. & T. 215.

(*m*) *Ante*, pp. 93, 398, 399.

(*n*) *Vide ante*, pp. 94, 398, 399; and see *Leman*, [1898] P. 215; *Donovan*, (1898) 78 L. T. 567.

(*o*) *Harris* v. *Milburn*, (1828) 2 Hagg. 62; *Brown*, (1872) 2 P. & D. 455.

And in the exceptional cases, referred to in an earlier section, where a limited grant is still made in respect of the will of a married woman, the husband, if he is the first to apply, may take a grant "save and except" (*p*).

Grant "save and except" naval assets.

Again, if the will of a seaman or marine is invalid to transfer "naval assets" under 28 & 29 Vict. c. 72, probate of the will or administration with the will annexed is granted "save and except" the naval assets (*q*).

(*p*) *Leman,* [1898] P. 215; *Donovan,* (1898) 78 L. T. 567.
(*q*) *Beavan,* (1865) 1 P. & D. 15. *Vide post,* p. 453.

CHAPTER XI.

GRANTS OF ADMINISTRATION UNDER THE SEVENTY-THIRD SECTION OF THE COURT OF PROBATE ACT.

Power of the Court in granting administration enlarged by s. 73.

THE powers of the Court with reference to grants of administration both on intestacy and with the will annexed have been greatly enlarged by sect. 73 of the Court of Probate Act, 1857 (*a*).

Provisions of that section.

That section provides: "Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator, upon his giving such security (if any) as the Court shall direct; and every such administration may be limited as the Court shall think fit."

(*a*) 20 & 21 Vict. c. 77, s. 73.

Under what circumstances grants under s. 73 may be made.

To enable the Court to have recourse to the powers conferred upon it by this section, the following conditions must be satisfied:—

(1) The deceased must have died intestate, *or*

The will of the deceased must contain no appointment of an executor who is willing and competent to act, *or*

The executor appointed by the will of the deceased must be resident out of the United Kingdom, *and*

(2) The estate must be insolvent, *or*

There must be special circumstances which render it necessary or convenient for the Court to depart from the ordinary practice with reference to grants of administration.

When these circumstances coincide there is no limit to the discretion of the Court to grant administration to such person as the Court shall think fit.

It is proposed to consider in detail the cases in which the Court has had recourse to the special powers conferred upon it by the section.

(1) Executor passed over.

(1) The Court has, under sect. 73, passed over an executor appointed by the will of the testator, who was unwilling or incompetent to act, or resident out of the United Kingdom at the time of the death of the testator. In some cases a grant has been made under this section without requiring the absent executor to be cited.

The Court has power to pass over an executor only where he is resident out of this country, and special circumstances render him unfitted to act.

In *Samson* (*b*) Sir J. Hannen said: "The seventy-third section does not give me power to refuse probate to any executor appointed by a testator by reason of the badness of his character, but only in certain cases, namely, to such persons as shall be at the time of the testator's death out of the United Kingdom, and therefore beyond the jurisdiction of this Court; and there must be superadded a necessity or convenience that such person should not be allowed to act. The necessity or convenience is further defined as that arising from the insolvency of the estate or other special circumstances. This provision gives me power, where the executor is resident out of the country, if I think he is, by reason of his position there or his bad character, unfitted to act, to exercise a discretion and refuse him the appointment. But it is plain that I must not, merely because the executor is out of the country at the time of the testator's death, lightly set him aside on the ground that some accusation has been brought against him, although in some cases I may do so."

Executor absent from kingdom at

The deceased executed a will in which she appointed an executor who subsequently became bankrupt, and before the death of the testator had left this

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(*b*) (1873) 3 P. & D. 48, at pp. 49, 50.

country for Australia. The property being small, on the consent of the next of kin, the Court granted administration (will) to *one of the parties interested under the will* (*c*).

death of testator.

The testator by his will appointed two executors, of whom, at the time of the testator's death, one was dead and the other was in Brazil, the date of his return being uncertain. The Court, upon proof that there was urgent need of immediate representation, made a grant to the *guardian of the universal legatee* under the will (*d*).

A testator by his will nominated two executors, both of whom at the time of his death were resident out of the United Kingdom. The will contained a paragraph requesting H. B. R., *the partner of one of the executors*, to act for him in the event of his absence. It appeared that there was urgent necessity for the appointment of an administrator to the estate of the deceased, and the Court granted administration (will) to H. B. R. until such time as one or other of the executors should come in and take a grant of probate (*e*).

Where an executor, before the death of the testator, left the country under an assumed name, having sold all his effects, and there was reason to believe that he did not intend to return, administration (will) was granted to the *sole beneficiary under the will*, without requiring the executor to be cited (*f*).

Executor leaves kingdom after death of testator.

In the preceding cases the executor had left the kingdom before the death of the testator, but in *Massey* (*g*), where the executor took some steps towards obtaining probate and *afterwards* departed from the country in embarrassed circumstances, leaving no address, and apparently without any intention of returning, the Court, without requiring notice to be given to the executor, granted administration (will) to *one of the residuary legatees*, all parties interested under the will consenting. In this case the estate was of substantial value.

Executor not competent to act.

Where the sole executrix and universal legatee was a lunatic, and a creditor of the deceased testator applied for a grant of administration (will) and had served a citation on the guardian of the lunatic, who refused to allow personal service on the lunatic, the Court granted administration to the *creditor* without requiring the lunatic to be personally served (*h*).

A testatrix, by her will, appointed her daughter, who was under age, sole executrix, and certain persons *trustees for the daughter* until she should be of legal age. In a subsequent part of the will she directed the trustees, in case her daughter should die before coming of age, to divide the residue in a particular way. The Court refused to grant probate of the will to the trustees as executors according to its tenor, but granted administration (will) to them under sect. 73, by reason that the testatrix had not appointed by her will an executor competent to take probate thereof (*i*).

Executor cannot be ascertained.

Where an aged testator gave instructions that William George, of 4, Finsbury Square, watchmaker, should be his executor, and on the death of the testator it appeared that neither he nor his family knew any one of that name, and that no such person could be found or heard of at that address, the Court granted administration with the will annexed to *one of the residuary legatees*, all parties interested consenting, there being no appointment of an executor willing or competent to take probate (*k*).

(*c*) *Cooper*, (1869) 2 P. & D. 21 ; *Wohlgemuth*, (1910) 54 Sol. Jo. 460.

(*d*) *Batterbee*, (1889) 14 P. D. 39.

(*e*) *Taylor*, [1892] P. 90.

(*f*) *Crawshay*, [1893] P. 108.

(*g*) [1899] P. 270.

(*h*) *Atherton*, [1892] P. 104.

(*i*) *Stewart*, (1875) 3 P. & D. 244.

(*k*) *Sawtell*, (1862) 2 S. & T. 448.

(2) Grant to person entitled by the law of the deceased's domicil.

(2) The Court will grant administration under this section to the person entrusted with the administration of the estate by the Court having jurisdiction at the place of the domicil of the deceased at the time of his death (*l*).

(3) Persons primarily entitled to the grant passed over without citation.

(3) The Court has, in granting administration under this section, passed over persons entitled to the grant in priority to the applicant; and, in granting administration as aforesaid, has dispensed with notice to or citation of the person so entitled in priority.

But a case of pressing necessity must be made out.

But administration will not be granted under this section to a person not by law entitled to a grant, when the person who is entitled has not been cited, unless the Court is satisfied that a case of pressing necessity has been made out. A general statement upon affidavit that "it is necessary for the preservation of the personal estate and effects of the deceased that administration should be granted" will not satisfy the Court (*m*).

Husband passed over.

Husband passed over.—Upon an application for administration with the will annexed, it appeared that the testatrix had been deserted by her husband fifteen years prior to her death, and had not heard of or from him after such desertion. On being satisfied that there was urgent need of an immediate grant, the Court granted administration to a son of the testatrix who was under her will *trustee of substantially the whole of her estate*, without requiring the husband to be cited (*n*).

A wife died intestate. Her husband survived her, and she left a son by a former marriage, a minor, who was her heir-at-law. On it appearing that the husband was a dissipated man, who was mismanaging a public-house which was part of the estate, the Court granted administration to *the guardian of the infant heir-at-law* (*o*).

Widow passed over.

Widow passed over.—The widow may be passed over for good cause shown, and the grant made to the next of kin, without the necessity of recourse to the special powers conferred on the Court by sect. 73 (*p*).

In *Middleton* (*q*) the Court refused to grant administration under sect. 73 to the next of kin, passing over the widow, who was alleged to have contracted a bigamous marriage, and was resident in America. Butt, J., said: "I do not

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(*l*) *Costnahan,* (1866) 1 P. & D. 183; *Earl,* (1867) 1 P. & D. 450. See *Moffatt,* [1900] P. 152; and *vide ante,* p. 23. Such a grant may now issue on a registrar's order. *Vide post,* p. 486.

(*m*) *Cooke,* (1859) 1 S. & T. 267.

(*n*) *Shoosmith,* [1894] P. 23.

(*o*) *Ardern,* [1898] P. 147. A husband has also been passed over under the section in *Turner,* (1886) 12 P. D. 18. *Vide ante,* pp. 314, 315.

(*p*) *Vide ante,* pp. 319, 320.

(*q*) (1888) 14 P. D. 23.

think such a grant has ever been made without giving the person against whom such charges are alleged the opportunity of answering them. . . . I am afraid I must require you to cite the widow" (*r*).

Where the widow of a deceased intestate, who died in India, was resident in India and had received her share of the intestate's estate, and the rest had been transmitted to England for distribution amongst the parties entitled thereto, the Court refused to make a general grant to the *personal representative of a deceased next of kin*, but granted administration to him under sect. 73 limited to the property transmitted to England (*s*).

Next of kin, etc., passed over.

Next of kin, etc., passed over.—An intestate left four children of whom one was of full age, but was abroad, and the other three were minors. An immediate grant of administration being necessary, the Court, under sect. 73, without notice to the major next of kin, granted administration to the *guardian of the minors* for their use and benefit, limited until one of the children should apply for a grant (*t*).

But the Court refused to grant administration (will) to the *guardian elected by two residuary legatees*, who were minors, without notice to the other two residuary legatees, both of whom were abroad and one of whom was of full age, when no special circumstances were put forward which convinced the Court that such a grant was necessary or convenient (*u*).

Where the sole executrix and universal legatee had died in the testator's lifetime, and the next of kin was abroad and could not be found, the Court, on being satisfied that an immediate representation was necessary, granted administration (will) to the *guardian of persons entitled in distribution*, who were minors, without citing the next of kin (*x*).

The Court, without requiring citation of the next of kin, to whom repeated applications had been made to take some steps in obtaining a grant, made a grant of administration with the will annexed to the sole beneficiary under the will (no executor or residuary legatee) limited to the property specifically given to her by the will (*a*).

Where a widow died without having taken administration to her husband's estate, which was of the net value of under £500, and, as he died without issue, belonged exclusively to her under sect. 1 of the Intestates' Estates Act, 1890, the Court granted administration to the *executor of the widow*, passing over the next of kin of the husband without citation (*b*).

The value of the whole property of an intestate, who died leaving a widow, but no issue, did not exceed £500. The widow was a pauper lunatic, and her father renounced his right to take a grant on her behalf. Administration for the use and benefit of the widow was granted under sect. 73 to a person nominated by the guardians of the union to whom she was indebted for her maintenance, without citing the next of kin of the intestate, who had no interest in his estate (*c*).

(*r*) See, as to the cases in which the widow *may* be passed over without citation, *ante*, pp. 319, 320.

(*s*) *Hughes*, (1873) 3 P. & D. 140; cf. *Walker* v. *Carless*, (1758) 2 Lee, 560; and *vide ante*, p. 319.

(*t*) *Burgess*, (1863) 4 S. & T. 188; cf. *Cartright's Case*, (1678) 1 Freem. 258, *ante*, p. 369.

(*u*) *Cooke*, (1859) 1 S. & T. 267.

(*x*) *See* (1879) 4 P. D. 86.

(*a*) *Baldwin*, [1903] P. 61. *Vide ante*, p. 394.

(*b*) *Bryant*, [1896] P. 159; *Green*, (1901) 84 L. T. 61. Cf., *Rees* v. *Cart*, (1718) 2 Hagg. App. 161.

(*c*) *Everley*, [1892] P. 50. *Vide post*, p. 415.

Where the estate was small, and the *executor of one of the next of kin* applied for a grant, the Court relaxed the general rule requiring a person directly entitled in distribution to be cited before a grant is made to the representatives of the next of kin, and granted administration under sect. 73 to the applicant, without requiring the citation of a person entitled in distribution, who was abroad and had not been heard of for many years (*d*).

Grants to creditors.

Grants to Creditors.—In *Hawke* v. *Wedderburne* (*g*) Sir J. P. Wilde said: "Where there is any doubt as to the fact of the insolvency of the estate, the Court clearly ought not to pass over the persons entitled under the statute in case of intestacy or under a will, although the words of the seventy-third section may perhaps be wide enough to give it power to do so." In that case the learned judge refused to grant administration to a creditor, since the insolvency of the estate was disputed, and granted administration with the will annexed to the widow of the testator, who was the *residuary legatee* under his will.

In *Farrands* (*h*) administration was granted to a creditor under this section, passing over the *next of kin* of the intestate, who was a woman in a low position in life, and quite unfitted to carry on or wind up the business of the deceased, who had been a paper manufacturer. The insolvency of the estate was disputed, and Sir James Hannen said: "What should be the character of the special circumstances which may guide the Court in exercising its discretion? It would seem that insolvency of the estate is only given as an example, and I cannot conceive any reason for setting aside a next of kin on the ground of the insolvency of the estate, which would not be peculiarly applicable when the person entitled to the grant appears to be entirely unfitted for the office."

The Court granted administration with the will annexed to a creditor, passing over the *sole executrix and residuary legatee*, who was a lunatic, and, since the creditor had served a citation upon the guardian of the lunatic, did not require the lunatic to be personally served (*i*).

In granting administration of a small estate to a creditor, the Court dispensed with the citation of the *next of kin*, on proof that they had received notice of the application (*k*).

(4) Administration *durante minoritate* without citing next of kin of minor.

(4) The Court has, under sect. 73, granted administration *durante minoritate* without requiring the next of kin, or the person primarily entitled to the grant, to be cited.

The Court granted administration *durante minoritate* to the guardian elected by minors for their use and benefit, without requiring renunciation or citation of their next of kin, where the property was very small, and the next of kin were in Australia, and their interest was infinitesimal (*l*).

Where, of the next of kin of the minor, one had renounced and the other was

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(*d*) *Kinchella*, [1894] P. 264. Cf. *Middleton*, (1828) 2 Hagg. 60; *Carr*, (1867) 1 P. & D. 291.

(*g*) (1868) 1 P. & D. 594.

(*h*) (1876) 1 P. D. 439.

(*i*) *Atherton*, [1892] P. 104.

(*k*) *Teece*, [1896] P. 6; see *Heerman*, [1910] P. 357, and *vide post*, p. 469.

(*l*) *Hagger*, (1863) 3 S. & T. 65; *Webb*, (1888) 13 P. D. 71.

resident out of the jurisdiction, a grant was made to the *paternal aunt* of the minor, whom she had elected as her guardian (*m*).

(5) Administration for the use and benefit of a lunatic.

(5) The Court has, under sect. 73, made grants of administration for the use and benefit of a lunatic passing over the person primarily entitled to that species of grant.

The sole next of kin of the deceased intestate was a person "not lawfully detained as a lunatic and not found a lunatic by inquisition, but through mental infirmity arising from age incapable of managing her affairs," within the meaning of sub-sect. 1 (d) of sect. 116 of the Lunacy Act, 1890. Her estate was administered by a person appointed to act with the powers of a committee under sub-sect. 2 of such section. The Court made a general grant of administration, under sect. 73, to the person thus appointed, for the benefit of the next of kin (*n*).

When the sole next of kin of a deceased intestate was a lunatic without any committee, administration for her use and benefit was granted to her *stepmother* without citing her next of kin (*o*).

The Court has, under this section, granted administration for the use and benefit of a lunatic to persons to whom the lunatic was indebted for his maintenance and support, and who were thus *creditors of the lunatic* (*p*).

Thus where the next of kin of the deceased was a pauper lunatic, and had for some years been maintained at the charge of the Hamlet of Mile End Old Town, there having been appointed no committee of her person or estate, the Court granted administration to the clerk of the Guardians of the Poor of the Hamlet for the use and benefit of the lunatic limited to the period of her lunacy (*q*).

Grants were made under similar circumstances to the nominee of the institution to which the lunatic was indebted for his or her maintenance and support in *Eccles* (*r*) and *Hockin* (*s*). And in *Everley* (*t*), where the value of the whole property of an intestate, who died leaving a widow, but no issue, did not exceed £500, and the widow was a pauper lunatic, a grant was made to the nominee of the union to which the widow was indebted for her maintenance, without citing the next of kin of the intestate, who had no interest, for the whole estate, by virtue of the Intestates' Estates Act, 1890, belonged absolutely to the widow.

(*m*) *Batterbee,* (1889) 14 P. D. 39. And see further, as to grants of administration *durante minoritate* under this section, *Burgess,* (1863) 4 S. & T. 188; *Lilley,* (1897) 76 L. T. 164; *See,* (1879) 4 P. D. 86; *Webb,* (1888) 13 P. D. 71; and *ante,* pp. 412, 413.

(*n*) *Leese,* [1894] P. 160. See *Cooke,* [1895] P. 68; and *vide ante,* p. 375.

(*o*) *Burrell,* (1858) 1 S. & T. 64. And see further, as to this species of grant, *Slumbers,* (1865) 4 S. & T. 32; *Hastings,* (1878) 4 P. D. 73; *Everley,* [1892] P. 50; *Hockin,* (1895) 73 L. T. 316; *Findlay,* (1863) 3 S. & T. 265; *Eccles,* (1889) 15 P. D. 1.

(*p*) As to the position of such persons as creditors, see *Windeatt* v. *Sharland,* (1871) 2 P. & D. 217.

(*q*) *Findlay,* (1863) 3 S. & T. 265.

(*r*) (1889) 15 P. D. 1.

(*s*) (1895) 73 L. T. 316. For form of nomination, see App. VII., Form 44.

(*t*) [1892] P. 50.

Where the only next of kin of an intestate were of very advanced age, and were unwilling to take upon themselves the burden of administration, administration was, at their desire, granted to their son for their use and benefit (*u*).

(6) Administration for the use and benefit of next of kin out of the kingdom.

(6) Where there was urgent necessity for an immediate grant, and the person entitled thereto was out of the kingdom, the Court has granted administration under sect. 73 for his use and benefit until such time as the grant could be made to the person entitled or his lawful attorney.

Thus when, at the death of the intestate, his son and only next of kin was in New Zealand, the Court, on being satisfied that an immediate representation was necessary for the preservation of the personal estate, granted administration to the *sister of the intestate* for the use and benefit of the next of kin, limited until such time as the grant should be made to the next of kin or his lawful attorney (*v*).

Grants were made in the same form and under similar circumstances in *Jones* (*x*) to the *father-in-law* of the absentee next of kin, and in *Suarez* (*y*) to a *member of a firm of accountants* in whose hands the books of the intestate's firm had been placed.

But the Court must be satisfied, before making a grant of this description, that an immediate grant is necessary for the preservation of the property. Thus in *White* (*z*), where there was no evidence to this effect, a grant was refused.

Where the person solely entitled to a grant was abroad, and it was not known where she was or when she would return, and there was a sum of money payable to the estate of the deceased, the Court granted administration to a person whom the absentee had duly authorised by power of attorney to manage her property in England, although the terms of the power were not wide enough to admit of the attorney taking out administration on behalf of the absentee (*a*).

When the sole next of kin, who was resident abroad, had written a letter to his cousin in England giving the latter directions to deal with the estate of the deceased in a certain way, the Court made a grant to the cousin limited to carrying into effect the directions contained in the letter (*b*).

(7) Administration where an uncertainty exists as to whether person entitled to a grant in priority to applicant, survived the testator or intestate:

(7) The Court has made grants under this section:

(i.) In cases where the date of the death of the intestate or testator could not precisely be ascertained, and it was uncertain whether he died before or after the person who, if the survivor, would have been entitled to a grant.

(ii.) Without requiring citation of the person primarily

(*u*) *Roberts,* (1858) 1 S. & T. 64; but *vide post,* pp. 417—419.

(*v*) *Cholwill,* (1866) 1 P. & D. 192.

(*x*) (1858) 1 S. & T. 13.

(*y*) [1897] P. 82.

(*z*) (1862) 2 S. & T. 457.

(*a*) *Escot,* (1858) 4 S. & T. 186.

(*b*) *Drinkwater,* (1862) 2 S. & T. 611.

entitled to a grant, who had not been heard of for a long period, and might reasonably be presumed to be dead.

or whether person primarily entitled to a grant is still alive.

Thus in *Peck* (c) A., a bachelor, had gone to Australia, and had not been heard of for seven years. His father died intestate at about two years and five months before the expiration of the seven years, and no personal representation had been taken out to the father. It being uncertain whether A. had died before or after his father, the Court granted administration to A.'s estate, under sect. 73, to his sister as one of his next of kin. This case was followed in *Harling* (d), where a person was presumed to have died intestate in or since 1863, and his father died in 1866 also intestate. A grant was made to the brother of the presumed deceased, no representative of the father's estate having been appointed.

Again, in *Smith* (e), where the father of the deceased had not been heard of for seven years, the Court, although refusing to presume that the father had died at any given period within the seven years, granted under sect. 73 administration of the effects of the son, who had died four years after the father had last been heard of, to the mother, without requiring her first to take out administration to the father.

In *Callicot* (f), the intestate died in 1898. His son, who, if alive, would have been entitled to administration as sole next of kin, had left the country in 1872, and not been heard of since. The Court allowed a grandson of the intestate to take a grant under sect. 73 without requiring the missing next of kin to be cited by advertisements, but, following *Reed* (g), required the applicant to swear that he believed himself to be the sole next of kin of the intestate.

A grant was made under similar circumstances, and with the same requirement, in *Byrne* (i) and in *Chapman* (k), and the headnote of the latter case contains the following passage: "Where the special circumstances justify the conclusion that the person who would be entitled in priority to the applicant may be reasonably presumed to be dead, the Court should grant administration to the applicant upon his swearing that he believes himself to be the next of kin of the deceased" (l).

But each case of this nature must be decided on its own merits, and where the facts upon which the conclusion is sought to be based are not sufficiently strong, citation of the person who, if alive, would have the prior right to administration will be required in accordance with the general rule (m).

(8) The Court has, but only in very exceptional cases, granted administration under this section to mere nominees of the persons entitled to a grant.

(8) Grants to mere nominees of the persons entitled.

(c) (1860) 2 S. & T. 506.

(d) [1900] P. 59.

(e) (1861) 2 S. & T. 508.

(f) [1899] P. 189.

(g) (1874) 29 L. T. 932.

(i) (1901) 84 L. T. 570.

(k) [1903] P. 192.

(l) See *Love,* (1901) 17 T. L. R. 721; *Bowden,* (1905) 21 T. L. R. 13. But see *Jackson,* (1902) 87 L. T. 747, where doubt was cast on the case of *Reed,* (1874) 29 L. T. 932, and the report of that case was said to be inaccurate.

(m) *Pridham,* (1889) 61 L. T. 302; *Harper,* [1899] P. 59.

In *Roberts* (*n*), where the sole next of kin, on account of their great age, were desirous that the administration should be granted to their son, who had no interest in the estate, a grant was made under sect. 73 to the son, for their use and benefit. And in *Farrell* v. *Brownbill* (*o*) the Court decided to grant administration, with the consent of all the parties interested in the property of the deceased, to their nominee, who took no interest in the property himself (*p*).

But in *Bullar* (*q*) Lord Penzance refused to grant administration to the nominee of universal legatees, who were anxious that administration should be granted to him, and indicated that the right course would be for the persons entitled to take a grant and then to appoint the nominee to be their attorney. And in *Richardson* (*r*) the same learned judge refused to lay down the rule that whenever the parties interested like to consent that some person nominated by them shall take the grant, the Court will make the grant to such nominee under sect. 73, and where an application of that nature rested simply upon the ground that the parties interested consented to it, he rejected the application.

Consent of all persons interested not sufficient to justify grant to mere nominee.

In *Teague* v. *Wharton* (*s*), where the next of kin were unable to agree amongst themselves which of them should take administration of the deceased's estate, and were all willing that such administration should be granted to a nominee who had no interest therein, Lord Penzance again held that the mere fact of their agreement was not a special circumstance to justify the Court in making a grant to the nominee under sect. 73.

In *Hale* (*t*) the will of the deceased had been set aside by reason of an informality in the execution, and the widow and children had entered into an arrangement by deed to carry out the provisions of the will, in spite of its informality. They were desirous that administration should, under sect. 73, be granted to the executors named in the will, as the nominees of the persons entitled, though the executors had no interest in the estate. Sir J. Hannen refused to make such a grant, and followed the rule laid down by Lord Penzance that the mere fact that the persons who would be entitled to administration desire that some one else should be appointed administrator, does not constitute such a special state of circumstances as to justify a grant under sect. 73 (*u*).

In *Brotherton* (*x*), where under an intestacy, the sole next of kin, a daughter of the deceased, renounced, and the husband of a deceased next of kin also renounced and expressly consented to a grant being made to the brother of the deceased, Gorell Barnes, J., held that no special circumstances had been shown to bring the case within sect. 73 (*y*).

But where, in addition to the consent of all persons interested, there are

But where, besides the fact that the persons entitled to administration desire that some one else should be appointed administrator, there are in addition other special circumstances—such, for instance, as an agreement to terminate litigation—which render such a grant convenient and desirable, it would seem that a

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(*n*) (1858) 1 S. & T. 64.

(*o*) (1864) 3 S. & T. 467.

(*p*) But see Lord Penzance's remarks on this case in *Teague* v. *Wharton*, (1871) 2 P. & D. 360.

(*q*) (1870) 22 L. T. 140.

(*r*) (1871) 2 P. & D. 244.

(*s*) (1871) 2 P. & D. 360.

(*t*) (1874) 3 P. & D. 207.

(*u*) See also *Prosser*, (1876) 11 Ir. Rep. Eq. 37.

(*x*) [1901] P. 139.

(*y*) But see *Keane*, (1828) 1 Hagg. 692; *Johnson*, (1862) 2 S. & T. 595; *Trigg*, [1901] P. 42; and *vide ante*, p. 332.

grant may be made under this section to a mere nominee without interest in the estate.

other special circumstances, administration may be granted to a mere nominee of the parties.

Thus in *Hopkins* (*z*), a doubt having arisen as to the legitimacy of the sole next of kin, a deed was entered into by the parties interested for the distribution of the deceased's estate amongst themselves in certain proportions, and it was a part of the arrangement that administration should be applied for by a person who had under no circumstances an interest in the estate. It was held that there were special circumstances in the case which authorised the Court to grant administration to the nominee under sect. 73. A similar grant was made in *Minshull* (*a*), where the facts were very similar to those in the preceding case, to the next of kin whose legitimacy was disputed.

Again, where all parties interested in the estate of the deceased had entered into a compromise, with a view to putting an end to all further disputes and litigation, upon the basis that B., a stranger in blood, who had been employed by the deceased in auditing his accounts, should apply for and obtain a grant of administration with the will annexed, the Court, upon his application, and subject to the consents of all persons interested in the estate, made a grant to him under sect. 73. Gorell Barnes, J., said that he made the grant "partly on account of the litigation, which it is desired by all persons interested in the estate to put an end to, and partly also on account of the position of the applicant in relation to the estate" (*b*).

(9) Joint grants.

(9) Under special circumstances the Court has made joint grants of administration under sect. 73 to the widow and a person entitled in distribution (not next of kin); and to one of the next of kin and a person entitled in distribution.

In *Browning* (*c*) an application was made for a joint grant of administration to the widow of the intestate and a nephew of the intestate, one of the persons entitled in distribution to his effects. The application was made as a result of an arrangement between the parties, and in consideration of the withdrawal of a caveat. Sir C. Cresswell said: "I am of opinion that the statute 21 Hen. VIII., c. 5, precludes me from joining the nephew, who is only a person entitled in distribution, and not next of kin, in the grant. Neither can I make the grant under sect. 73."

In *Grundy* (*d*), however, a joint grant of administration *de bonis non* was made under sect. 73 to a next of kin and to a person entitled in distribution, the next of kin consenting to the grant, there being special circumstances rendering such joint grant convenient. The learned judge (Sir J. P. Wilde), referring to the question whether the Court was bound to follow the strict rule laid down by the statute 21 Hen. VIII., c. 5, said: "I am of opinion that the terms of sect. 73 are wide enough to admit of its application to the present case."

In *Richardson* (*e*) the same learned judge held that the consent of all the persons interested is not in itself a sufficient ground for making a joint grant under the section to two of the persons interested in distribution and to a nominee of the next of kin, where there are not in addition special circumstances which justify an exceptional grant.

(*z*) (1875) 3 P. & D. 235.

(*a*) (1889) 14 P. D. 151.

(*b*) *Potter* v. *Potter*, [1899] P. 265.

(*c*) (1861) 2 S. & T. 634.

(*d*) (1868) 1 P. & D. 459.

(*e*) (1871) 2 P. & D. 244.

In *Clayton* (*f*), under special circumstances, the estate being insolvent, the Court made a joint grant to a residuary and to a specific legatee at the desire of the creditors of the estate.

In *Walsh* (*g*), a widow died intestate leaving a brother, her sole next of kin, and nine nephews and nieces, who, with the brother, were the only persons entitled in distribution. The Court made a joint grant to the brother and one of the nephews under sect. 73 without requiring the consent of three of the nephews and nieces, who were in Australia.

(10) Grant to creditor, etc., of the person primarily entitled to the grant.

(10) Under special circumstances the Court has, under this section, granted administration to persons who had no direct interest in the estate of the deceased, but had a claim against the estate of the person primarily entitled to a grant.

Where the father of an intestate, who was her sole next of kin, had died without taking out a grant to her estate, the Court granted administration to a creditor of the father, on his personal representative filing a renunciation and consent (*h*).

Where the husband of a deceased intestate had left the country, and had been adjudicated bankrupt before he had administered to his wife's estate, the Court refused to regard his right to administer as "property divisible among his creditors" under sect. 44 of the Bankruptcy Act, 1883, but under the circumstances made a grant of administration to the wife's estate to the husband's trustee in bankruptcy, without requiring the husband to be cited (*i*).

(11) Grant to person whose claim cannot be put on any recognised footing.

(11) Under very special circumstances the Court made a grant under sect. 73 to a person whose claim to administration could not be put "on any footing recognised by the practice of the Court."

An intestate died owing debts exceeding in value his personal estate and effects. Gifts of money had been made to him during his life by C., a stranger in blood, and after his death his debts were voluntarily paid by C. There were only two next of kin and persons entitled in distribution, and of these one renounced and the other was a lunatic, and his next of kin renounced on his behalf. There was thus no one willing or able to take a grant as next of kin or person entitled in distribution or creditor. Under the peculiar circumstances the Court granted administration of the intestate's estate to C. under sect. 73, although the applicant could not put his right to the grant on any footing recognised by the practice of the Court (*k*).

(*f*) (1886) 11 P. D. 76.

(*g*) [1892] P. 230.

(*h*) *Fraser*, (1867) 1 P. & D. 327 ; *Wensley*, (1882) 7 P. D. 13.

(*i*) *Turner*, (1886) 12 P. D. 18 ; *vide ante*, p. 336.

(*k*) *Bateman*, (1871) 2 P. & D. 242.

CHAPTER XII.

PRESUMPTIVE PROOF OF DEATH—SURVIVORSHIP.

Section 1.

PRESUMPTIVE PROOF OF DEATH.

Executor or administrator required to depose to the exact day of the death of testator or intestate.

An executor or administrator is required, in his oath to lead the grant of probate or letters of administration, not only to swear to the death of the testator or intestate, but to specify the day, the month, and the year in which he died. If this cannot be done, and the fact of the death is certain (*a*), a registrar, upon satisfactory explanation why a more precise date cannot be assigned, may allow the grant to issue.

The Court may allow the form of oath to be varied, and grant probate, etc., to the applicant on his swearing that the deceased died on or since a given date.

But if it be uncertain whether the testator or supposed intestate be dead or alive, the evidence must be laid before the Court on motion (*b*); and the judge, if satisfied that the facts proved raise a reasonable presumption that the testator or intestate is no longer alive, will grant the applicant leave to swear that he died on or since the last date on which he is known to have been alive. Upon such oath being taken the grant of probate or letters of administration will issue to the applicant.

The Court does not find as a fact that the testator or intestate is dead.

Some misunderstanding may arise from the fact that applications of this character are frequently called "motions to presume death." It should therefore be observed that the Court does not find as a fact that the presumed deceased is dead, but merely finds that sufficient evidence has been laid before it to justify its granting to the applicant leave to swear the death (*c*). Its order therefore does not dispense with the necessity of proving the fact of death, if the applicant relies upon that fact in any other Court (*d*).

(*a*) *E.g.*, in a case where the deceased is found drowned, but it is impossible to ascertain on what day he met his death.

(*b*) A registrar can deal with these applications under certain circumstances; *vide post*, p. 555.

(*c*) *Jackson*, (1902) 87 L. T. 747.

(*d*) See *Thompson* v. *Donaldson*, (1799) 3 Esp. N. P. C. 63; *Moons* v. *De Bernales*, (1826) 1 Russ. Chan. Cas. 301; but see *French* v. *French*, (1755) Dick. 268. For this reason, sequestrators or alleged creditors have no *locus standi* to resist a motion to depose to the death: *Fowler*, the *Times* newspaper, April 7th, 1908.

The Court will not presume that the death took place on a given date,

The Court gives leave to the applicant to swear the death as occurring on or since the last date upon which the presumed deceased was known to be alive. It will not allow the applicant to swear the death as occurring on a particular day—*e.g.*, at the end of seven years since the presumed deceased was last heard of (*e*). If important issues turn upon the question whether the presumed deceased was alive or dead at a given date subsequent to that upon which he was last known to be alive, that is a matter which must be a subject for proof, usually in another Court; it will not be determined on an application of this character, where the only question which arises is the fact of death.

or presume the death of any person other than the person in respect of whose estate the grant is to be made.

The Court will not presume the death of any person other than the person whose estate is to be administered. Therefore where a married woman died intestate, and her next of kin applied for administration, the Court refused to presume the death of her husband (*f*).

The Court is guided by the circumstances of each individual case.

In granting applications of this character, the Court is guided by the circumstances of each individual case. If the evidence is clear and cogent, the death of a testator or intestate may be presumed within a few months of his disappearance (*g*); on the other hand, where a person has disappeared and has not since been heard of, but good reasons can be assigned for his failure to communicate with his relatives and friends, the lapse of seven, twenty, or even fifty years might not justify the Court in allowing administration to issue in respect of his estate.

Court must be satisfied that

In each case the Court must be satisfied that every inquiry

(*e*) *How*, (1858) 1 S. & T. 53, unless, of course, there is absolute proof of the testator or intestate's death on a given day, in which case an application for leave to vary the oath would be unnecessary.

(*f*) *Clark*, (1889) 15 P. D. 10. The presumed deceased must be cited by advertisement, or a grant may be made under s. 73; *vide ante*, p. 417.

(*g*) In *Matthews*, [1898] P. 17, the Court, on proof of sufficient inquiries, allowed the death of a testator to be sworn three years after his disappearance; but in *Bishop*, (1859) 1 S. & T. 303, an application to presume the death of one of the crew of a vessel, of which nothing had been heard for five months, was held to be premature, and the learned judge said that inquiries ought to have been made as to whether any survivors had come to shore. Three months later the motion was renewed, and successfully. As to inquiry for survivors, see *Smyth*, (1858) 28 L. J. P. 1.

has been made, and that every clue which might throw any light upon the question before it, has been followed up and investigated, and that the results have been placed before the Court.

all inquiries possible have been made.

Necessity for advertisements.

It is usual to require that advertisements requesting information as to the present whereabouts of the presumed deceased, if alive, or as to the place and date of his death, should be published in newspapers circulating in those parts of the world where they are most likely to come to his knowledge, if alive (*h*); but advertisements in newspapers for persons supposed to be dead may be dispensed with when their history is known, and traced to within a short period of their being last heard of, *e.g.*, in a case where the presumed deceased is proved to have embarked upon a vessel, which has never come to port (*i*).

Presumption arising from seven years' absence without communication to friends and relations.

The circumstance that a person has not been heard of for seven years by those who, if he had been alive, would naturally have heard from him, raises at common law a presumption that he is no longer alive; and the Probate Division will give full weight to that presumption (*k*), unless the circumstances of the case are such as to account for his not being heard of, without assuming his death. There is, however, nothing to prevent the Court from inferring the death of a person in a proper case, although seven years have not elapsed since he was last heard of (*l*). But in *In the Goods of Winstone* (*m*), where application was made in 1898 for leave to presume the death of a person who had not been heard of since 1891, the Court, in giving leave to depose to the death, directed that the grant of administration should, except in so far as it might be required in the Chancery Division, remain in the registry until the expiration of seven years from the date of the disappearance.

(*h*) So the Court insisted upon advertisements even though the estate was small, and the presumed deceased had not been heard of for twenty-five years: *Robertson*, [1896] P. 8.

(*i*) *Norris*, (1858) 1 S. & T. 6; *Main*, (1858) 1 S. & T. 11.

(*k*) *How*, (1858) 1 S. & T. at p. 54. But the Court will not act on the presumption alone. It requires proper inquiries in addition: *Robertson*, [1896] P. 8.

(*l*) *Matthews*, [1898] P. 17.

(*m*) [1898] P. 143.

No presumption that testator or intestate died at beginning or end of the seven years.

The fact that seven years have elapsed since a person was last heard of, though fair ground for presuming that he is dead, is no ground for presuming that he died at the beginning or end of the seven years (*n*). The fact of his being alive or dead at any particular period during the seven years must be proved by the party relying on it (*o*).

Effect of presumption of death by foreign Court.

Where a foreign Court of competent jurisdiction has made a grant on the presumption of the death of a testator or intestate, the grant may be accepted by the Probate Division as sufficient proof of the death, without requiring it to be proved by independent evidence (*p*).

Section 2.

SURVIVORSHIP.

Closely connected with the subject of presumptive proof of death is that of survivorship, which is here considered as affecting the right to a grant of letters of administration.

Questions of survivorship arise where persons perish in the same calamity.

Questions of survivorship arise when two persons perish in the same calamity, such as a wreck, a massacre (*q*), a battle, an earthquake, or some other disaster (*r*). Where such persons are related, as husband and wife, father and son, or testator and residuary legatee, and no direct proof can be obtained that either survived the other, the question arises: On what principles will the Court of Probate act in granting letters of administration to their respective estates?

By the Roman law questions of survivorship determined by presumptions.

By the Roman law questions of survivorship in such cases were determined by presumptions (*s*), to which recourse might be had in the total absence of direct evidence. These presumptions were founded on the probabilities of survivorship arising

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(*n*) *How*, (1858) 1 S. & T. at p. 54.

(*o*) *Doe* v. *Nepean*, (1833) 5 Barn. & Adol. 86.

(*p*) *Spenceley*, [1892] P. 255.

(*q*) See *Wainwright*, (1858) 1 S. & T. 257; *Ewart*, (1859) 1 S. & T. 259; *Benyon*, [1901] P. 141.

(*r*) The question arose where two persons were hanged at the same moment: *Broughton* v. *Randall*, (1596) Cro. Eliz. 503; where husband and wife were swept into the sea by one wave: *Underwood* v. *Wing*, (1854) 19 Beav. 459; where mistress and servant were murdered at the same time: see *Doe* v. *Nepean*, (1833) 5 Barn. & Adol. at p. 92.

(*s*) See *Taylor* v. *Diplock*, (1815) 2 Phil. at p. 265.

from the sex of the two persons and their relative ages and strength. Thus it was said that if a mother and her son, who was under the age of puberty, perished in a shipwreck, it is to be presumed that the son died first (*t*), but if the son was over the age of puberty, that he survived the mother (*u*).

Presumptions of a similar character are recognised in several foreign systems of jurisprudence, and there are not wanting certain early cases in which the English Court has assumed their existence as a part of the English law (*x*).

In English law there is no presumption arising from age or sex as to survivorship among persons who perish in the same calamity.

But in *Wing* v. *Angrave* (*y*) it was laid down by the House of Lords that in English law there is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause (*z*), nor is there any presumption of law that all died at the same time (*a*). The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the Court will treat it as a matter incapable

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(*t*) Dig., lib. 34, tit. 5, 23.

(*u*) *Ibid.*, tit. 22.

(*x*) *E.g.*, *Sillick* v. *Booth,* (1841) 1 Y. & C. C. 117, where the Vice-Chancellor said: "Two brothers having perished by shipwreck under circumstances of which there is no evidence, . . . by the law of England evidence of health, strength, age, or other circumstances, may be given, tending to the judicial presumption that one party survived the other." So in *Colvin* v. *The King's Proctor,* (1827) 1 Hagg. 92, where husband and wife were drowned by the upsetting of a boat, the Court said that the *primâ facie* presumption of law was that the husband survived. And see *Selwyn,* (1831) 3 Hagg. at p. 749.

(*y*) (1860) 8 H. L. C. 183.

(*z*) "According to our jurisprudence," said Lord Campbell, L.C., in that case (8 H. L. C. at p. 197), "where the question arises, which of two individuals, who perished in the same calamity, survived, there is no inference of law from age or sex, and the question is to be decided upon the circumstances proved in each particular case. . . . The question is always from first to last a pure question of fact, the *onus probandi* lying on the party who asserts the affirmative." See also *Doe* v. *Nepean,* (1833) 5 Barn. & Adol. at p. 91. So in *Underwood* v. *Wing,* (1854) 19 Beav. 459, where husband and wife were swept into the sea by the same wave, and were never afterwards seen, the Court, rejecting all speculations and presumptions arising from the relative strength, sex, etc., of the parties, held that there was no evidence to show which was the survivor.

(*a*) This view was suggested in *Wright* v. *Sarmuda,* (1793) 2 Phill. at p. 277, n. See also *Taylor* v. *Diplock,* (1815) 2 Phill. at p. 280. In *Wing* v. *Angrave,* (1860) 8 H. L. C. 183, at p. 199, Campbell, L.C., said: "There is no foundation for the doctrine . . . [that] where it is left doubtful which of two individuals died first, there is a presumption of law, *juris et de jure,* that they died at the same point of time."

Burden of proof on person who asserts affirmative.

of being determined. The burden of proof lies on the person who asserts the affirmative (*b*). The practical result of these rules, considered with reference to grants of letters of administration to the estates of persons who perish in the same catastrophe, will appear from the following illustrations :—

If testator and residuary legatee perish in same calamity, and there is no evidence as to survivorship, administration (will) is granted to testator's next of kin.

(1) Where a testator and his residuary legatee perish in the same calamity, and there is a total absence of evidence as to survivorship, if there is no executor, administration with his will annexed will be granted to the testator's next of kin, to the exclusion of the representatives of the residuary legatee (*c*).

The reason for this procedure was stated by Sir John Nicholl in *Taylor* v. *Diplock* (*d*), a case in which a husband appointed his wife executrix and residuary legatee, and both husband and wife were drowned in the same wreck. " The question is," said the learned judge, " whether the administration is to be granted to the next of kin of the testator or to the next of kin of the residuary legatee. The administration prayed is . . . to the husband. *Primâ facie* it belongs to the next of kin of the party deceased ; to him and to his property the wife or next of kin has a right to administer under the Statute of Administrations. But it is laid down in the books, that in case of there being a residuary legatee, the statute does not apply. The next of kin has the *primâ facie* right ; but if there is a residuary legatee he would be entitled. There

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(*b*) *Wing* v. *Angrave,* (1860) 8 H. L. C. 183, at p. 198.

(*c*) The rule was first laid down in *Taylor* v. *Diplock,* (1815) 2 Phill. 261 ; and was recognised in *Selwyn,* (1831) 3 Hagg. 748, where, however, probate of the husband's will was granted to executors substituted for the wife " in the event of her dying in his lifetime." See also *Colvin* v. *The King's Proctor,* (1827) 1 Hagg. 92. In *Alston,* [1892] P. 142, a husband and wife executed identical wills, each appointing the other universal legatee and sole executor, and substituting executors in case of the other dying first. They started together upon a voyage in the same ship, which was supposed to have been lost at sea with all on board. There was no evidence that either of them survived the other. Administration with the husband's will annexed was granted to his next of kin, and administration with the will of the wife annexed, to her next of kin. See also *Carmichael,* (1863) 4 S. & T. 224 ; *Murray,* (1837) 1 Curt. 596 ; *Shilling,* (1856) Dea. & Sw. 183.

(*d*) (1815) 2 Phill. 261, at pp. 268 *et seq.*

is no such person here, for the party claims derivatively from the residuary legatee: the burden of proof lies on him to show that the deceased left a residuary legatee; the next of kin of the residuary legatee is to show that the wife survived her husband. . . . Upon the whole I am not satisfied that proof is adduced that the wife survived, . . . and therefore I shall grant the administration to the representatives of the husband. I am not deciding that the husband survived the wife."

If husband and wife perish in same disaster, and there is no evidence as to survivorship, administration to the husband is granted to his next of kin, administration to the wife to her next of kin.

(2) If a husband and wife perish in the same disaster, and there is no evidence that either survived the other, administration to the estate of the intestate husband will be granted to his next of kin, and administration to the estate of the intestate wife will be granted to her next of kin, to the exclusion of the next of kin of the husband (*e*).

Form of oath.

In both cases the Court may allow the applicant to vary the usual form of oath, and to swear (i.) that the deceased and his wife died on (*or* on or since) a date stated and that, after due inquiries, there was no reason to believe that the wife survived the husband, or (ii.) that the deceased and her husband died on (*or* on or since) a date stated and that, after due inquiries, there was no reason to believe that the husband survived the wife (*f*), as the case may require.

"The mode in which this Court deals with . . . [cases in which the husband and wife have perished by drowning or some other disaster about the same period, and it is impossible to know which of them survived the other]," said Lord Penzance in *In the Goods of Nicholls* (*g*), "is to say that those whose claim is founded on the survivorship of either, must prove it affirmatively. Thus, if the next of kin of the husband claim administration to the wife on the ground that he survived, they must produce evidence of the fact, and conversely, if the next of kin of the wife claim the grant [to the husband's estate],

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(*e*) *Satterthwaite* v. *Powell*, (1838) 1 Curt. 705; *Wainwright*, (1858) 1 S. & T. 257; *Ewart*, (1859) 1 S. & T. 258; *Benyon*, [1901] P. 141; *Good*, (1908) 24 T. L. R. 493; *Bruce*, (1910) 26 T. L. R. 381. See *Johnson*, (1898) 78 L. T. 85.

(*f*) *Wainwright*, (1858) 1 S. & T. 257; *Ewart*, (1859) 1 S. & T. 258; *Benyon*, [1901] P. 141; *Good*, (1908) 24 T. L. R. 493; *Bruce*, (1910) 26 T. L. R. 381. See *Johnson*, (1898) 78 L. T. 85; and see App. VIII., Precedent 41.

(*g*) (1872) 2 P. & D. 461.

they must show that she survived." Again, in *Satterthwaite* v. *Powell* (*h*) Sir Herbert Jenner said: "The principle has frequently been acted upon, that where a party dies possessed of property, the right to that property passes to his next of kin unless it be shown to have passed to another by survivorship. Here the next of kin of the husband claims the property which was vested in his wife: that claim must be made out; it must be shown that the husband survived. The property remains where it is found to be vested, unless there be evidence to show that it has been divested. . . . There being nothing to show that the husband survived his wife, the administration must pass to her next of kin."

The foregoing rules do not apply where the date of the wife's death is known, and it is merely presumed that the husband is dead.

The foregoing considerations do not apply to cases in which the date of the wife's death is known, and it is not positively known whether the husband is dead, when application is made for a grant of administration to the wife's estate. In such a case the wife's next of kin, if they apply for a grant, must either satisfy the Court that the deceased died a widow, or follow the usual practice by citing the husband or his representatives to accept or refuse a grant (*i*).

If husband and wife perish in the same calamity, and creditor applies for administration to the husband, he must cite the next of kin of both husband and wife.

If a husband and wife perish in the same accident, and a creditor of the husband is desirous of taking administration to his estate, it is stated (*k*) that he must obtain not only the renunciation of the husband's next of kin, but the consent also of the next of kin of the wife, or cite the latter as "persons who would have been entitled to the personal estate of the wife, in case she had survived her husband," to show cause why the grant should not be made to him (the creditor).

Form of citation.

In *Colvin* v. *The King's Proctor* (*l*), where a creditor of an intestate bastard, who had been drowned together with his wife and only child, applied for a grant of administration to his estate, after citing the King's Proctor, the Court said that in strictness the representatives of the wife ought to have been cited;

(*h*) (1838) 1 Curt. at pp. 706, 707.

(*i*) *Nicholls*, (1872) 2 P. & D. 461. Or they may apply for a grant under sect. 73, swearing that they verily believe that the deceased died a widow; *vide ante*, p. 417.

(*k*) Tristram & Coote, 199.

(*l*) (1827) 1 Hagg. 92.

but, as the property was small and the debt large, the decree might pass.

Wills of persons who perish in same calamity must be proved.

Where one of two persons, both of whom perished in the same calamity, has left a will, it must be proved, even though it be entirely inoperative under the circumstances, as giving the whole of the estate to the other.

CHAPTER XIII.

OF THE REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION AND OF THE CONSEQUENCES THEREOF.

Section 1.

OF THE REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

Revocation of probate in common form on citation followed by an action.

Any person whose interest is adversely affected by a probate granted in common form may, without limitation as to time, issue a citation against the person who proved the will, calling upon him to bring in the probate and to show cause why the same shall not be revoked, and if, in the event, the will is not sufficiently proved, the probate will be revoked (*a*).

Probate in solemn form cannot be revoked at instance of party or privy to the suit unless decree obtained by fraud, or later will discovered.

But if a will is proved in solemn form, no person who has been a party or privy to the proceedings can afterwards, by a fresh citation, put the executor again to proof of the will (*b*), except in two cases, namely, where the decree in the proceedings for proof in solemn form has been obtained by fraud (*c*), or where the existence of a later will has been discovered subsequent to the date of the decree (*d*). In both these cases the probate, even though granted in solemn form, is liable to revocation at the instance of parties having an interest.

Other cases in which grants may be revoked.

Apart from these instances, there are other cases in which probate or letters of administration may be revoked, either with the consent and at the instance of the person to whom they were originally granted, or without his consent at the instance of a person interested (*dd*). These cases fall under three heads.

(*a*) *Ante*, p. 276.

(*b*) *Vide ante*, p. 277.

(*c*) *Birch* v. *Birch*, [1902] P. 130 ; *vide ante*, p. 277.

(*d*) *Vide ante*, p. 277.

(*dd*) A complete summary of the five just causes for revocation will be found in the Indian Succession Act, 1865, s. 234 ; all of which, except the fifth, seem to embody the English law. See the Act set out, [1909] 2 Ch. at p. 352.

(1) Where the original grant was made in an irregular manner.

(1) Where the original grant was made in an irregular manner.

It is said that the administration may be revoked where a next of kin comes too hastily to take out the administration within the fourteen days, though in such case it should be granted to the same person (*e*); or where it has been granted without citing the necessary parties (*f*); or where the surname of the deceased is wrongly stated in the grant (*g*).

(2) Grant made to person not entitled, or unlawfully made.

(2) Where the original grant was made to a person not entitled thereto, or where, owing to false or inaccurate information furnished to the Court, or material facts suppressed, the original grant was unlawfully made.

Thus an administration granted to one claiming to be the widow of an intestate may be revoked, if it subsequently appears that she was never legally married to the deceased (*h*); or to one claiming to be next of kin, if it appears that he is not of kin, *i.e.*, an impostor or an illegitimate relative (*i*). So, too, the Court may revoke its grant of administration if made to one of kin, but not next of kin, there being others nearer (*k*); or to a guardian elected by the minors, there being a testamentary guardian entitled in priority (*l*); or to a creditor without renunciation or citation of the next of kin (*m*); or to the Crown where those of kin exist (*n*). And administration with the will annexed may be revoked if granted to the next of kin, and it subsequently appears that there was a residuary legatee (*o*). And where a grant of administration to the estate of a married woman was granted to the representative of her next of kin, as if she had been a spinster, the grant was revoked at the instance of her husband (*p*).

(*e*) Bac. Abr. Exors. E. 12; Toller, p. 125; and see Tristram & Coote, 180, n.

(*f*) Com. Dig. Administrator, B. 8; *Ravenscroft* v. *Ravenscroft*, (1682) 1 Lev. 305.

(*g*) *Vide post*, p. 497.

(*h*) *Moore*, (1845) 3 N. C. 601; *Langley*, (1851) 2 Rob. 407.

(*i*) *Bergman*, (1842) 2 N. C. 22.

(*k*) *Blackborough* v. *Davis*, (1700) 1 Salk. 38.

(*l*) *Morris*, (1862) 2 S. & T. 360.

(*m*) Com. Dig. Administrator, B. 6.

(*n*) *Carr*, (1858) 1 S. & T. 111.

(*o*) *Warren* v. *Kelson*, (1859) 1 S. & T. 290; Bac. Abr. Exors. E. 12.

(*p*) *Copeland* v. *Simister*, [1893] P. 16; *Blackborough* v. *Davis*, (1700) 1 Salk. 38; S.C. 1 Ld. Raymond, 681.

But an administration not revoked if it subsequently appears that others *equally* entitled with the grantee exist.

But an administration will not be revoked if it subsequently appears that a person exists who had merely an *equal* right with the grantee to be appointed administrator (*q*).

So where one of the next of kin of an intestate obtained letters of administration of his estate, believing himself and her brother to be the only next of kin of the deceased, and subsequently seven others were discovered of the same degree of kindred, it was held that the administration could not be revoked, nor could a new administration be granted to another of the next of kin, though no act had been done by virtue of that administration, and all parties interested consented (*r*).

Semble, administration unlawfully granted will not be revoked after death of administrator.

And even where administration has been granted to one of kin, when a nearer of kin existed, it is doubtful whether the Court would entertain a suit to revoke that administration after the death of the administrator, for the power granted to him entirely ceases upon his death (*s*).

Grant revoked if will is discovered.

A grant of administration as on intestacy will be revoked if a will is subsequently discovered, and probate of a will or letters of administration with a will annexed will be revoked, if a later will subsequently comes to light (*t*).

Probate granted of will, codicil afterwards discovered.

Where probate has been granted of a will alone, and a codicil is subsequently discovered, a separate probate may be granted of the latter, and the original probate is not revoked, unless indeed the codicil revokes or adds to the appointment of executors under the will (*u*).

Administration with will only annexed, codicil afterwards found.

But if administration with a will annexed has been granted, and a codicil is afterwards found, it is said that the administration must be revoked, and a new administration with the will and codicil annexed must be taken (*x*).

Grant obtained by

A grant, whether of probate or administration, may be revoked for any fraud used in obtaining it, for the Court has

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(*q*) *Hill* v. *Bird,* (1648) Sty. 102; *Dubois* v. *Trant,* (1701) 12 Mod. at p. 438; *Taylor* v. *Shore,* (1693) T. Jones, 161; *Ayliffe* v. *Ayliffe,* (1683) 2 Keb. 812.

(*r*) *Heslop,* (1846) 1 Rob. 457.

(*s*) *Willis* v. *Earl Beauchamp,* (1886) 11 P. D. at pp. 61, 63, 64.

(*t*) *Baker* v. *Russell,* (1752) 1 Lee, 167.

(*u*) Tristram & Coote, 177.

(*x*) *Ibid.* 180.

full power to vacate and set aside an act of its own which has been obtained by deceit or imposition (*y*).

fraud will be revoked.

So where probate is obtained of a forged or revoked will, or administration as on intestacy is obtained by suppressing a will, the grant may be revoked (*z*). And the Court may revoke a grant which it has made to an executor or administrator who is a minor on the assumption that he is of full age (*a*), or a grant which has been made on the renunciation of an executor who has intermeddled with the estate (*b*).

The Court revoked a grant of administration with the will annexed which had been surreptitiously obtained, without notice to the adverse party, during the pendency of a suit as to the validity of the will in the *forum domicilii* (*c*).

Probate of will of living person.

It seems scarcely necessary to add that if probate has been granted of the will, or letters of administration to the estate of a living person, the grant will be revoked on proof that the supposed deceased is in fact alive (*d*).

(3) Where the grant has become inoperative or ineffectual.

(3) Where the original grant, though lawfully made, has since become inoperative or ineffectual.

Grant to two executors or administrators, one of whom subsequently becomes insane.

So where one of two co-executors to whom probate has been granted subsequently becomes insane, or otherwise incapable of acting (*e*), the original probate will be revoked, and a fresh grant made to the other executor, power being reserved to the lunatic of joining in the grant should he on recovering his sanity wish to do so (*f*).

And where of two joint administrators, whether on intestacy or with the will, one becomes insane, the grant is revoked and a fresh grant made to the capable administrator (*g*).

Where sole executor or

But where a sole executor or administrator becomes insane

(*y*) Bac. Abr. Exors. E. 12.

(*z*) *Ibid.* Even if the will was proved in solemn form: *Priestman* v. *Thomas* (1884) 9 P. D. 70; *ante,* p. 277.

(*a*) Tristram & Coote, 177, citing Ought., tit. 222.

(*b*) Godolph, Part II., c. 31, s. 3.

(*c*) *Trimlestown* v. *Trimlestown,* (1830) 3 Hagg. 243.

(*d*) *Napier,* (1809) 1 Phill. 83; Bro. Administrator, pl. 3; Toller, 131.

(*e*) *Powell,* (1895) cited in Tristram & Coote, p. 178.

(*f*) *Marshall,* (1836) 1 Curt. 297; *Sowerby,* (1891) 65 L. T. 764; *Shaw,* [1905] P. 92.

(*g*) *Phillips,* (1824) 2 Add. 335; *Newton,* (1843) 3 Curt. 428.

administrator becomes insane after grant made to him.

after a grant has been made to him, the original grant is not revoked, but a fresh grant is made to another for the use and benefit of the lunatic until he shall become of sound mind (*h*).

And in such cases the original grant, though not revoked, is impounded, unless indeed the fresh grant is made to the committee of the lunatic or to the person appointed under sect. 116 of the Lunacy Act, 1890, with general authority over the lunatic's property, when the original grant remains at large (*i*).

Where administrator absconds, or is desirous of retiring from the administration.

Where a grant of administration of the estate of an intestate was made to a creditor who, after his debt had been fully satisfied, absconded and could not be found, the Court revoked the grant to the creditor and made a new grant to the sole next of kin of the deceased (*k*).

And where a creditor administrator, having paid his debt, was desirous of retiring from the administration, the Court revoked the grant to the creditor, and made a new grant to one of the children of the intestate (*l*).

In what cases the Court will refuse to revoke a grant.

It has already been seen (*m*) that the Court will not revoke a grant if it subsequently appears that some person exists who has merely an equal right with the grantee to be appointed administrator. And it is said that the Court cannot revoke a grant on account of abuse (*n*), or on account of the administrator's omission to bring an inventory or account (*o*).

The consent of all parties interested is no

And if the administration has been properly granted, it will not be revoked even on the application of the administrator himself, nor is the consent of all parties interested, the fact

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(*h*) *Binckes*, (1836) 1 Curt. 286; *Cooke*, [1895] P. 68. *Vide ante*, pp. 378, 379.

(*i*) *Cooke*, [1895] P. 68; and *vide ante*, pp. 379, 380.

(*k*) *Bradshaw*, (1887) 13 P. D. 18; *Jenkins*, (1819) 3 Phill. 33; *Covell*, (1889) 15 P. D. 8; *Colclough*, [1902] 2 Ir. R. 499. This procedure forms a convenient alternative, in certain cases, to a grant under s. 74 of the Court of Probate Act, 1857: *vide ante*, pp. 403—406. It is not confined to cases where the original administrator was a creditor: see *Covell*, *Bradshaw*, and *Colclough*, cited *supra*, and *French*, [1910] P. 169; *Loveday*, [1900] P. 154.

(*l*) *Hoare*, (1833) 2 S. & T. 361, n.; *Thacker*, [1900] P. 15.

(*m*) *Ante*, p. 432.

(*n*) *Thomas* v. *Butler*, (1672) 1 Ventr. 219.

(*o*) Wms. on Exors. 457, citing *Hill* v. *Bird*, (1648) Sty. 102.

that the administrator has done no act under the grant, or a mere suggestion that it will benefit the estate, sufficient to justify the revocation of such a grant and a fresh grant to another person (*p*).

ground for revocation.

The Court will not revoke a limited grant in order to enable those entitled thereto to take a general grant. The practice is, when a limited grant has been made, to supplement it by a *cæterorum* grant (*q*).

The Court will not revoke a limited grant to enable those entitled to take a general grant.

It was at one time stated that the Court cannot revoke a grant at the application of a creditor, whatever may be the merits of the case, because such creditor cannot demand a grant to be made to himself of immediate right (*r*). But it has recently been held that there is no reason in principle why creditors should be precluded from applying to revoke an existing grant (*s*). Accordingly, where the original administrator of a deceased intestate disappeared and could not be traced, and fresh assets became payable to the legal personal representative of the deceased, the Court, at the instance of a creditor, revoked the original letters of administration and made a fresh grant to him, the next of kin of the deceased declining either to renounce or to apply for a grant (*t*).

Revocation at the instance of a creditor.

(*p*) *Heslop*, (1846) 1 Rob. 457. In *Dye*, (1850) 2 Rob. 342, where probate had been lawfully granted to an executor and to an executrix, who was a married woman, and the Bank of England refused to allow a transfer of stock in the absence of the husband of the executrix, who had deserted her, the probate was revoked and re-granted to the executor alone. In this case the executrix had not intermeddled with the estate. And in *Ferrier*, (1828) 1 Hagg. 241, where administration limited to a particular property was granted to the tenant for life, and he assigned his interest to his son, and asked that the grant might be revoked and a fresh grant made to the son limited to that particular property, the grant was revoked, although the administrator had intermeddled with the property. But in *Reid*, (1886) 11 P. D. 70, Butt, J., refused to revoke a general grant of administration where the administratrix had intermeddled with the general estate, and to make a fresh grant to another person, although similar grounds to those shown in *Dye* (*supra*) appeared, and his decision was upheld by the Court of Appeal on the ground that there was no precedent for such an order.

(*q*) *Harris* v. *Milburn*, (1828) 2 Hagg. 62; *Brown*, (1872) 2 P. & D. 455; but see *Currey*, (1846) 5 N. C. 54.

(*r*) Tristram & Coote, p. 181, citing *Bergman*, (1843) 2 N. C. 22. And see Wms. on Exors., p. 457.

(*s*) *French*, [1910] P. 169.

(*t*) *Ibid.*

Section 2.

CONSEQUENCES OF REVOCATION.

Consequences of revocation of grant on intermediate acts of executor or administrator.

It is necessary briefly to consider the effect of revocation of probate or letters of administration on the intermediate acts of the former executor or administrator.

Court of Probate Act, 1857, s. 77.

Executor, etc., under revoked grant may reimburse himself in respect of payments which might lawfully have been made by subsequent executor, etc.

The Court of Probate Act, 1857, s. 77, provides: "Where any probate or administration is revoked under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him *which the person to whom probate or administration shall be afterwards granted might have lawfully made.*"

Position of executor or administrator who distributes estate.

Position of distributees.

With regard to acts done under the revoked probate or administration which might not have been lawfully done by the subsequent executor or administrator, the former executor or administrator has, it seems, no such protection; and therefore if he distributes the estate amongst the persons entitled on intestacy where there is a will, or in accordance with the provisions of a will where there is a later will, or the will is invalid, he is, it would seem, answerable for the moneys so distributed as if he were a stranger who had dealt with the estate, and the property so distributed may be recovered from the distributees by the person to whom probate or administration is granted on the revocation of the earlier grant (*u*). But in *Fitzpatrick* v. *M'Glone* (*v*), probate of an alleged will having been granted in common form to the executors named therein, they paid a charitable bequest to the defendant, who *bonâ fide*, and without notice of any invalidity of the alleged will, applied portion thereof in accordance with the trusts of the bequest. On probate being subsequently revoked and letters of administration granted to the plaintiff, it was held

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(*u*) See *Woolley* v. *Clark*, (1822) 5 Barn. & Ald. 744.

(*v*) [1897] 2 Ir. R. 542.

that the plaintiff could not recover from the defendant the amount which the latter had expended in execution of the supposed trusts.

Transactions between executor or administrator and third parties.

With regard to transactions between third parties and the executor or administrator under the revoked grant, a distinction exists between cases in which the original grant is revoked on the ground of the existence of a will *appointing executors*, and cases in which the grant of administration is revoked on the ground of the existence of a will *not appointing executors*, or the grant of probate is revoked on the ground of the existence of a later will *not appointing executors.*

Administration obtained by suppression of a will appointing executors void *ab initio*, and all dealings by administrator void.

A grant of administration obtained by the suppression of a will *appointing executors* is void *ab initio*, and all dispositions of assets by the supposed administrator are void also (*x*), except acts done in the due course of administration, *i.e.*, acts which the executor under the will might have been compelled to do (*y*). The ground for this rule is that, if there are in fact executors, the property is vested in the executors from the death of the testator, and the Court has no power to grant administration; the letters of administration and the dealings by the administrator are simply void (*z*).

Administration obtained by suppressing a will *not* appointing executors is voidable, not void *ab initio*.

But where a grant of administration is obtained by suppressing a will *containing no appointment of executors*, the grant so obtained is not void *ab initio*, but merely voidable. The revocation takes effect only from the time of the recall (*a*). Accordingly a sale of leaseholds by an administratrix, who had obtained administration under such circumstances, to a purchaser who was ignorant of the suppression of the will, was upheld by the Court, although the grant was revoked after the sale (*b*).

Grant issued under decree of Court,

If, however, a sentence pronouncing for a will or an intestacy

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(*x*) Unless, of course, they are saved by s. 77 of the Court of Probate Act, 1857; *ante*, p. 436.

(*y*) *Ellis* v. *Ellis*, [1905] 1 Ch. 613; *Abram* v. *Cunningham*, (1677) 2 Lev. 182; *Graysbrook* v. *Fox*, (1564) 1 Plowd. 275.

(*z*) *Abram* v. *Cunningham*, (1677) 2 Lev. 182.

(*a*) *Packman's Case*, (1595) 6 Co. Rep. 18 *b*; *Woolley* v. *Clark*, (1822) 5 Barn. & Ald. 744; *Boxall* v. *Boxall*, (1884) 27 Ch. D. 220; *Craster* v. *Thomas*, [1909] 2 Ch. 349.

(*b*) *Boxall* v. *Boxall*, *ubi supra*.

and decree reversed on appeal.

is reversed *on appeal*, all intermediate acts of the executor or administrator are ineffectual, unless they are saved by the Court of Probate Act, 1857, s. 77, because an appeal suspends the former sentence, and on its reversal it is as if it had never existed (*c*).

(*c*) Wms. on Exors. 463, citing *Packman's Case,* (1595) 6 Co. Rep. 18 *b* ; *Price* v. *Parker,* (1665) 1 Lev. 158.

PART THE SECOND.

OF THE PRACTICE OF THE COURT IN NON-CONTENTIOUS BUSINESS.

CHAPTER I.

INTRODUCTORY.

Section 1.

NON-CONTENTIOUS BUSINESS DEFINED.

The business of the Court either "non-contentious" or "contentious."

THE business of the Probate Division is either (1) non-contentious or common form, or (2) contentious business.

Non-contentious business defined.

By the Court of Probate Act, 1857, s. 2, "'common form business' shall mean the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy or intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration."

By the Rules in Non-contentious Business of 1862, "non-contentious business shall include all common form business as defined by the Court of Probate Act, 1857, and the warning of caveats."

The Judicature Acts have no effect whatever on the non-contentious branch of the jurisdiction of the Court.

It is important to observe that the Judicature Acts have no effect whatever upon the non-contentious branch of the jurisdiction of the Court, and no question of the enlargement of the jurisdiction existing in the Court can arise in non-contentious business. It can only be when a suit has been instituted that any such question can arise (*a*).

(*a*) *Tomlinson,* (1881) 6 P. D. 209, at p. 210. See Judicature Act, 1875, s. 18.

Section 2.

SOURCES OF PRACTICE.

Court of Probate Act, 1857, s. 29. Practice of the Court of Probate to follow that of the Prerogative Court.

The Court of Probate Act, 1857, s. 29, provides: "The practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will permit, according to the present practice in the Prerogative Court."

Court of Probate Act, 1857, s. 30. Rules and orders to be made for regulating the procedure of the Court.

By sect. 30 rules and orders are to be made for regulating the procedure and practice of the Court, and the duties of the registrars, district registrars, and other officers thereof, and for determining what shall be deemed contentious and what shall be deemed non-contentious business, and generally for carrying the provisions of the Act into effect; and the judge of the Court of Probate, with the concurrence of the Lord Chancellor and other judges, is empowered to repeal, amend, add to, or alter such rules and orders.

Rules and Orders of 1862, 1863.

Under the powers conferred by this section a number of very copious, minute, and explicit (*b*) rules and orders were in the years 1862 and 1863 made for the guidance of practitioners in respect of non-contentious business, for the instruction as well of the principal registrars as of the district registrars. These rules, which have been amended and added to from time to time, are set out in Appendix III. The mode of citation in the following chapters is as follows: "Rule 1, N.-C. B.," signifies "Rule 1 of the Rules and Orders for the Instruction of the Registrars of the Principal Registry in Non-contentious Business," while "Rule 1, D. R.," signifies "Rule 1 of the Rules and Orders for District Registrars in Non-contentious Business."

Mode of citation.

Rules and Orders of 1862, 1863, unaffected by the rules of the Supreme Court framed under the Judicature Acts.

The Judicature Acts have in no way altered the procedure or practice of the Court of Probate in non-contentious business (*c*), and therefore these rules, as amended and altered from time to time, still govern the practice of the Court in non-contentious business, and are entirely unaffected by the rules of the Supreme Court framed under the Judicature Acts.

(*b*) The terms are those of Sir Edward Vaughan Williams.

(*c*) *Tomlinson*, (1881) 6 P. D. 209. See Judicature Act, 1875, s. 18.

CHAPTER II.

PRACTICE IN OBTAINING PROBATE IN COMMON FORM.

Section 1.

GENERAL RULES OF PRACTICE.

To whom granted.—Probate in common form is granted to the executor named in the will, or to the executor according to its tenor.

Probate is granted to the executor.

If there are several executors, one may prove alone without notice to the others; in such a case power is reserved to grant probate to the other executors whenever they or any of them shall duly apply for a grant. This they may do at any time during the lifetime or after the death of the executor first proving, provided they have not renounced their right in the meantime or failed to appear to a citation to accept or refuse probate.

Power reserved to other original executors to take probate

Power is not reserved to the executor *substituted* in the will on the determination of the office of the original executor by death or otherwise; in such a case the original probate ceases on the determination of the office of the original executors, and a second or *cessate* probate is granted to the executor substitute.

but not to an executor substitute.

By whom Application is made.—Application may be made through a solicitor, or in person by the executor. Applications in person will not be received by letter, nor through the medium of any agent (Rule 2, N.-C. B.).

Application made through a solicitor or in person

Special rules, orders, and instructions have been framed to meet the case of personal applications, and to these the practitioner is referred (*a*).

Where made.—Application for probate in common form may be made at the principal registry in all cases (*b*) (Rule 1, N.-C. B.). Application may be made at a district registry in cases where the deceased, at the time of his death, had a fixed place of abode within the district in which the application is made, and not otherwise (*c*) (Rule 1, D. R.). The practice in

to the principal registry;

to the district registry.

(*a*) App. III., pp. 907, 908.

(*b*) *Vide ante*, p. 8.

(*c*) *Vide ante*, p. 9.

obtaining probate in the district registry may be taken to correspond with that in the principal registry, as stated in the succeeding sections, unless specifically stated to differ therefrom.

Not within seven days from the death.

Time of Application.—The earliest date at which the probate may issue is the eighth day after the death of the testator (Rule 43, N.-C. B.), unless under the direction of the judge or by order of *two* of the registrars of the principal registry (*d*).

Delay of more than three years must be accounted for.

In every case where probate is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of delay must be certified to the registrars. Should the certificate be unsatisfactory, the registrars may require such proof of the alleged cause of the delay as they may see fit (Rule 45, N.-C. B.).

Reason of delay to be certified.

A form of affidavit or certificate of delay will be found in the Appendix (*e*). It may take the form of a certificate signed by the applicant and countersigned by his solicitor, or signed by the solicitor alone. An affidavit sworn by the applicant alone in explanation of the delay will be accepted. The essential facts which must be stated are (1) the amount of the property of the deceased at the date of his death, (2) the reason why an application has not previously been made, and (3) the reason why a grant is now required. Where the property in respect of which the grant is required is a reversion which has fallen into possession, the dates of the deaths of the life tenants should be stated.

How obtained.—The following requirements must be complied with before probate in common form will be granted :—

A. Executor's Oath.—An oath must be sworn by the proving executor or executors.

The executor must swear an oath before a commissioner for oaths.

Before whom sworn.—The oath is sworn before a commissioner for oaths. The proper official in cases where the executor resides abroad is the person authorised to administer oaths under 52 Vict. c. 10 and 54 & 55 Vict. c. 50 (*f*).

Form of Oath.—Forms of the executor's oath will be

(*d*) The order of *one* of the registrars of the principal registry is sufficient to authorise an earlier grant from a district registry : Rule 51, D. R.

(*e*) App. VII., Forms 21, 77.

(*f*) See the very convenient table in the Annual Practice, Vol. II., Part IX., and see 9 Edw. VII. c. 9.

found in the Appendix (*g*). The following points should be noted in filling up the oath :—

The oath must contain the name and description of the executor.

Description of the Executor.—The oath must state the name and addition or occupation (*h*) of the executor, and, if a woman, her status, *i.e.*, "wife of A. B.," "widow" (*i*), or "spinster."

Name of executor misspelt in will.

If the name of an executor is misspelt in the will, in addition to his correct name the words "in the will written ——" must appear on the oath.

Description of executor.

The description of the executor contained in the will (*e.g.*, "my nephew A., son of my sister B.") must, if it is a true description, appear in the oath.

Executor misdescribed in will,

If the executor is misdescribed in the will, an affidavit (App. VII., Form 15) is required in proof of the identity of the applicant (Rule 48, N.-C. B.). Such affidavit must be made by some one who can speak to the facts, and must disclose facts which justify the recognition of the person applying for a grant as the executor described in the will. In such cases the misdescription in the will should appear in the oath, preceded by the word "erroneously." No evidence of identity is required when an executor, having more than one christian name, is described in his appointment by his first christian name only.

or wrongly named, or no name stated.

The same rule applies when the executor is wrongly named in the will (*k*), or when, though described, his name does not appear (*l*).

Residence of executor to be inserted in oath.

Address of Executor.—The true place of residence of the executor must appear in the oath. Except in the case of residential clubs, club addresses are not accepted. Should the executor have changed his address since the date of the will, his address at the time of making the application should be given, as well as the address, if any, mentioned in the will.

(*g*) App. VII., Forms 151—161.

(*h*) As "the Reverend John Johnson, of Bangor, clerk ; the Reverend William Smith, of ——, Wesleyan minister ; John Smith, bankers' clerk," etc.

(*i*) If the executrix is widow of the deceased, she will be described as "Mary Jones, widow, the relict of the deceased hereafter named."

(*k*) *E.g.*, John William Jones is appointed executor, but his name is written in the will "John Frederick Jones." He swears the oath as "John William Jones, in the will written 'John Frederick Jones,'" and files an affidavit of identity. And see *Baskett,* (1898) 78 L. T. 843.

(*l*) *E.g.*, the testator appoints as his executor "his dear wife," "his loving son."

Testamentary papers must be marked.

Testamentary Papers to be marked.—Every will, copy of a will, or other testamentary paper, to which an executor is sworn, must be marked by such executor and by the person before whom he is sworn (Rule 49, N.-C. B.).

The oath must specify the name, etc., of the testator.

Description of the Testator.—The oath must specify the name, address, and addition or status of the testator. (See *post*, pp. 496, 926.)

His signature to the will to be taken as his name.

Name.—As a general rule the signature of the testator to the will is to be adopted as his name, although it differ from the name written at the heading of the will (*m*).

The grant may go in more than one name if the testator held property in two or more names.

If it is desired that the grant should go in more than one name, *e.g.*, where the testator held property in more than one name, an affidavit (App. VII., Form 14) is required setting out the facts, supplemented by such additional proof—*e.g.*, production of bank books, deeds, etc.—as the registrars may require. The registrars must also be fully satisfied as to the identity of the person who holds property under the various names (Rule 48, N.-C. B.).

If these circumstances are satisfactorily proved, but not otherwise, the testator may be described in the oath under one or more aliases (*e.g.*, "John Smith, otherwise John Robinson," or "John William Shaw-Smith, otherwise John William Shaw"); and the grant will issue accordingly.

Christian name of testator omitted.

When the testator's signature omits one of his christian names other than the first (*e.g.*, where Albert Edward Robinson signs himself "Albert Robinson"), probate will be granted in the testator's full name on a certificate by the solicitor that the signature as it stands was the testator's usual form of signature. But this will not be done in cases where the first christian name has been omitted (*e.g.*, where Albert Edward Robinson signs himself "Edward Robinson"). In such a case an affidavit justifying an alias is required.

Testator described as "the younger" or "the elder."

Description.—If the testator is described in the will as "the younger," but does not so subscribe, still he should be described in the oath as "the younger"; but a similar course is not necessary where the description in the will is "the elder."

The exact date of death

Date of the Death.—The exact day on which the testator

(*m*) Memoranda for District Registrars, *post*, p. 926; where minute instructions as to filling in the testator's name are given.

to be specified,

died must be specified in the oath (*e.g.*, "who died on the 12th day of July, 1910"). If this cannot be done, in cases where the fact of the death is certain (*n*), the registrars may, on satisfactory explanation why a more precise date cannot be given, allow the grant to issue. But where the evidence of death is merely presumptive, application must, except in cases where the registrar may make the order (*post*, p. 555), be made to the Court on motion for leave to vary the form of oath, and to swear that the testator died *on or since* a specific date (the date when he was last heard of (*o*)).

or leave obtained to vary the form of oath.

Executor, how designated.

Executor, how designated.—The executor or executrix, if only one applies, should describe himself or herself as "the sole executor" (*or* "executrix"), "the surviving executor" (*or* "executrix"), or as "one of the executors" named in the will (or codicil) of the deceased, as the case may be (*p*).

If more than one apply, and all are females, they are described as "the executrixes"; if all are males, or some males and some females, as "the executors."

Statement of domicil when grant is to be resealed in Scotland.

Domicil.—If the deceased possessed property in England and Scotland, and the executor is desirous of resealing the grant in Scotland, the oath (App. VII., Form 234) should state the deceased's domicil and contain an allegation that the estate disclosed is the total of the estate in the United Kingdom. The statement of domicil is, however, not required where it is desired to reseal the grant in Ireland (*q*).

Value of the estate to be stated in the oath.

Value of the Estate.—If the testator died before the 1st January, 1898, the value of the personal estate only *need* appear; if since that date, the value of both real and personal estate must be inserted. The amount of the estate within the

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(*n*) In a case, for instance, where the testator is found drowned, but it is impossible to say on what day his death occurred.

(*o*) *Vide ante*, pp. 421—424; *post*, pp. 554—556.

(*p*) Other designations may become necessary, as "the executrix for life, if she remain a widow"; "the sole executor in respect of all the estate of the deceased except estate in the colony of Natal." Where an executor or executrix to whom power has been reserved applies, after an executor has already proved, he or she should be described as "another" or "the other" executor (*not* executrix). In cases where there is no limitation for life or otherwise in the appointment of an executor, but other executors are substituted on death, the first named executor is to be described as "an executor named in the will."

(*q*) *Vide post*, pp. 448—492.

United Kingdom, as stated in the Inland Revenue affidavit, is to be stated in the oath, notwithstanding that the grant may not extend to the parts of the estate, if any, situate in Scotland or Ireland. In cases where the deceased died possessed of no estate except trust property, the oath to lead the grant must show that the deceased was only legally entitled thereto, and had no beneficial interest therein. The fee for the grant under seal is the same as for grants under a nominal sum.

Instructions for filling in oath.

Very minute instructions as to filling in the oath and grant are contained in a memorandum for the use of district registrars which will be found in the Appendix (*r*).

The oath to be filed.

Filing Oath.—The oath is to be subscribed and sworn as an affidavit and then filed in the registry (Rule 47, N.-C. B.). The attention of practitioners is directed to Rules 51—58, N.-C. B., 1862, amended in 1882 (*s*), which refer to all affidavits, and contain directions which must be attended to before an affidavit will be accepted at the registry.

Instructions as to affidavits.

An Inland Revenue affidavit is to be sworn.

B. The Inland Revenue Affidavit.—The executor must make an affidavit of the property for the use of the Commissioners of Inland Revenue.

Duties payable in respect of probates and letters of administration.

The duties payable in respect of probates and letters of administration are regulated in the case of deaths occurring since the 1st August, 1894, by the Finance Acts, 1894, 1896, 1898, 1900, and 1907, and the Revenue Act, 1903. Important alterations in the scale of duties as regards persons dying on or after April 30th, 1909, have been made by the Finance (1909-10) Act, 1910. In the case of deaths occurring before the 1st August, 1894, the duties payable are regulated by the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12).

These Acts are, so far as they apply, set out in App. I., Part II., and details of the duties payable on obtaining grants of probate and administration will be found in the instructions issued by the Commissioners of Inland Revenue (*t*).

The Inland Revenue affidavit to be filed.

The Inland Revenue affidavit is filed with the papers to lead the grant. The two preceding documents, (1) the executor's oath and (2) the Inland Revenue affidavit, are essential requirements in every application for probate. In particular

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(*r*) *Post*, p. 926.
(*s*) *Post*, App. III.
(*t*) *Post*, App. II.

cases it may be necessary to furnish further affidavits in compliance with the following rules :—

Additional requirements in certain cases.

C. Affidavit as to Due Execution (*u*).—If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be irregular or insufficient, the registrars require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of the statutes in reference to execution were complied with (Rule 4, N.-C. B.).

Affidavit of due execution where attestation clause is absent or defective.

If, on perusing the affidavits of both the subscribing witnesses, it appear that the requirements of the statute were not complied with, probate is to be refused (Rule 5, N.-C. B.). In cases of doubt, the registrar may require the parties to bring the matter before the judge on motion (Rule 6, N.-C. B.).

If the registrar is not satisfied, probate may be refused.

If both the subscribing witnesses are dead, or if no affidavit can be obtained from either of them, resort may be had to other persons, if any, who were present at the execution of the will; if no affidavit by any such person can be obtained, an affidavit (App. VII., Forms 7, 8, 10) must be filed stating that fact, identifying the handwriting of the testator and the subscribing witnesses, and stating circumstances, if any, which raise a presumption in favour of due execution (Rule 7, N.-C. B.). Even in the total absence of evidence of due execution, a will may be admitted to probate if all persons prejudiced thereby are of full age and consent.

Both subscribing witnesses dead, or not available.

An affidavit of due execution is necessary also where the signature of the testator is placed in the attestation or testimonium clause (App. VII., Form 3).

Affidavit where will signed in attestation or testimonium clause.

D. Affidavit as to Interlineations and Alterations (*x*).—Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will or by the subsequent execution of a codicil thereto (Rule 8, N.-C. B.).

When interlineations and alterations appear in the will

Where interlineations or alterations appear in the will, unless duly executed or recited in, or otherwise identified by, the attestation clause, an affidavit (*x*) or affidavits in proof of

an affidavit stating that they were made before

(*u*) For forms, see App. VII., Forms 2, 3.

(*x*) For forms, see App. VII., Forms 5, 6.

its execution is required.

their having existed in the will before its execution must be filed, except where the alterations are merely verbal, or where they are of but small importance and are evidenced by the initials of the attesting witnesses (Rule 9, N.-C. B.).

Where there are erasures or obliterations a similar affidavit is required.

E. Affidavit as to Erasures and Obliterations (*y*).—Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced (*z*), but can upon inspection of the paper be ascertained, they must form part of the probate (Rule 10, N.-C. B.).

In every case where words which might be of importance are erased or obliterated, an affidavit as to the time and circumstances of the erasure is required (Rule 11, N.-C. B.).

Where the will refers to another document

the document must be produced, or its non-production accounted for.

F. Production of Deeds and Documents referred to in the Will or Codicil.—If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such deed, paper, memorandum, or other document is required, with a view to ascertain whether it be entitled to probate; and if not produced, its non-production must be accounted for on affidavit (Rule 12, N.-C. B.).

Where the document was not in existence when the will was executed.

No deed, paper, memorandum, or other document can form part of a will unless it was in existence at the time when the will was executed (Rule 13, N.-C. B.).

Will executed in duplicate.

If the will was executed in duplicate, both parts must be produced, or the absence of one of them accounted for on affidavit. The affidavit must satisfy the registrar that the part produced was the part in the testator's possession at the time of his death, otherwise probate may be refused.

(*y*) For forms, see App. VII., Forms 5, 6.

(*z*) If the words are completely obliterated, the erasure is left blank in the probate. As to what amounts to a complete obliteration, and as to certain cases in which parol evidence is admissible to prove what the words obliterated were, *vide ante*, pp. 213—216.

An incorporated document or paper is proved as part of the will which incorporates it, and the document must, as a general rule, be engrossed and registered in its entirety. Exceptions are sometimes made in cases of documents of very great length (*a*), and where a part only is material, the whole need not be engrossed and registered (*b*).

Incorporated documents to be engrossed and registered, except in certain cases.

Where documents are incorporated by reference, the executor describes the will in his oath as "the will as contained in the paper writings marked A, B, and C."

G. Affidavit of Plight and Condition (*c*).—If there are any vestiges of sealing wax or wafers or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for on affidavit, or the production of such paper, memorandum, or other document is required; if not produced, its non-production must be accounted for on affidavit (Rule 14, N.-C. B.).

Where the will shows signs of having had annexures.

The affidavit (*c*), which is called an affidavit of plight and condition, should state that the will, when found on the testator's death, was in the same plight and condition in which it is now produced.

An affidavit of plight and condition is required.

H. Affidavit as to the Knowledge, etc., of a Blind or Illiterate Testator (*d*).—Probate of the will of any blind or obviously illiterate or ignorant testator will not be granted unless the registrars are satisfied that the will was read over to the testator before its execution, or that the testator had at that time knowledge of its contents (Rule 71, N.-C. B.).

Where the testator was blind or illiterate an affidavit of his knowledge of the contents of the will is required,

This rule applies to wills signed by a mark, or where the signature is so imperfectly or badly written as to raise an inference of illiteracy or extreme feebleness, also where the will is signed by some person at the direction of the testator.

and where the will is signed by a mark, or by a third person for the testator.

Where the signature is by mark, and no evidence of the testator's knowledge of the contents of his will is available,

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(*a*) *Vide ante*, p. 237; *Lansdowne*, (1863) 3 S. & T. 194; *Dundas*, (1863) 32 L. J. P. 165.

(*b*) *Limerick*, (1850) 2 Rob. 313; *ante*, p. 237.

(*c*) For form, see App. VII., Form 11.

(*d*) For form, see App. VII., Form 4.

an affidavit stating that the testator was neither blind nor illiterate is required.

Where the will is not dated, an affidavit as to the date thereof is required, or an affidavit of search for later wills.

1. Affidavit as to Date.—If the will is not dated, or the date is incomplete, an affidavit by one of the attesting witnesses stating the date of its execution is required (*e*).

J. Affidavit of Search (*f*).—If no evidence as to the date of a will is available, an affidavit must be filed stating that search has been made, and that no will of presumably later date has been found. An affidavit of search is also necessary where the will is endorsed or headed "Draft" or "Instructions," and where a codicil refers to a will by a wrong date.

Will headed "Draft" or "Instructions."

Every affidavit by an attesting witness must depose to due execution.

General Rule as to Affidavits by Attesting Witness.—Every affidavit made by an attesting witness to a will must, in addition to supplying information with regard to the particular deficiency which renders an affidavit necessary, depose as to the mode in which the will or codicil was executed and attested (Rule 57, N.-C. B.).

Codicils.

Codicils.—The foregoing requirements as to wills apply equally to codicils (Rule 16, N.-C. B.).

An engrossment is to be made for probate.

Engrossment for Probate.—The engrossment for probate is to be made on paper of regulation size. Printed and typewritten engrossments are accepted (Amended Rule 79, N.-C. B.).

Fiat copy.

Alterations which are duly authenticated are written fair in the engrossment. Where there are unauthenticated alterations in the will or codicil, these are omitted in the engrossment. Beside the engrossment an additional copy of the will in its original unaltered state must in that case be furnished by the practitioner, and is known as the *fiat copy*.

Copy to assist.

Again, a second copy, known as the *copy to assist*, must be furnished where the will is illegibly written, or there is much misspelling, or many authenticated alterations.

Copy to perpetuate pencil writings.

A second copy, known as the *copy to perpetuate pencil writings*, is sometimes filed when the will is written wholly or

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(*e*) The practice, in such cases, of inserting the date of the execution of the will or codicil in the grant, has been discontinued, and the following note is now signed by the registrar on the engrossed copy will or codicil, annexed to the grant and registered: "Affidavit filed that will (*or* codicil) was duly executed on the day of ."

(*f*) For form, see App. VII., Form 9.

partly in pencil. But the more usual course is to file an affidavit reciting the portion of the will which is written in pencil, and stating that the will is now in the same plight and condition as when executed. This affidavit may be sworn by any one who is acquainted with the facts.

The engrossment must be strictly accurate.

Affidavits are no longer registered.

Registering Affidavits.—The practice of registering affidavits has been discontinued, and a note is now signed by the registrar on the engrossment and registered, to the effect that affidavits of due execution, of domicil, or as the case may be have been filed (Rule 4A, N.-C. B.).

In cases presenting difficulty, affidavits may still be registered on the direction of the registrar.

Fees payable upon grants.

Fees.—A schedule of fees is made out by the Receiver of Wills. Particulars of the fees payable upon grants of probate will be found in Appendix V.

Fixed fee in certain cases.

A fixed fee of one shilling on the grant, irrespective of the value of the property, is charged when the grant is in respect of trust property only, or in respect of other estate not liable to duty.

No fee for filing certain documents.

No fee is charged for filing the will, codicils, oath, or Inland Revenue affidavit.

Inclusive fee where estate not over £500.

The statutes 44 Vict. c. 12, s. 33, and 57 & 58 Vict. c. 30, s. 16, contain provisions whereby a fixed fee of fifteen shillings may be paid in respect of estates the total amount of which, without deduction of debts, does not exceed £500. This fee covers all expenses of an application for probate or administration, including a reference to the judge in chambers, where necessary. (See *post*, p. 958.)

Procedure on obtaining probate.

Obtaining Probate.—The executor's oath, the Inland Revenue affidavit, the will, the engrossment of the will, and such of the various other documents and affidavits above referred to as are necessary having been prepared, they are to be taken to the department of the Receiver of Wills at the Principal Registry, Somerset House, Strand (*g*). A receipt is given for the papers, for which a shilling stamp is required.

Receipt for papers.

Engrossment examined.

The engrossment of the will is then examined and collated

(*g*) Or, where the application is to a district registry, to the proper official.

with the original. This done, the papers are transmitted to the Clerk of the Seat.

Probate filled up,

The Clerk of the Seat causes the usual forms of probate to be filled up and annexed to the engrossment.

signed, sealed, and issued.

The probate is signed by the registrar, is sealed by the sealer, and is delivered out by the sealer to the person who produces and delivers up to him the receipt given for the papers by the Receiver of Wills.

Will registered.

The will after probate is registered, *i.e.*, copied in the public books.

"Probate Act."

An entry or record of the grant, called the "Probate Act," is made by the Clerk of the Seat.

Section 2.

PROBATE OF WILLS DATED BEFORE THE 1ST JANUARY, 1838.

Rules for probate of wills executed prior to 1st January, 1838.

Special rules have been framed to meet the cases, now of very rare occurrence, in which application is made for probate of wills and other testamentary papers executed at a date prior to the 1st January, 1838, when the Wills Act, 1837, came into operation. To these rules (Rules 17—27, N.-C. B.) the practitioner is referred.

Section 3.

PROBATE OF THE WILLS OF SOLDIERS AND SEAMEN (*i*).

Wills of soldiers in actual military service and seamen at sea exempt from the formalities prescribed by the Wills Act.

The wills of personal estate of soldiers in actual military service and of mariners or seamen at sea are exempted from the formalities required for the execution of wills by the Statute of Frauds by sect. 23 of that statute, and from the formalities required by the Wills Act, 1837, by sect. 11 of that Act (*i*).

Privileged wills, how proved.

The sole requisite in the case of these privileged wills is a declaration by the testator of the manner in which he wishes his personal estate to be dealt with after his death. That declaration may be oral or in writing.

Probate of such privileged wills will be granted upon affidavits which satisfy the registrar that the testator was a soldier in actual military service or a mariner or seaman at sea when the will was made (*k*).

(*i*) *Ante*, pp. 295—300.

(*k*) A mere averment that the deceased held such a rank in his regiment, was in such a place, and was in actual military service at the date when the paper was written, is not enough. The affidavit should con-

If the declaration is in writing, an affidavit identifying the handwriting as that of the testator is required (*l*); if oral, evidence sufficient to satisfy the registrar of the substance of the declaration, and that it was intended to be testamentary, must be adduced.

In cases of doubt or difficulty, a motion to the Court may become necessary, or the will must be propounded in an action.

Wills of soldiers and seamen not made *in expeditione.*

The wills of soldiers and seamen not made *in expeditione* must be executed in accordance with the formalities prescribed by sect. 9 of the Wills Act, 1837.

Special formalities required in the case of wills made by seamen or marines by Navy and Marines (Wills) Acts, 1865 and 1897.

The wills of persons serving as seamen or marines (*m*) are subject to certain restrictions with reference to their mode of execution imposed by the Navy and Marines (Wills) Acts of 1865 and 1897 (*n*), and by an Order in Council made thereunder on the 28th December, 1865 (*o*).

Unless these formalities are complied with, such wills are ineffective to pass "naval assets," except in certain cases.

Unless the formalities prescribed by these Acts are complied with, the will, though duly executed in accordance with the provisions of the Wills Act, 1837, is ineffective to pass the testator's "naval assets" (*p*). But in case of a will made by

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tain a statement of the circumstances full enough to enable the Court to judge for itself whether the testator was in actual military service: *Thorne,* (1865) 4 S. & T. 36.

(*l*) *I.e.,* an affidavit of two disinterested persons stating in terms that the signature is the testator's handwriting, and how they became acquainted with his handwriting: see Rule 20, N.-C. B. The form in App. VII., Form 10, must be strictly followed: *Neville,* (1859) 4 S. & T. 218. Where the will is signed by a mark, an affidavit stating that the deceased at the time of its execution had a knowledge of its contents must be filed: see Rule 71, N.-C. B.; *Hackett,* (1859) 4 S. & T. 220.

(*m*) See these terms defined: 28 & 29 Vict. c. 72, s. 2 (*post,* p. 783). By a communication dated 28th December, 1860, it appears that the persons composing the complement of a ship whose wills are exempt from inspection by the Inspector of Seamen's Wills at the Admiralty, are:—"Admirals or flag officers, commodores, captains, commanders, lieutenants, masters, second masters, pilots, physicians, surgeons, assistant surgeons, chaplains, secretaries to flag officers, inspectors and deputy inspectors of hospitals, inspectors of machinery, chief and assistant engineers [of all classes], mates [note: mates are now sub-lieutenants], naval instructors, paymasters, assistant paymasters, boatswains, gunners, carpenters, and commissioned officers of marines."

(*n*) 28 & 29 Vict. c. 72 (*post,* p. 783), amended by 60 & 61 Vict. c. 15 (*post,* p. 807).

(*o*) App. I., *post,* p. 788.

(*p*) *I.e.,* wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in the charge of the Admiralty: 28 & 29 Vict. c. 72, s. 3.

any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver the "naval assets" to the person claiming to be entitled thereto under such will, though not made in conformity with the Acts under discussion, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that the requirements of these Acts may properly be dispensed with (*q*).

Wills of seamen and marines who are prisoners of war.

The Acts prescribe the formalities requisite for the execution of wills by seamen and marines who are prisoners of war (*r*).

Certificate of Inspector of Seamen's Wills required.

Before probate of the wills of persons subject to these Acts is applied for, a certificate, endorsed on the will, must be obtained from the Inspector of Seamen's Wills (*s*) that there is no objection to probate issuing.

Form of probate.

If the requirements of the Acts have been complied with, general probate is granted ; but if the will is not valid to pass "naval assets," these are excluded from the operation of the probate.

Wills of merchant seamen.

The wills of merchant seamen are subject to certain similar restrictions imposed by the Merchant Shipping Act, 1894, ss. 176, 177 (*t*).

Section 4.

LIMITED PROBATES.

Practice as to limited probates.

Where, in accordance with the rules set out in an earlier chapter (*u*), the probate is limited or special, the rules mentioned in section 1 of this chapter are to be complied with, with the following exceptions :—

Executor's oath is settled in the registry.

The Executor's Oath is not, as in cases of general probate, filled in by the practitioner without assistance, but is taken in draft to the Clerk of the Seat, and is settled by him. If necessary, the Clerk of the Seat may refer the oath to a registrar for final settlement.

(*q*) 28 & 29 Vict. c. 72, s. 7.

(*r*) *Ibid.*, s. 6.

(*s*) Admiralty Offices, Spring Gardens, Charing Cross.

(*t*) 57 & 58 Vict. c. 60, ss. 176, 177 ; *vide* App. I., p. 806.

(*u*) *Ante*, pp. 278—281.

Fees. Fees for perusing and settling the oath are payable to the Clerk of the Seat, varying according to the length of the draft, a folio being calculated at seventy-two words. Additional fees are charged if the perusal of any other deed or document becomes necessary (*v*).

The oath, when settled, is returned to the practitioner, and is engrossed and sworn. The procedure then follows that in the case of general probate; but the draft oath should be lodged with the other papers.

Draft oath to be lodged.

Extra fees on limited grants.

In addition to the ordinary fees, extra fees are charged for special or limited grants of probate; particulars will be found in Appendix V.

Section 5.

PROBATES "SAVE AND EXCEPT" AND *CÆTERORUM*.

Where there is a general and a special executor.

Probate "save and except."

If a testator appoints one executor for a special purpose or in respect of a specific part of his estate, and another executor for all other purposes, probate is granted to the latter, if he is the first to apply, save and except that special purpose or specific part of the estate. On the other hand, if the limited executor is the first to obtain a grant, the other may take probate *cæterorum*—*i.e.*, of the rest of the testator's estate (*x*).

Probate *cæterorum*.

Where both general and special executors apply simultaneously.

If both executors apply simultaneously, the grant is made in the same instrument, but the powers of the executors are distinguished—*i.e.*, probate is granted to the general executor of all the estate save and except the property which vests in the limited executor; and probate is granted to the limited executor restricted in accordance with the will (*x*).

Practice.

The practice is the same as in other cases of special probates, but special oaths setting out the circumstances of the case are sworn. (App. VII., Forms 157, 158.)

Probate "save and except naval assets."

Another instance of a probate "save and except" occurs where the will of a seaman or marine is invalid to pass naval assets: the executor there takes probate "save and except" the naval assets (*y*).

(*v*) See App. V.

(*x*) *Vide ante*, pp. 279, 280; and for the practice in obtaining a double probate, *post*, p. 482.

(*y*) *Vide ante*, pp. 408, 454.

CHAPTER III.

PRACTICE AS TO GRANTS OF LETTERS OF ADMINISTRATION.

Section 1.

GENERAL ADMINISTRATION ON INTESTACY.

To whom granted.—Administration is granted to the person entitled in accordance with the rules discussed in detail in an earlier chapter (*a*).

Where several persons are equally entitled to the grant, and one alone is appointed administrator, power not reserved to the others.

When several persons are equally entitled to a grant, and a grant is made to one alone of such persons, power is not reserved to grant administration to the others if any or all of them shall thereafter apply for a grant. During the lifetime of the administrator, their right to administration ceases, but, as has been seen (*b*), upon his death they may come in and take a grant *de bonis non*.

Application made through a solicitor or in person

Application, by whom made.—Application for a grant of letters of administration may be made through a solicitor, or in person by the party entitled; but applications in person will not be received by letter nor through the medium of any agent (Rule 2, N.-C. B.).

Special rules, orders, and instructions, which will be found on page 907, have been framed to meet the case of personal applications, and to these the practitioner is referred.

to the principal registry;

to the district registry.

Application, where made.—Application for letters of administration may be made to the principal registry in all cases (Rule 1, N.-C. B.). Application may be made to a district registry in cases where the deceased, at the time of his death, had a fixed place of abode within the district of the registry in which application is made, and not otherwise (Rule 1, D. R.).

(*a*) *Ante*, pp. 308—344.
(*b*) *Ante*, pp. 327, 359.

The practice with regard to applications to the district registry is identical with that with regard to applications to the principal registry, unless a difference is expressly stated in the text of the following sections.

Not within fourteen days from the death.

Application, when made.—The earliest date at which letters of administration may issue is the fifteenth day after the death of the intestate, unless under the direction of the judge or by order of two of the registrars of the principal registry (*c*) (Rule 44, N.-C. B.).

Delay of more than three years must be accounted for. Certificate of delay.

In every case where administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified by the practitioner to the registrar. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they shall think fit (*d*) (Rule 45, N.-C. B.).

Persons entitled in priority to the applicant to be cited,

Preliminary.—When the person applying for a grant is not the person primarily entitled thereto, he must lodge a caveat, and issue a citation against all persons entitled in priority to himself to accept or refuse a grant or to show cause why a grant should not be made to him. If the persons so cited enter no appearance to the citation, the applicant must obtain an order of the judge on motion that the grant shall be made to him.

The practice as to citations will be found in the chapter on Citations (*e*), and the practice as to motions in the chapter on Motions (*f*).

unless they renounce.

Where the persons entitled to a grant in priority to the applicant formally renounce their right, no citation or motion is necessary.

Where one or some only of several next of kin apply, the registrar may require notice to be given to the other or others.

Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the registrar may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin (Rule 28, N.-C. B.). This rule

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(*c*) The order of one of the registrars of the principal registry is sufficient to authorise an earlier grant from a district registry: Rule 52, D. R.

(*d*) Further, as to certificate of delay, see *ante*, p. 442. For forms, see App. VII., Forms 21, 77.

(*e*) *Post*, pp. 521 *et seq.*

(*f*) *Post*, pp. 544, 563 *et seq.*

is not strictly enforced, and, in the absence of special circumstances, the grant will be made to the next of kin first applying without notice to the other next of kin; but where separate applications are made by two or more next of kin, a grant will not be made until one or the other withdraws his application, or until they agree to take a joint grant.

Procedure where one of the next of kin desires to question the fitness of the next of kin who applies for a grant.

Where one or more of the next of kin desire to question the fitness of the next of kin who is applying for a grant, he or they will enter a caveat, and, when it is warned, enter an appearance to the warning as next of kin of the deceased. The applicant must then take out a summons to discontinue contentious proceedings (*g*), and on the hearing of this summons before a registrar the claims of the rival applicants are considered, and a grant is made to one or other of them on the principles discussed in an earlier chapter (*h*). Affidavits are filed setting forth the rival claims. An appeal lies from the decision of the registrar to the judge in chambers.

Papers to lead the grant.

Papers to lead the Grant.—The papers necessary to lead the grant of administration are three in number: A, the administrator's oath; B, the Inland Revenue affidavit; and C, the administration bond. These documents will be discussed in their order.

The administrator must swear an oath.

A. The Administrator's Oath.—The administrator must swear an oath. The rules previously laid down with reference to the oath of an executor (*i*) will, with the necessary alterations, prove of assistance in filling in the administrator's oath; but there are further requirements which must receive attention.

Form of oath.

The following is a common form of oath:—

"In the High Court of Justice,
Probate, Divorce, and Admiralty Division (Probate).
The Principal Probate Registry.

Oath of administrator where cousin-german takes as next of kin.

"In the Estate of *Anna Maria Smith*, deceased.

"I, *John Henry Wilson*, of 5, *John Street, Bristol, in the county of Somerset, draper*, make oath and say that *Anna Maria Smith*, of 15, *Redland Road, Bristol, aforesaid*, deceased, died

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(*g*) *Vide post*, p. 542.
(*h*) *Ante*, pp. 324 *et seq.*
(*i*) *Ante*, pp. 442—446.

on the 1*st* day of *April*, 1910, at 15, *Redland Road, aforesaid,* intestate, *a spinster, without parent, brother or sister, uncle or aunt, nephew or niece,* and that I am the *lawful cousin-german and one of the next of kin* of the said deceased; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £1,200, and no more, to the best of my knowledge, information, and belief.

"(Signed) JOHN HENRY WILSON.

"Sworn etc."

Rules for filling in the oath.

The wording of the oath varies with the particular circumstances of each case. It is hoped that the forms in the Appendix will furnish a sufficient guide in most cases (*k*).

The oath to be so worded as to clear off all persons having a prior right to the grant, and to show how the prior interests have been cleared off, and to state that the applicant is the only next of kin, etc.

The following rules must be noted: The oath of administrators, and of administrators with the will, is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off, and the oath is to set forth, when the fact is so, that the party applying is the only next of kin, or one of the next of kin, of the deceased. In all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case (Rule 37, N.-C. B.).

What is meant by the expression "cleared off."

By "cleared off" is meant a statement in the oath that no person entitled in priority to the applicant (in the case to which the form above set out applies: parent, brother or sister, uncle or aunt, nephew or niece) exists, or that such persons "have duly renounced letters of administration of [the intestate's] estate," or that such persons have died since the death of the intestate without having taken upon themselves letters of administration to his estate.

(*k*) App. VII., Forms 182—206, 220, 221.

How the applicant for administration is described in the oath.

The applicant for administration describes himself as follows (*e*):—

A husband	as	"the lawful husband;"
A wife	as	"the lawful widow and relict;"
A father	as	"the natural and lawful father and next of kin;"
A mother	as	"the natural and lawful mother and only next of kin;"
A child	as	"the natural and lawful child and only next of kin," or "the natural and lawful child and one of the next of kin;"
A brother	as	"the natural and lawful brother;"
A sister	as	"the natural and lawful sister."

If there are no parents living, the brother or sister is further to be described as "one of the next of kin" or "the only next of kin," as the case may be.

An uncle	as	"the lawful uncle,"	and "one of the next of kin" or "the only next of kin," as the case may be;
An aunt	as	"the lawful aunt,"	
A nephew	as	"the lawful nephew,"	and "one of the next of kin" or "only next of kin," as the case may be.
A niece	as	"the lawful niece,"	

If the intestate has left a brother or sister who has been cleared off, and a nephew or niece applies for a grant, he or she should be described not as "next of kin," but as "the natural and lawful child of A. B., the natural and lawful brother" (*or* sister) "of the intestate, who died in his lifetime, and as such one of the persons entitled in distribution to his personal estate."

(*e*) "Directions for describing Testators or Intestates and Parties applying for Probate and Administration," *post*, App. IV., p. 926.

A grandparent, grandchild, cousin, etc. { as "lawful" and "one of the next of kin" or "only next of kin," as the case may be;
The heir-at-law as "the heir-at-law."

Inland Revenue affidavit to be filed.

B. The Inland Revenue Affidavit.—The applicant for administration must make an affidavit of the property for the use of the Commissioners of Inland Revenue. The Inland Revenue affidavit is filed with the papers to lead the grant (*f*).

Court of Probate Act, 1857, s. 81.

Persons to whom grant of administration shall be committed shall give bond,

except Solicitors for the Treasury or the Duchy of Lancaster.

C. The Administration Bond.—Sect. 81 of the Court of Probate Act, 1857, provides: "Every person to whom any grant of administration shall be committed shall give bond to the judge of the Court of Probate to enure for the benefit of the judge for the time being, and, if the Court of Probate, or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate (*g*) of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct: Provided that it shall not be necessary for the Solicitor for the affairs of the Treasury or the Solicitor of the Duchy of Lancaster applying for or obtaining administration to the use or benefit of her Majesty to give any such bond as aforesaid" (*h*).

Bond cannot be dispensed with.

The Court has no discretion, and cannot dispense with the execution of an administration bond (*i*), except in favour of the Solicitor for the Treasury and the Solicitor of the Duchy of Lancaster.

Form.

Form.—Forms of administration bond will be found in the Appendix. (App. VII., Forms 66-75.)

Bond to be executed by applicant in person,

Execution.—The bond is to be executed by the applicant for administration. In one case, where, after administration had been granted, a large sum became payable to the estate of the

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(*f*) *Vide ante*, p. 446.

(*g*) Since the Land Transfer Act, 1897, "all the estate which by law devolves to and vests in the personal representative of the deceased."

(*h*) These officials, although they give no bond, are subject, as regards the administration, to the liabilities and duties imposed by a bond: *vide ante*, p. 340; and they must file a declaration of the deceased's estate: *Powis*, (1865) 34 L. J. P. 55. For form, see App. VII., Form 119.

(*i*) Where two persons were appointed joint administrators *pendente lite* the Court refused to dispense with the execution of a joint bond: *Stanley* v. *Bernes*, (1830) 1 Hagg. 221.

except in very special circumstances.

deceased, the Court, under circumstances of urgency, allowed another person to execute a bond to cover the increased amount in place of the administrator, who had gone abroad after taking out administration. This was done on the understanding that as soon as possible the administrator should himself execute a similar bond (*k*).

Bond of married woman administratrix.

Husband no longer required to join,

but may become a surety.

Before the Married Women's Property Act, 1882, came into operation, where the administratrix was a married woman her husband was required to join in the administration bond (*l*). For that reason, amongst others, a married woman could not be appointed administratrix without her husband's consent. Since the Act the husband's concurrence is no longer required. The married woman alone executes the bond, nor can her husband execute it on her behalf. He may, however, become a surety (*m*).

Bond, by whom attested.

Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person authorised to administer oaths under 52 Vict. c. 10, and 54 & 55 Vict. c. 50, but in no case are they to be attested by the solicitor of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix (Rule 38, N.-C. B.) (*n*).

Before whom sureties may execute the bond.

Where bond is executed by a marksman.

The sureties may execute the bond before any person duly qualified under this rule, not necessarily the person who attests the signature of the administrator. If any of the parties sign by a mark, the Commissioner should state that the effect of the bond was duly explained, and that the mark was made in the Commissioner's presence.

Seals may be printed.

By an order of the 21st April, 1902, seals may be printed.

Sureties must be responsible persons.

Sureties.—The registrars are to take care, as far as possible, that the sureties to administration bonds are responsible persons (Rule 41, N.-C. B.).

(*k*) *Ross*, (1877) 2 P. D. 274.

(*l*) *Sutherland*, (1862) 4 S. & T. 189.

(*m*) *Ayres*, (1883) 8 P. D. 168.

(*n*) See *Parker*, (1866) 1 P. & D. 301, where this rule was relaxed. But when the oath has to be re-sworn, and this is done before another commissioner, the bond need not be re-attested.

What persons are accepted as sureties: women; married women;

A woman, whether single, married, or a widow, will be accepted as a surety, but a married woman must prove on affidavit that she has separate sufficient estate to cover the penalty of the bond.

guarantee society;

A "guarantee society" may be accepted as surety, even though its directors do not by the bond render themselves personally liable, but only if the society is approved by the Registrars after perusal of the balance sheet, and the proposed affidavit of justification (*o*). The corporate seal of the society is affixed to the bond, and an affidavit as to the sufficiency of the society must be filed (*p*). A society having its main office in Scotland, but a branch in London, has been accepted, but a special form of bond is required. (App. VII., Form 73.)

solicitors' clerks.

Solicitors' clerks are not, except in very special circumstances, accepted as sureties in the principal registry. In the district registries they may be accepted, if the solicitor extracting the grant certifies that they are sufficient for the amount of the bond, and are not sureties in any other case.

As a general rule the sureties must reside within the jurisdiction.

Foreign sureties.—As a general rule, the sureties to the administration bond must reside within the United Kingdom, the Channel Islands, or the Isle of Man (*q*).

In what cases the rule is relaxed.

But the administrator (wherever resident) of a foreign subject resident abroad may be allowed to give bond with foreign sureties, if it be proved on affidavit that the deceased left no debts in England (*r*). In all other cases, leave to give bond with foreign sureties must be obtained on summons to a judge in chambers (*s*).

(*o*) *Carpenter* v. *Queen's Proctor,* (1882) 7 P. D. 235.

(*p*) For forms, see App. VII., Forms 25, 72, 73.

(*q*) The rule was established at a time when the assignee of the bond could not have served the sureties with process if they were resident abroad; but by 15 & 16 Vict. c. 76, s. 18, service can be effected on a person abroad. The rule was consequently relaxed: *Reed,* (1863) 3 S. & T. 439; *Fernandez,* (1879) 4 P. D. 229; but not as to Scotland, for 15 & 16 Vict. c. 76 did not apply to Scotland or Ireland: *Herbert* v. *Sheill,* (1864) 3 S. & T. 479; but see *Houston,* (1865) 1 P. & D. 85, where sureties resident in Scotland were allowed. See now R. S. C., Order XI.

(*r*) Direction of the President, May 10th, 1893, so construed by the President, June 29th, 1897; see *De Beaufort,* [1893] P. 231.

(*s*) Direction of the President, May 10th, 1893; *Scott,* [1895] P. 342. Where the deceased died domiciled in a British Colony, it was held that the administrator must apply to a judge in chambers for leave to give bond with foreign sureties: *Simpkins,* December 3rd, 1896.

Two sureties are usually required.

Where the property is under £50,

Number of Sureties.—As a general rule, two sureties (*t*) are required, but where the property is *bonâ fide* under the gross value of £50, one surety only may be taken to the administration bond (Rule 45, D. R.).

or grant is made to deceased's husband, etc., one surety will suffice.

When administration is granted to the husband of the deceased, or to the husband's representative or attorney, one surety only is required (Rule 39, N.-C. B.) (*u*).

On good cause shown sureties may be dispensed with.

In what cases sureties have been dispensed with.

Sureties dispensed with.—On good cause shown sureties may be dispensed with altogether, and the bond of the administrator alone may be accepted. Thus the Court dispensed with sureties where the estate had been paid into the Court of Chancery and was being administered by that Court (*v*); where the proposed administrator was the nominee of a public department (*x*), or was the deceased's trustee in bankruptcy or official receiver in bankruptcy (*y*); and where the person applying for a grant was entitled to the whole estate, and all the debts had been paid (*z*).

In one case, under special circumstances, the Court dispensed with sureties to the bond in order to allow the administratrix a free hand in the management of the estate (*a*).

The fact that the estate is large and the risk small not sufficient ground.

The Court will not, by reason of the estate being large and the risk small, dispense with sureties to the administration bond; but it may allow the security to be made up by any number of bonds (*b*).

(*t*) The number may be increased if the applicant desires it: *Herbert* v. *Sheill,* (1864) 3 S. & T. 479.

(*u*) This is an old rule of the Prerogative Court: see *Noel,* (1832) 4 Hagg. 207; and see *Hunt,* [1896] P. 288.

(*v*) *Cleverly* v. *Gladdish,* (1862) 2 S. & T. 335; *De la Farque,* (1862) 2 S. & T. 631; *Stelfox,* (1894) 70 L. T. 814; *Leach,* (1899) 80 L. T. 170. But the Court must be satisfied that the Court of Chancery will continue to have the management of the estate after the grant of administration: *Jackson* v. *Jackson,* (1865) 1 P. & D. 13.

(*x*) *Bryan,* [1905] P. 88; *Solicitor of the Duchy* v. *Canning,* (1880) 5 P. D. 114.

(*y*) *Belcher* v. *Maberly,* (1840) 2 Curt. 629; *Cope,* (1890) 15 P. D. 107; *Astbury,* (1899) 80 L. T. 296. So where the trustee in bankruptcy of the person entitled to a grant applies for administration the Court will dispense with sureties: *Thacker,* [1900] P. 15; *Causton,* [1906] P. 124.

(*z*) *De la Farque,* (1862) 2 S. & T. 631; *Allen,* [1893] P. 184; *Paton,* [1901] P. 188; *Unwin,* (1902) 87 L. T. 749; see *Harper,* [1909] P. 88.

(*a*) *Cory,* [1903] P. 62; *Rushworth,* (1908) 25 T. L. R. 128.

(*b*) *Earle,* (1885) 10 P. D. 196; *McGowan,* (1885) 10 P. D. 197.

Applications for leave to dispense with sureties, how made.

Applications for leave to dispense with sureties to an administration bond are made to the Court on motion; except where the official receiver applies for administration of the estate of a deceased bankrupt, in which case his application to dispense with sureties may be dealt with by a registrar (*c*).

The original sureties to the bond will not be discharged and others substituted.

Sureties, Discharge.—The Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them, for the latter would not be and could not be made responsible for any past transactions of which they might know nothing (*d*).

What is meant by justification of sureties.

Justification of Sureties.—A surety is said to "justify" when he makes affidavit that he is, after payment of all his just debts, well and truly worth in real or personal estate the sum of £ , the amount of half the penalty of the bond (*e*).

Justification not required in ordinary circumstances.

In ordinary circumstances the sureties are not required to justify; but there are cases in which the Court will, as a general rule, require justification of sureties.

In what cases justification of sureties is required by the regular practice of the Court.

When any person takes letters of administration in default of the appearance of parties cited, but not personally served with the citation (*f*), or when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he is a committee appointed by the Court of Chancery, a declaration of the estate and effects of the deceased (App. VII., Form 119) must be filed at the registry, and the sureties to the administration bond must justify (*g*) (Rule 42, N.-C. B.).

The same rule applies where the Court makes an order for a grant on the presumption of the death of the testator or intestate.

Where administration is granted pending suit, or under sect. 73 of the Court of Probate Act, 1857, justification of sureties is usually required.

Justification of sureties

In any case the Court may order the sureties to the

(*c*) *Renninson,* (1894) 1 Manson's Reports, 475.

(*d*) *Stark,* (1866) 1 P. & D. 76.

(*e*) For form of affidavit of justification, see App. VII., Forms 24, 25.

(*f*) See *Aitkin* v. *Ford,* (1830) 3 Hagg. 194, n.; *Milligan,* (1849) 2 Rob. 108; *Belcher* v. *Maberly,* (1840) 2 Curt. 629.

(*g*) In these cases the Court will not relax the rule even partially, except in very special circumstances: *Howell* v. *Metcalfe,* (1824) 2 Add. 348; *Jackson* v. *Jackson,* (1865) 1 P. & D. 12.

may be ordered in other cases on the application of a person interested.

administration bond to justify, on the application of a person interested in the estate. Thus on the application of the next of kin (*h*) or of a legatee (*i*) the sureties to an administration bond have been required to justify, at least to the extent of the applicant's interest in the estate (*k*).

As a general rule, creditors have no right to require justification of sureties.

Creditors, as a general rule, have no right to call upon the next of kin to give justifying security, and a very strong case must be made out before a departure from this rule is allowed (*l*).

How an order for justification of sureties is obtained.

A person who is desirous of obtaining an order that the sureties to the administration bond should justify, should enter a caveat, and appear to the warning. The application for justifying security is then made on summons to a registrar.

Court of Probate Act, 1857, s. 82.

Penalty on bond.

Penalty on Bond.—An administration bond "shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn (*m*), unless the Court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the Court or district registrar so to do; and the Court or district registrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court or district registrar shall think reasonable" (*n*).

Applications for reduction of penalty, etc., how made.

Applications under the foregoing section for a reduction of the penalty of the bond or for an order that more than one bond may be given are made to the Court on motion.

(*h*) *Coppin* v. *Dillon,* (1831) 4 Hagg. at p. 376.

(*i*) *Pickering* v. *Pickering,* (1828) 1 Hagg. 480.

(*k*) *Jackson* v. *Jackson,* (1865) 1 P. & D. 12 ; *Friswell* v. *Moore,* (1819) 3 Phill. at p. 139 ; *Hardstone,* (1828) 1 Hagg. 487. See *Williams,* (1830) 3 Hagg. 217 ; *Howell* v. *Metcalfe,* (1824) 2 Add. at p. 350 ; *Campbell,* (1829) 2 Hagg. 555 ; but see *Taylor* v. *Diplock,* (1815) 2 Phill. at p. 280.

(*l*) *Hughes* v. *Cook,* (1753) 1 Lee, 386 ; *John* v. *Bradbury,* (1866) 1 P. & D. 245 ; *Hackman* v. *Black,* (1755) 2 Lee, 251. A creditor's application was granted in *Noel,* (1832) 4 Hagg. 207.

(*m*) If the deceased died on or since the 1st day of January, 1898, the penalty is double the gross principal value of the personal estate *plus* double the gross *annual* value of the real estate : Direction of the President, February, 1898. By a direction of Sir J. Hannen (March, 1885), when an administration bond with a penalty of less than this amount is tendered at the Principal Registry, the registrars are at liberty to receive it, provided that the deficiency does not exceed £5 *per cent.* of the sum above indicated.

(*n*) Court of Probate Act, 1857, s. 82.

Orders for the reduction of the penalty on the bond, when made.

Orders reducing the penalty on the bond were made in the following cases:—

Where the original grant of administration had expired, and a fresh grant and bond was required owing to the fact that the estate had not been fully administered, the Court allowed the bond to be given in double the amount of the unadministered estate (*o*).

Where letters of administration were granted merely for the purpose of executing a formal release to the trustee under a marriage settlement, the Court allowed the administration bond to be given for a nominal sum (*p*).

Where an intestate died leaving property of the value of £3,000, to which his mother was solely entitled, and debts to the amount of £45, the Court granted administration on the mother entering into a bond, with sureties, for double the amount of the debts—namely, £100 (*q*).

Where, owing to an unexpected addition to the deceased's estate after the grant had issued, it was necessary to reswear the value of the estate, the Court directed the registrars to accept a separate bond in the penalty of a sum which, together with the penalty on the original bond, would be double the amount of the sum under which the estate was to be resworn (*r*).

Where the greater part of the estate had been paid into the Court of Chancery to be administered there, the Court allowed the sureties to enter into a bond in double the amount remaining in the hands of the administrator (*s*).

Where, under a misapprehension as to the value of the estate of an intestate, the penalty of an administration bond was too large, the Court, upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry to be cancelled (*t*).

The Court may allow

Under the section the Court may direct that more bonds

(*o*) *Halliwell*, (1885) 10 P. D. 198; *Fozard*, (1863) 3 S. & T. 173; *Oakey*, [1896] P. 7.

(*p*) *Stacpoole*, (1861) 2 S. & T. 316.

(*q*) *Gent*, (1858) 1 S. & T. 55.

(*r*) *Weir*, (1859) 1 S. & T. 506.

(*s*) *Morris*, (1889) 15 P. D. 9; *Cormack*, [1891] P. 151; *Paxton*, (1889) 14 P. D. 40.

(*t*) *Goold*, (1865) 4 S. & T. 20.

more bonds than one to be given, so as to limit the liability of the sureties.

than one shall be given, so as to limit the liability of the sureties. And it has been held that though the Court will not, by reason of the property being large and the risk small, dispense with sureties to an administration bond or lessen the amount to be secured, it may allow the security to be made up of any number of bonds (*u*).

Court of Probate Act, 1857, s. 83. Power of Court to assign bond.

Assignment of Bond.—"The Court may, on application made on motion or petition (*x*) in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person, to be named in such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond" (*y*).

Under what circumstances the Court will order an assignment.

The registrar will order such an assignment (see App. VII., Form 65) upon being satisfied on affidavits that the application is made *bonâ fide*, and upon a *primâ facie* case being made out that the condition has been broken, and that the applicant is entitled to sue the administrator for the breach (*z*).

Practice.

The assignment, which must bear an impressed stamp for 5*s*., is drawn up by the registrar, but the bond and assignment are not given out. If the bond is filed at a District Registry, the District Registrar must be requested to forward it to the Principal Registry. Arrangements must be made with the Record Keeper for the attendance of a clerk with the bond and assignment at the hearing of the action.

Where there were two

Where an administrator executed a bond with one surety

(*u*) *Earle*, (1885) 10 P. D. 196.

(*x*) Such applications are, by the present practice, made on summons issued by the applicant against the administrator and sureties, returnable before a registrar.

(*y*) Court of Probate Act, 1857, s. 83; and see, as to bonds given prior to the 11th January, 1858, the Court of Probate Act, 1858, s. 15.

(*z*) *Young*, (1866) 1 P. & D. 186. See *Bouverie* v. *Maxwell*, (1866) 1 P. & D. 272, at p. 275; *Baker* v. *Brooks*, (1862) 3 S. & T. 32. And see the following cases (but not on the practice, which is altered: *vide supra*, note (*x*)); *Young* v. *Oxley*, (1858) 1 S. & T. 25; *Sandrey* v. *Michell*, (1862) 3 S. & T. 25; *Cartwright*, (1876) 1 P. D. 422.

under a nominal penalty, and having subsequently resworn the value of the estate at an increased sum, executed a fresh bond with two new sureties, an application was made to the Court for the assignment of both bonds. The Court refused to assign the first bond until the action on the second had been disposed of (*a*).

bonds, the estate having been resworn, the Court refused to assign the first bond until an action on the second had been disposed of.

Where one surety to an administration bond executed the same on the assurance that the other person named in it as co-surety would execute it, and the latter refused, the bond being executed by another surety without the first surety's assent, the bond was held void and ordered to be cancelled (*b*).

Surety induced to execute bond by misrepresentation, bond cancelled.

Creditor's Bond.—The bond of a creditor administrator contains an undertaking to pay the debts "rateably and proportionally and according to the priority required by law, not, however, preferring his own debt or that of any other person by reason of being administrator" (*c*) (App. VII., Form 70).

Form of bond given by a creditor administrator.

Extracting the Grant.—The necessary documents are deposited in the registry in the same way as in the case of a will (*ante*, p. 451), and if the papers are in order, letters of administration are granted in due course.

Practice on extracting a grant of letters of administration.

Practice where a Creditor applies for a Grant.—A creditor who applies for a grant must obtain the renunciation of the widow, the next of kin, all persons entitled in distribution, and the representatives of any of them who have died subsequently to the deceased, also of the heir-at-law, if there is real estate, or must cite these persons "to accept or refuse letters of administration, or show cause why such administration should not be granted" to such creditor. Failure on the part of the persons so cited to appear and to accept a grant is equivalent to a renunciation of their right, and the grant may be made to the creditor without any further renunciation (*d*).

Creditor who applies for a grant of administration.

Where the deceased intestate leaves a husband her surviving,

What persons are to be

(*a*) *Irving*, (1869) 1 P. & D. 658.

(*b*) *Cowardin*, (1901) 86 L. T. 261.

(*c*) *Vide post*, p. 471.

(*d*) In granting administration of a small estate to a creditor, the Court has dispensed with citation of the next of kin on proof that they had received notice of the application: *Teece*, [1896] P. 6; *Morgan*, (1896) 75 L. T. 190; but see *Cope*, (1890) 15 P. D. 107.

The Court may dispense with citation or notice under s. 73 of the Court of Probate Act, 1857: *Turner*, (1886) 12 P. D. 18; *Conolly*, cited where the intestate left a husband her surviving.

only the husband and heir-at-law, where there is real estate, need renounce or be cited, for none other has an interest in the estate; when the surviving husband dies before the grant is applied for, the creditor must cite his personal representative (*e*).

Where the deceased was a bastard intestate the creditor must give notice to the King's Proctor.

A creditor who is desirous of obtaining a grant of administration to the estate of a bastard intestate, who has died without issue or surviving spouse, must, under Rule 75, N.-C. B., give notice of his application to the King's Proctor, or the Solicitor for the Duchy of Lancaster, as the case may be, and no grant will issue until that officer has signified the course he intends to take. This he will do by letter; and if he declines to take administration on behalf of the Crown, the grant (*f*) will be made to the creditor without an order of the Court. The creditor's notice must disclose the value of the assets, and a grant will not issue for a larger amount than that disclosed by such notice, without further notice to the officer of the Crown.

Where the deceased died intestate without known relations the creditor must give notice to the King's Proctor,

A creditor who is desirous of obtaining a grant of administration to a person who has died without any known relation must first give notice to, and receive an intimation of acquiescence from, the proper officer of the Crown, in accordance with Rule 75, N.-C. B., referred to above.

and cite the next of kin, if any, and all persons having an interest, etc., by advertisement.

The creditor must then issue a citation against "the next of kin, if any, and all persons having or pretending to have any interest in the estate of the deceased," as prescribed by Rule 76, N.-C. B. (*g*) (App. VII., Form 39).

The citation is served by advertisement in the mode prescribed by Rules 70 and 76, N.-C. B. (see App. VII., Form 39).

A caveat must be entered before a citation will issue.

In all cases, before a citation will issue, the creditor must enter a caveat (Rule 66, N.-C. B.), and must in his affidavit to lead the citation (App. VII., Form 42) state the nature and

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(1896) 74 L. T. 461 ; *Adams,* (1896) 74 L. T. 462, n ; *Heerman,* [1910] P. 357 ; *vide ante,* p. 414. For forms of citation, see App. VII., Forms 83, 87, 100.

(*e*) For cases in which citation of the husband has been dispensed with, see the preceding note.

(*f*) *I.e.*, of the personal estate only ; the real estate, if any, vests in the Crown without a grant.

(*g*) But see *Heerman,* [1910] P. 357, where such citation was dispensed with under sect. 73.

amount of his debt (*h*) and of the estate (*i*), and that he holds no security whatever for his debt or any part thereof (*j*).

Affidavit to lead citation.

It is not unusual, where a citation has issued at the instance of one creditor, and no appearance to the citation has been entered, to allow another creditor to take the grant in substitution for the creditor at whose instance the citation issued (*k*).

Grant made to creditor substituted for the creditor who issues the citation.

If the next of kin appears to the citation, and expresses his willingness to accept a grant, he is preferred to the creditor; but the creditor, if he has been compelled to take steps owing to the undue delay of the next of kin in taking administration, is entitled to his costs (*l*).

If next of kin, etc., appears to the citation, he is preferred to the creditor.

If none of the persons entitled in priority to the creditor appear to the citation, application for a grant to the creditor is made to the Court on motion (*post*, pp. 540, 544).

If none appear to the citation, application for grant to creditor made to Court on motion.

A creditor to whom administration is granted must file a declaration of the estate of the deceased, and the sureties to his administration bond must justify (Rule 42, N.-C. B.).

Creditor administrator must file a declaration of the estate.

Sureties must justify.

The Court requires every creditor administrator before taking administration to enter into a bond to pay the debts "rateably and proportionally and according to the priority required by law, not, however, preferring his own debt or that of any other person by reason of being administrator" (*m*) (App. VII., Form 70).

Form of bond executed by creditor administrator.

Section 2.

PRACTICE AS TO GRANTS OF ADMINISTRATION WITH THE WILL ANNEXED.

The practice as to grants of administration with the will annexed resembles in some respects that as to obtaining probate in common form; in other respects it has features

Practice as to administration *cum testamento annexo*.

(*h*) *Aitkin* v. *Ford,* (1829) 3 Hagg. 194, n.; and the time when the debt became due: *Rawlinson* v. *Burnell,* (1864) 3 S. & T. 479.

(*i*) *Martineau* v. *Rede,* (1825) 2 Add. 455; *Briggs* v. *Roope,* (1860) 29 L. J. P. 96.

(*j*) *Aitkin* v. *Ford,* (1829) 3 Hagg. 194, n. As to where the creditor is a mortgagee, see *Roxburgh* v. *Lambert,* (1829) 2 Hagg. 557.

(*k*) *Talbot* v. *Andrews,* (1828) 1 Hagg. 697; *Andrews* v. *Murphy,* (1860) 4 S. & T. 198.

(*l*) *Cole* v. *Rea,* (1817) 2 Phill. 428; *Jones* v. *Beytagh,* (1821) 3 Phill. 635; *vide post,* p. 541.

(*m*) See *Brackenbury,* (1877) 2 P. D. 272. Before 1900 the words were "not *unduly* preferring his own debt"; but in *Davies* v. *Parry,* [1899] 1 Ch. 602, it was held that these words did not disable the creditor from in common with the practice as to obtaining administration on intestacy.

To whom the grant is made. If made to one where several are equally entitled, power not reserved to the rest.

The grant is made to the person entitled in accordance with the rules discussed in detail in an earlier chapter (*n*). Where several persons are equally entitled to the grant, and the grant is made to one of them, power is not reserved to grant administration to the others; during the lifetime of the administrator they have no right to administer, but upon his death they may come in and take administration with the will annexed *de bonis non*.

By whom application may be made.

The application for the grant is made by the person entitled, or his solicitor, in accordance with the same rules as apply to administration on intestacy (*ante*, p. 456).

Time and place of application.

The rules as to the time and place of the application are the same as in applications for probate (*ante*, pp. 441, 442).

The applicant must obtain the renunciation of all persons entitled in priority, or cite them to accept or refuse the grant.

The rules as to citation (*o*) of all persons entitled in priority to the applicant are the same as in administration on intestacy (*ante*, pp. 457, 458). Thus the residuary legatee or devisee in trust who applies for a grant must obtain the renunciation of or cite the executor or executors; the beneficial residuary legatee or devisee for life must cite the executor and residuary legatee and devisee in trust; the residuary legatee or devisee substituted after the death of the residuary legatee and devisee for life must cite the latter, the residuary legatee and devisee in trust, and the executor; the personal representative of a residuary legatee or devisee who applies for a grant cites all persons directly interested in the residue and the executor, if any.

If the residue is not disposed of by will, and there is no executor, a legatee or creditor who applies for a grant must cite the next of kin and heir-at-law if there is real estate, and all other persons, if any, entitled in distribution to the personal estate.

But if the residue is disposed of by will, and the residuary legatees and devisees all renounce, the grant is made

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paying his own debt in priority to others. In consequence of that decision, the words in the text have been substituted. See practice note, [1899] W. N. 262; *Belham,* [1901] 2 Ch. 52.

(*n*) *Ante,* pp. 344—355.

(*o*) For forms of citation, see App. VII., Forms 81—101.

indifferently to a legatee or to the testator's next of kin or heir-at-law, according to priority of application; and if the legatee applies for the grant, the next of kin or heir-at-law need not be cited.

Citations to accept or refuse a grant are dealt with in a later chapter (*p*).

The administrator's oath to be so worded as to clear off all persons having a prior right to the grant, and to show the capacity in which the applicant is entitled.

Administrators' Oath.—The oath of administrators with the will is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off (Rule 37, N.-C. B.). The oath must show the capacity in which the applicant is entitled.

Forms of oath are given in the Appendix (App. VII., Forms 164—175) but in illustration of this rule an example may be useful.

Example.

Thus where the executor and residuary legatee and devisee in trust, and the testator's widow (the residuary legatee and devisee for life), both renounce, and the testator's son, one of the residuary legatees substituted—*i.e.*, the persons who are to take the residue on the death of the residuary legatee or devisee for life—applies for the grant, the oath will state "that A. B., the sole executor and residuary legatee and devisee in trust, has duly renounced the probate and execution thereof; that C. D., widow, the relict of the said deceased, the residuary legatee and devisee for life named in the said will, has duly renounced letters of administration with the said will annexed; that I am the son and one of the residuary legatees substituted in the said will."

How the oath is to be worded where the residue is given to a *class* of which the applicant is a member.

Where the residue is not given by the will to any person or persons specifically, but to a class, *e.g.*, "to my children" or "to my nephews," the oath must state that the applicant is "the natural and lawful child" (*or* nephew) "of the testator, and *as such* one of the residuary legatees named in the will."

In all other respects the rules for making the administrator's oath are the same as those for the oath of an executor (*ante*, pp. 442—446).

Inland Revenue affidavit.

An *Inland Revenue affidavit* is required (*ante*, p. 446).

(*p*) *Post*, pp. 522—525.

The will, how proved.

The will is proved in all respects in the same way as by an executor (*ante*, pp. 441—452).

Administrator (with will) must give bond.

The Administrator's Bond.—Unlike an executor, the administrator with the will must give bond for the due performance of his duties. The form of bond for administration with the will annexed differs from that given by an administrator on intestacy (for form, see App. VII., Form 67), but in all other respects the practice as to the bond, sureties, penalty, etc., is identical with that set out in an earlier section on administration on intestacy (*ante*, pp. 461—469).

Section 3.

PRACTICE AS TO LIMITED ADMINISTRATIONS.

Limited administrations not granted unless all persons entitled to the general grant renounce, or consent, or are cited.

Limited administrations (*ante*, pp. 363—408) are not granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge (*n*) (Rule 29, N.-C. B.).

No person entitled to a general grant permitted to take a limited grant.

No person entitled to a general grant of administration of the estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the judge (*o*) (Rule 30, N.-C. B.).

Practice as to limited administrations.

The practice is the same as in applying for a general grant, with the following exceptions:—

The administrator's oath to be framed in accordance with the facts,

The Oath.—In all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case (Rule 37, N.-C. B.).

and is settled at the registry.

The oath is not, as in the case of general grants, filled in by the practitioner without assistance, but is taken in draft to the Clerk of the Seat to be settled by him. If necessary, he may refer the oath to a registrar for final settlement.

Fees for settling oath.

Fees for perusing and settling the oath are payable to the Clerk of the Seat, varying according to the length of the draft. Additional fees are charged if the perusal of any deed or other document is necessary (see *post*, p. 941).

(*n*) An order for a limited grant, after citation of persons entitled to a general grant, must be obtained on motion (see *post*, p. 561), except in one case, viz., where application is made for a grant limited to the only portion of an estate *left unadministered*. In that case, the application is reported to the judge by the registrar, and the grant issues under the direction of the judge without a motion: Tristram & Coote, p. 280.

(*o*) To be obtained on motion (*post*, p. 560).

Further procedure.

The oath when settled is returned to the practitioner, and is engrossed and sworn. The draft oath and the engrossment must be lodged with the other papers. Where the grant is limited to a particular property, the value of that property only is sworn to in the oath.

Value of property sworn.

Administration bond prepared in the registry.

The Bond.—The administration bond is, in all cases of limited or special administrations, to be prepared in the registry (Rule 40, N.-C. B.).

The number of sureties required.

In all cases of limited or special administrations two sureties are required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one is required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant (*p*) (Rule 39, N.-C. B.).

Penalty on bond.

Further procedure.

With these exceptions, the procedure to be followed is the same as in the case of general administrations. In addition to the ordinary fees, extra fees are charged for special or limited grants. Particulars will be found on page 938.

Fees.

Section 4.

ADMINISTRATION "SAVE AND EXCEPT" AND *CÆTERORUM.*

Administrations "save and except" and *cæterorum.*

The practice as to these grants when they become necessary (*ante*, p. 406) is the same as that in other cases of administrations limited to part of the deceased's estate. Special oaths are sworn (App. VII., Forms 157, 158; and see *ante*, p. 455).

Section 5.

PRACTICE AS TO GRANTS TO AN ATTORNEY.

Grants to an attorney under a power of attorney.

In the case of a person residing out of England, administration or administration with the will annexed may be granted to his attorney acting under a power of attorney (Rule 32, N.-C. B.; *ante*, pp. 364—368).

Power of attorney,

The power of attorney, which should be under seal (*q*), is

(*p*) If the deceased died on or since the 1st January, 1898, the penalty must be given in double the gross *annual* value of the realty *plus* double the gross personalty: Direction of the President, February, 1898; *vide ante*, p. 466. The rule that the penalty must be in double the amount of the property does not apply in a case where the estate being in settlement is sworn under a nominal amount, or to an administration limited to carry on proceedings in Chancery.

(*q*) But see *ante*, p. 366, and for forms, see App. VII., Forms 311—313.

form and procedure.

filed at the registry. If it is a general power and is needed for other purposes, it may be delivered out after the grant has been made.

Attorney administrator's oath.

The attorney swears a special oath (App. VII., Forms 162, 163, 207—211) stating that the executor or the person entitled to a grant whom he represents, and also any other executors or persons entitled to the grant whom he does not represent, are all resident out of England, for if any executor or person entitled to the grant is resident in England, the grant is not made to the attorney of an absentee.

Status of the attorney of an absentee *jus habens.*

A person acting under a power of attorney has the same equality and priority as the donor of the power would have if applying personally (*r*).

Whether the grant to the attorney shall be limited or general.

Where the power of attorney is limited to the administration of a specific portion of the estate, the grant may on good cause shown be limited accordingly, but the general rule is that, if the donor of the power is entitled to a general grant, his attorney must take a general grant (*ante*, p. 367).

Further procedure.

In all other respects the practice as to grants to attorneys is the same as the practice in other cases of grants for the use and benefit of a *jus habens.* The attorney administrator must execute the usual bond, and prove the will, if any, in the same way in all respects as his constituent would have done had he applied personally.

Section 6.

PRACTICE AS TO GRANTS OF ADMINISTRATION *DURANTE MINORE ÆTATE* (*s*).

Guardians of minors and infants, when entitled to administration *durante minoritate.*

Guardians of minors and infants are not entitled to a grant without clearing off all persons of age equally entitled with the minors and infants, whether as having an interest in the real or personal estate (*t*).

Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by

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(*r*) Additional Instructions under Land Transfer Act, 1897; *post,* p. 929.

(*s*) *Vide ante,* pp. 368—374; and for forms of oath, see App. VII., Forms 212—216.

(*t*) Additional Instructions under Land Transfer Act, 1897; *post,* p. 929.

minors of their next of kin or next friend, as the case may be, are required (Rule 33, N.-C. B.).

How appointed.

In cases of infants (under the age of seven years) not having a testamentary guardian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the judge or one of the registrars. The registrar's order is founded on an affidavit showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his right to the guardianship, and is consenting to the assignment of the proposed guardian, or that he has been cited and has failed to appear (*u*), and that the proposed guardian is ready to undertake the guardianship (Rule 34, N.-C. B.).

Form of affidavit and procedure.

The affidavit, a form of which will be found in the Appendix (App. VII., Forms 45—48), is filed at the registry, and thereupon the registrar's order is made (App. VII., Forms 262—265).

Form of election of guardian.

A minor elects his guardian by an instrument in writing signed by him in the presence of an attesting witness, and filed at the registry (*v*). The document need not be under seal.

If a minor wishes to elect a relative who is not his next of kin, a summons returnable before a registrar should be taken out, and served on the next of kin.

No election or assignment of the mother as guardian required.

No election or assignment is required where the mother or her appointee under the Guardianship of Infants Act, 1866, takes the grant (App. VII., Form 216).

Procedure where testamentary or statutory guardian, guardian appointed by the Chancery Division or by foreign Court applies for grant.

A guardian appointed by will must in his affidavit refer to the will as proved. If appointed by deed, he must produce the deed. A guardian appointed by the Court of Chancery must file an office copy of the decree or order; and guardians appointed by a foreign Court must file a copy of the order, duly authenticated by the seal of the Court.

The Court will not grant administration to one of several statutory guardians, or guardians appointed by the Court of Chancery, unless the rest renounce and consent.

Renunciation of next of kin.

If the next of kin renounce their right to be appointed

(*u*) For form of citation, see App. VII., Form 112.

(*v*) Form of election to take a grant: App. VII., Form 127; to renounce: App. VII., Form 128.

guardians of the minor or infant, their renunciations must be filed (App. VII., Forms 322, 323).

Where there are both minors and infants.

Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them by order of the judge or a registrar, provided the object in view is to take a grant. If the object be to renounce a grant, a guardian must be specially assigned to the infants by order of the judge or a registrar (Rule 35, N.-C. B.).

The first part of the rule applies only where the guardian elected by the minors is also next of kin of the infants; otherwise the infant's next of kin must be cleared off, and the guardian elected by the minors assigned to the infants by order of the registrar.

Where there are several minors or infants all equally entitled to the grant.

Where there are several minors or infants all equally entitled to a grant, the grant may be made to the guardian elected by all of them. But all the minors must join in the election of the guardian. If one is unwilling to join in the election, he must renounce his right to administration by his guardian specially elected by him for that purpose, or must be cited (*w*).

Under special circumstances, however, the registrar may grant administration to the guardian of some alone of several minors, for the use and benefit of them all, without requiring the others to be cited or renounce, *e.g.*, where some are resident abroad, and prevented from joining in the election. In such cases an explanatory affidavit must be filed, and a registrar's order obtained.

The administrator *durante minoritate* must exhibit a declaration of the estate, except in certain cases.

In all cases where grants of administration are made for the use and benefit of minors or infants, the administrators must exhibit a declaration on oath of the estate and effects of the deceased, except when the effects are sworn under £20, or when the administrators are the guardians appointed by the Court of Chancery, or other competent Court, or are the testamentary guardians of the minor or infants (see Rule 36, N.-C. B.).

This declaration must be exhibited before the grant will be allowed to pass the seal. (For form, see App. VII., Form 119.)

Where the minor or

If the minor or infant has no known relations, or is a

(*w*) *Spriggs* v. *Banks,* (1845) 4 N. C. 102.

bastard, the consent of the King's Proctor or the Solicitors for the Duchies of Cornwall or Lancaster, as the case may be, must be obtained before a stranger is elected or assigned to be his guardian for the purpose of taking the grant. This consent must be filed in the registry.

infant is a bastard, or without known relations.

Section 7.

PRACTICE AS TO GRANTS OF ADMINISTRATION FOR THE USE AND BENEFIT OF A LUNATIC (*x*).

No grant for the use, etc., of a lunatic will be made unless all persons equally entitled with the lunatic have been "cleared off."

A grant will not be made to a person for the use and benefit of a lunatic without clearing off all other persons equally entitled with the lunatic, whether as having an interest in the real or personal estate.

Procedure where the committee of the lunatic applies.

Where the grant is applied for by the committee of the lunatic, he will produce his commission, which is sufficient proof of his title and of the lunacy of the person of whose estate he is committee.

Procedure where the person for whose use, etc., the grant is to be made has not been found a lunatic by inquisition.

Where the person for whose use and benefit the grant is to be made has not been found a lunatic by inquisition, a joint affidavit, by the medical man under whose care the patient is confined and the patient's attendant or nurse, is required, stating that the patient is a lunatic and totally incapable of managing himself or his affairs (*z*).

Form of oath.

The administrator takes a special form of oath, in which the circumstances of the case are recited (*a*).

An administrator for the use, etc., of a lunatic must file a declaration of the estate.

When any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee, a declaration of the estate of the deceased must be filed in the registry, and the sureties to the administration bond must justify (Rule 42, N.-C. B.) (*b*).

The sureties to the bond must justify.

Applications for grants of administration for the use and benefit of a person who has become insane after a grant has been made to him, are made to the Court on motion (*c*).

(*x*) *Vide ante*, pp. 374—381.

(*z*) For form of affidavit, see App. VII., Form 20.

(*a*) For forms, see App. VII., Forms 217—219.

(*b*) See *Hardstone*, (1828) 1 Hagg. 487. Form of declaration: App. VII., Form 119.

(*c*) *Vide ante*, pp. 378 *et seq.*; *post*, pp. 558, 559.

Section 8.

PRACTICE AS TO ADMINISTRATION *PENDENTE LITE* (*d*).

Applications for the appointment of an administrator *pendente lite.*

Application for the appointment of an administrator *pendente lite* is made to the Court on motion. The procedure on the motion is discussed in a later chapter (*post*, p. 662).

Procedure where the administrator *pendente lite* is to be nominated by a registrar.

An order of the Court having been obtained on motion, if the administrator *pendente lite* is to be nominated by a registrar, an appointment is taken out before the taxing registrar, who settles who is to be the administrator after hearing the parties, and decides what security he shall give.

Administrator *pendente lite* required to give justifying security.

An administrator *pendente lite* is usually required to give justifying security.

Papers to lead the grant.

The usual documents—*i.e.*, the oath (App. VII., Form 223), the bond (App. VII., Forms 74, 75), a declaration of the estate, and the Inland Revenue affidavit—are then lodged at the registry, and the grant issues in the ordinary way.

Joint administrators *pendente lite.*

Joint administrators *pendente lite* must execute a joint bond.

A grant of administration *pendente lite* can only be made in the principal registry.

Section 9.

PRACTICE AS TO ADMINISTRATION *DE BONIS NON* (*e*).

Administration *de bonis non cum testamento annexo.*

Where application is made for a grant of administration with the will annexed *de bonis non*, the administrator's oath, the Inland Revenue affidavit, and the administration bond is required, but in some respects these differ from those prepared on an original application.

The oath.

The Oath (*f*) recites the fact and date of the original grant.

Copy of the record of the previous grant must be lodged.

A copy of the act or record of the first grant or last previous grant must be applied for at the Record Keeper's Department and lodged with the papers.

Form of oath.

The applicant swears that he will administer according to law all the unadministered estate which by law devolves to and vests in the personal representative of the deceased, and the amount of the estate sworn in the oath is the value of the unadministered estate alone.

Amount of the estate to be sworn.

(*d*) *Vide ante*, pp. 381—388, *post*, pp. 662—664.

(*e*) *Vide ante*, pp. 356—362.

(*f*) For forms, see App. VII., Forms 177—181.

The applicant may attend at the registry and be sworn to the original will, in which case the original will must be looked up, and a fee is paid for the search. Or he may be sworn to and mark the original grant, or a certified copy under seal of the will, before any person duly qualified to administer oaths.

The oath, where sworn.

The Bond is in the form required for grants *de bonis non* and is given in respect of the unadministered estate. Note that the person before whom the oath was sworn must attest the bond (Rule 38, N.-C. B., *ante*, p. 462).

The bond.

Engrossment of Will.—If the will has been proved in the principal registry, the engrossment for the *de bonis non* grant may be made in the registry on payment of a fee, or the practitioner may himself engross the will from a copy, if he prefers.

Engrossment of will.

Inland Revenue Affidavit.—Where application is made for a second or subsequent grant in respect of property which came within the operation of a previous grant, if the deceased died after the 1st August, 1894, the form of Inland Revenue affidavit A—5 must be prepared. The unadministered estate only is included, giving the value at the date of the affidavit. Where the deceased died on or before that date, Form A is used.

The Inland Revenue affidavit.

Form.

The Commissioners of Inland Revenue will on presentation of a memorial in the form set out in the Appendix (App. VII., Form 131) accompanied by the Inland Revenue affidavit, impress a duty-paid stamp or endorse a certificate of payment of duty on the affidavit, if duty has been paid on the original estate (*g*).

Certificate of payment of duty, or duty-paid stamp.

If any portion of the unadministered estate has not borne duty, a corrective affidavit (Form D—1) must be rendered, and the duty paid.

Corrective affidavit.

Where the deceased died *before* the 1st August, 1894, and the whole unadministered estate does not exceed £100, no memorial or certificate need be obtained.

The original grant need not be produced if taken after the

(*g*) See Probate Manual, published by Waterlow & Sons, 7th ed., p. 38.

1st June, 1891. The memorial must be signed by the solicitor extracting the grant.

Procedure on extracting the grant.

Extracting the Grant.—The oath, the engrossment of the will, the office copy of the record or act of the previous grant, the Inland Revenue affidavit with the certificate of payment of duty or duty-paid stamp endorsed on it, and the bond are lodged at the Department of the Receiver of Papers. The original will must also be looked up and sent to the seat. *No certificate of delay is required.*

In due course, if the papers are in order, the grant issues.

Administration *de bonis non* on intestacy.

Grants of administration de bonis non *on intestacy.*—The foregoing instructions, with the necessary variations, apply equally to grants *de bonis non* on an intestacy. The papers required in such cases are the oath (App. VII., Forms 226—233), Inland Revenue affidavit with certificate of duty paid, the bond, and the office copy act of the first grant.

Section 10.

PRACTICE AS TO SECOND OR *CESSATE* GRANTS—DOUBLE PROBATES (*h*).

Second or *cessate* grants, when required.

Second or Cessate *Grants.*—Closely allied to grants *de bonis non* are second or *cessate* grants, which become necessary where the original grant was limited for a specified time or until the happening of a certain contingency or event. When that time elapses, or that contingency or event occurs, the original grant ceases and expires, and if the estate has not been fully administered, a second or *cessate* grant must be made.

Double probates.

Double Probates.—Where power has been reserved, in the original grant of probate, to one or more of the executors to come in afterwards and prove, the Court will, on the application of the executor or executors to whom power has been reserved, at any time during the lifetime or after the death of the proving executor, grant them a double probate of the will (*i*).

(*h*) *Vide ante,* pp. 280—281, 391—392.

(*i*) An application for an order on executors to supply information necessary for obtaining double probate, may be made on summons: *Griffin,* (1910) 54 Sol. Jo. 378.

PRACTICE.

Practice.

Where an executor applies for a double probate or a *cessate* probate, the practice is as follows:

Double or *cessate* probate.

The Oath.—The executor swears generally that he will administer the estate (not merely the unadministered estate), but the amount of the estate as sworn is only the value of the unadministered estate (App. VII., Forms 152, 159—162).

As to swearing to the will the practice is the same as that in administrations with the will annexed *de bonis non* (*ante*, p. 481).

The Inland Revenue Affidavit is prepared in precisely the same way as in the case of grants *de bonis non* (*ante*, p. 481), and the practice as to engrossment of the will, search, method of obtaining the grant, etc., is identical in both cases (*ante*, p. 482). There is no objection to the seal being attached to the old grant, if the practitioner desires it.

Cessate administrations on intestacy, and with the will annexed.

The practice in *cessate* administrations on intestacy follows the practice in administrations *de bonis non* (*ante*, p. 482), and the practice as to *cessate* administrations with the will annexed follows the practice in *cessate* probates and in grants of administration with the will annexed *de bonis non* (*ante*, p. 480). (For forms of oath, see App. VII., Forms 176, 224, 225.)

Bond.

The bond is given in respect of the unadministered estate (*k*).

(*k*) The practice of making double probates and *cessate* grants general in their terms is still continued, but since April 1st, 1897, the practice has been to include only the amount of the unadministered estate in stating the amount of the estate in the oath and Inland Revenue Affidavit, and accordingly the word "unadministered" is now inserted before the words "estate," etc., in that part of the oath and certificate on the grant, respectively, where the amount of the assets is stated. The value of the estate is stated as at the date of the Inland Revenue Affidavit, instead of, as in the case of original grants, at the date of the death.

CHAPTER IV.

THE PRACTICE WITH REFERENCE TO PROBATE OF THE WILLS OF PERSONS DOMICILED ABROAD AND GRANTS ACCORDING TO FOREIGN LAW.

Section 1.

PROBATE OF THE PRIVILEGED WILLS OF BRITISH SUBJECTS (*a*).

Probate in common form of the will of a British subject valid under the Wills Act, 1861, s. 1.

In order to obtain probate of a will of personalty valid under Lord Kingsdown's Act, 1861, or administration with such a will annexed, in addition to the ordinary formalities the following affidavits must be filed:—

Affidavit of British status.

Affidavit of foreign law.

Under sect. 1 *of the Act.*—(1) An affidavit of the British status of the testator (*b*) and (2) an affidavit (*c*) sworn by some person conversant with the law of the country in question setting out that the will is valid by the law of the place where it was made, or where the testator was domiciled when it was made, or by the law of that part of the British Empire where the testator had his domicil of origin, as the case may be.

The second affidavit is unnecessary when the testator's domicil of origin was English or Irish, and the will is valid by English law.

Neither affidavit is necessary where the deceased died domiciled in any of the colonies brought within the Colonial Probates Act, 1892, by Order in Council (*d*), and the will is executed in accordance with the requirements of the law of the domicil, which is in these cases the same as the English law.

Probate in common form of the will of a British subject valid under the Wills Act, 1861, s. 2.

Under sect. 2 *of the Act.*—(1) An affidavit of British status (*b*) setting out where the will was made; (2) if the will was made in Scotland, an affidavit (*e*) setting out its validity by Scotch law.

(*a*) *Vide ante,* pp. 32—34.

(*b*) See App. VII., Form 18.

(*c*) See App. VII., Form 17.

(*d*) See p. 492, *post.*

(*e*) By a Scotch advocate or a Writer to the Signet (App. VII., Form 19).

Section 2.

PROBATE OF FOREIGN WILLS.

Probate in common form of a foreign will of personalty is granted in this country on one of two grounds.

Probate in common form of the will of a foreigner who died domiciled abroad: (1) where the will has been adopted as a valid testament by the Court of the country of domicil;

First, on the ground that the will has been adopted as a valid testament by the Court of the country of domicil (*f*).

The English Court, in order to be satisfied on this point, must have before it a duly authenticated copy of the actual document recognised by the foreign Court (*g*), and there must be satisfactory evidence of the act of recognition by the foreign Court, usually a copy of its decree under the seal of the Court (*h*).

A translation of both these documents must be annexed to them, and the translator, unless his competency is vouched for by his official position, must file an affidavit verifying the translation and stating his qualification (*i*).

A sealed copy of a will made by a foreign notary who has the custody of the original is, in some cases, admitted to probate without proof of foreign law, but as to these the direction of the Clerk of the Seat should be taken (*i*).

(2) where the will is valid by the law of the testator's domicil.

Second, on proof that the will is valid by the law of the country in which the testator was domiciled at the time of his death (*j*).

In this case the document to be proved is the original will, or a duly authenticated copy of the original will, if the latter cannot for good reasons be brought before the Court (*k*).

Oath.

In both cases the oath to lead the grant must contain a statement as to the country in which the testator died domiciled.

(*f*) *Deshais,* (1865) 4 S. & T. 13. *Vide ante,* pp. 25, 26.

(*g*) *Vigny,* (1865) 4 S. & T. 15. See, as to Russian probate, a departure from this rule: *Clarke,* (1867) 36 L. J. P. 72. In *Rule,* (1878) 4 P. D. 76, the rule in the text was adhered to; but in *Lemme,* [1892] P. 89, where a translation of the will of a British subject had been registered in the French Court, probate of a certified copy of the original will (not the translation) was granted "until such time as the original will is brought in." This case was followed, with reference to the will of a German subject, in *Von Linden,* [1896] P. 148. And see *Von Faber,* (1904) 20 T. L. R. 640.

(*h*) *Vigny,* cit. *supra; Clarke,* cit. *supra; Rule,* cit. *supra.*

(*i*) Tristram & Coote, p. 51.

(*j*) *Vide ante,* pp. 31—32.

(*k*) *Deshais,* (1865) 4 S. & T. 13.

Affidavit of foreign law, by whom such affidavit may be made.

The validity of the will by the law of that country is proved by an affidavit of an expert in that law—*i.e.*, a person who is familiar with the law of that country, not merely from theoretical study (*l*), but from practical experience in the Courts. The certificate of an ambassador of the country in question is sufficient (*m*). The Court, with some hesitation, accepted the affidavit of a notary public, who stated that he had had extensive practice in the law in question (*n*).

Colonial law may be proved by the certificate of the Secretary of State for the Colonies, and Scotch law by a Writer to the Signet or a member of the Scotch Bar (*o*).

Section 3.

GRANTS OF ADMINISTRATION (WITH OR WITHOUT WILL) TO PERSONS ENTITLED THERETO BY FOREIGN LAW.

The principles upon which the Court acts and the form of the grant in such cases have been described in a preceding chapter (*p*).

Grant to the personal representative appointed by the foreign Court.

Such grants are made—

(1) To "the person entrusted with the administration of the estate by the Court having jurisdiction at the place of the domicil of the deceased at the time of his death."

The applicant should be so described in the oath, which should state the domicil of the deceased, and, if he died intestate, that he left relations (*q*).

A duly authenticated copy of the foreign grant under seal must also be filed.

(*l*) *Bonelli,* (1875) 1 P. D. 69. Form of affidavit: App. VII., Form 17.

(*m*) *Klingemann,* (1862) 3 S. & T. 18; *Prince Oldenburg,* (1884) 9 P. D. 234; *Dost Aly Khan,* (1880) 6 P. D. 6. In *Terry* (June 16th, 1894), it was held that the affidavit of a clerk in the American Consulate in London as to the validity of a will by the laws of America, was not sufficient, but it was intimated that a certificate from the consul, under seal of the consulate, that the will was valid by the American laws, giving also the grounds of his opinion, would be accepted. In this case, evidence that the deceased died domiciled in America was required.

(*n*) *Whitelegg,* [1899] P. 267.

(*o*) Tristram & Coote, p. 52.

(*p*) *Ante,* pp. 22—25.

(*q*) See App. VII., Form 270.

Grant to the person entitled to be appointed personal representative of the deceased by the law of his domicil.

(2) To "the person entitled to the administration of the estate of the deceased by the law of —— " (*i.e.*, the country where the deceased died domiciled).

The applicant should be so described in the oath, which must contain statements as to domicil, etc., as in the preceding case (App. VII., Form 271).

An affidavit by an expert in the law of the country of domicil must be filed stating that the applicant is the person entitled to the grant by the law of that country (App. VII., Form 17).

In both cases, if the applicant is not the person to whom a grant would be made by the English law, a registrar's order must be obtained (App. VII., Forms 270, 271).

These observations apply to grants of administration with the will annexed to persons entitled thereto by foreign law, or entrusted therewith by the foreign Court, both where the will appoints no executors, or where there are executors, and another person is added to their number by the foreign Court (*e.g.*, the executor dative of the Roman-Dutch Law). In the latter case, a registrar's order is required. The will is proved as indicated in the preceding section.

CHAPTER V.

PRACTICE AS TO RESEALING IRISH, SCOTCH, AND COLONIAL GRANTS.

Section 1.

IRISH GRANTS RESEALED IN ENGLAND.

20 & 21 Vict. c. 79, s. 95. Probates, etc., granted in Ireland to be of like force as if originally granted in England on being resealed.

The Probates and Letters of Administration Act (Ireland), 1857 (*a*), s. 95 provides: "When any probate or letters of administration . . . granted by the Court of Probate in Ireland shall be produced to and a copy thereof deposited with the registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the last-mentioned Court (*b*), and being duly stamped shall be of the like force and effect and have the same operation in England as if it had been originally granted by the Court of Probate in England" (*c*).

A certificate that the Irish grant has been duly stamped is required.

And if the grant is of letters of administration, a certificate that sufficient bond has been given must be filed.

The Irish grant will not be resealed in England unless it appear from a certificate of the Commissioners of Inland Revenue, or their proper officer, that the probate or letters of administration is duly stamped in respect of the estate and effects of which the deceased died possessed in England (Rule 73, N.-C. B.), and, if the grant is one of letters of administration, unless a certificate has been filed under the hand of a registrar of the Court of Probate in Ireland that

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(*a*) 20 & 21 Vict. c. 79.

(*b*) See *Roche*, (1861) 7 Jur. (N. S.) 784; *Divenny* v. *Corcoran*, (1862) 32 L. J. P. 26.

(*c*) An Irish grant may be resealed in England whatever the domicil of the deceased, the rule in this respect differing from the rule as to Scotch grants. See further Judicature Act, 1873, which renders this provision applicable to the Probate Division. The Irish grant may be resealed in England whenever the deceased left property in this country, and where the deceased died since the 1st January, 1898, even though the property is real property only: *Sidney*, (15th November, 1900). A colonial grant resealed in Ireland and produced for resealing in England, will be treated as an ordinary Irish grant, and will be resealed accordingly.

bond has been given in Ireland, in a sum sufficient in amount to cover the property in England, as well as in Ireland, in respect of which such administration is required to be resealed (*d*).

Certificates, from whom obtained.

The former of these certificates is now obtained from the Inland Revenue Office, Dublin (*e*), the latter from the probate registrar in Ireland.

Practice.

Practice.—The copy of the grant, the certificate as to the payment of duty, and, if the grant is of letters of administration, the certificate as to the bond, are left at the principal probate registry, together with the Irish grant. For fees, see Appendix V.

If the application to reseal the grant is made under sect. 16 of the Finance Act, 1894, through the Personal Application Department, the copy grant is made in the office without charge; if otherwise applied for, the copy must be brought or sent with the application. The certificates above referred to must be obtained by the applicant in either case.

By rules reciprocally made between the Irish and English Courts, the person applying may deposit the necessary papers at the Irish registry for transmission to London for resealing (*f*).

Section 2.

ENGLISH GRANTS RESEALED IN IRELAND.

20 & 21 Vict. c. 79, s. 94. Probates, etc., granted in England to be of like force as if originally granted in Ireland on being resealed.

Similar provisions, *mutatis mutandis*, are made for the resealing of English grants in Ireland by 20 & 21 Vict. c. 79, s. 94 (*post*, p. 772).

Certificate that the grant is duly stamped.

A certificate that the probate or letters of administration is duly stamped in respect of the estate of which the deceased died possessed in Ireland must be obtained; the application is made to the Secretary, Estate Duty Office, Somerset House.

Where the grant is one of administration, the probate registrar in Ireland will require a certificate (App. VII., Form 79)

(*d*) Court of Probate Act, 1858, s. 29; Rule 73, N.-C. B. See *Potts*, (1860) 2 S. & T. 5.

(*e*) If the grant issued before the 1st June, 1888, application for this certificate must be made to the Estate Duty Department, Somerset House, London.

(*f*) Rules 107, 108, N.-C. B.

And if the grant is of letters of administration, a certificate that sufficient bond has been given is required.

stating that the bond given in England is sufficient to cover the estate in Ireland as well as England. Application for this certificate is made to the Notation Department, Somerset House, London. The application must be supported by an affidavit. The form of this affidavit will be found in Appendix VII. (Form 29), and detailed instructions for obtaining these two certificates are given on page 933.

Where it is intended to apply in Ireland to reseal the grant under the Finance Act, 1894, s. 16, the certificate as to bond is given without any fee beyond the 15*s.* payable under that section, if applied for at the time the grant is issued, but if applied for subsequently, the ordinary fees are charged.

Rule 107, N.-C. B.

The papers may be deposited in the English Probate registry for transmission to Ireland, there to be resealed.

Rule 107, N.-C. B. provides: "In any case in which it is intended to apply for the resealing in Ireland of any grant of probate or letters of administration made in . . . England, the executor or administrator may deposit in the principal or district probate registry where the grant has been made a copy of such grant, . . . together with the original and any certificate or certificates that may be required, and the fees payable in Ireland in respect of such resealing, and the registrar shall transmit by post the documents so deposited, together with such fees to the registrar of the principal probate registry in Ireland, for the purpose of such grant being resealed under the provisions of 20 & 21 Vict. c. 79, s. 94."

Practice.

Applications under this rule are made at the Personal Application Department (Room 37) by the administrator, executor, or his solicitor. The documents above mentioned are there deposited, and the necessary fees payable in Ireland are deposited in the form of postal orders. Detailed instructions are given on page 933, and particulars of the fees payable will be found on page 960.

Section 3.

SCOTCH GRANTS RESEALED IN ENGLAND.

21 & 22 Vict. c. 56, s. 12, amended by 39 & 40 Vict. c. 70.

The Confirmation and Probate Act, 1858 (*g*), s. 12, as amended by the Sheriff Courts (Scotland) Act, 1876 (*h*), s. 41, provides in substance that when any confirmation of the executor (*i.e.*, the

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(*g*) 21 & 22 Vict. c. 56 (*post*, p. 773).

(*h*) 39 & 40 Vict. c. 70 (*post*, p. 798).

equivalent in Scotland to an English grant of probate or letters of administration) of a person who shall be found to have died domiciled in Scotland, which includes, besides personal estate situated in Scotland, also personal estate situated in England, is produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, and there is inserted in such confirmation or noted thereon a statement signed by the Sheriff Clerk that the deceased died domiciled in Scotland (*i*) such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if probate or letters of administration, as the case may be, had been granted by the said Court of Probate (*j*).

Scotch confirmation produced in Probate Court in England and there resealed to have the effect in England of probate or administration.

A Scotch confirmation can thus be resealed in England only where the deceased died domiciled in Scotland, and the confirmation includes personal estate both in Scotland and England (*k*).

Scotch confirmation resealed in England only when the deceased died domiciled in Scotland and has left personal estate in both Scotland and England.

Practice.—The grant and a copy are left with the receiver of the Scotch Court, and are transmitted by him to the Clerk of the Seat at the principal probate registry, where the confirmation is resealed (*l*). Particulars of the fees payable will be found in Appendix V.

Practice.

(*i*) This note was by the statute 39 & 40 Vict. c. 70, s. 41, substituted for the certified copy interlocutor required by the former Act.

(*j*) The Sheriff Courts (Scotland) Act, 1876, ss. 42 and 43 (*post*, p. 799), extends the above provisions to certain confirmations not dealt with by the earlier Act—*i.e.*, eiks, or additional confirmations, and confirmations with a note of trust funds (only) in England. See, as to the effect of a grant so resealed, *Hood* v. *Barrington*, (1868) L. R. 6 Eq. 218 ; *Ewing* v. *Orr Ewing*, (1885) 10 A. C. 453. A testator died possessed of property of small value in England, and entitled under the will of X. to large assets in Scotland, which were being duly administered there. His executors proved his will in Scotland only, and a legatee applied in the Probate Division for a grant of administration of the estate in this country. The executors opposed the application, and it was held that the Court was not bound to make such a grant to the legatee, its power being discretionary, and that, as it was not shown that the executors were not doing their duty, there was no necessity for a grant in this country. Application refused : *Ewing*, (1881) 6 P. D. 19. Provision has been made for facilitating the resealing of Scotch confirmations in the case of small estates by the following statutes : 38 & 39 Vict. c. 41 ; 39 & 40 Vict. c. 24 ; 44 Vict. c. 12, s. 34 (*post*, p. 814) ; 57 & 58 Vict. c. 30, s. 23 (7) (*post*, p. 835) ; under which reduced fees are payable.

(*k*) See *Ryde*, (1870) 2 P. & D. 86.

(*l*) Tristram & Coote, 171

Section 4.

ENGLISH GRANTS MADE OPERATIVE IN SCOTLAND.

21 & 22 Vict. c. 56, s. 14; 39 & 40 Vict. c. 70, s. 35. English probate or letters of administration produced in the Sheriff Court of the County of Edinburgh and certified, to have effect of confirmation in Scotland.

An English grant made to the executor or administrator of any person who shall be therein, or by any note or memorandum written thereon, signed by the proper officer, *stated to have died domiciled in England*, will, on production of the grant to, and deposition of a copy thereof with, the clerk to the Sheriff Court of the County of Edinburgh, be endorsed with the proper certificate by him, and thereupon will have the same operation in Scotland as if a confirmation had been granted by the said Court (*m*).

Oath to lead the grant.

Where it is intended to have the English grant resealed in Scotland, the oath to lead the grant (App. VII., Form 16) must contain an averment that the deceased was domiciled in England at the time of his death. The domicil of the deceased is then noted on the grant.

Notation of domicil.

Where, *after* the grant has issued, a notation of domicil is required in order to reseal the grant in Scotland, the executor or administrator or one of them must swear an affidavit (App. VII., Form 54), and upon this affidavit the registrar will make an order for the notation (App. VII., Form 278).

If a notation of English domicil is required for the purpose of applying to seal an English grant in Scotland under sect. 26 (7) of the Finance Act, 1894 (*post*, p. 835), the notation may be made without additional fee if applied for concurrently with the grant.

Section 5.

RESEALING COLONIAL GRANTS IN ENGLAND.

55 Vict. c. 6. Sealing in England of colonial probates and letters of administration.

Provision is made by the Colonial Probates Act, 1892 (*n*), for the resealing by the English Court of grants of probate or letters of administration made by the Court of any British possession, not forming part of the United Kingdom, to which the Act has been made applicable by Order in Council.

The provisions of the Act will be found in the Appendix (*post*, p. 803), and the practice is regulated by Rules 92—105, N.-C. B. The Act has by Order in Council been made

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(*m*) Confirmation and Probate Act, 1858, s. 14 (*post*, p. 773); Sheriff Courts (Scotland) Act, 1876, ss. 35, 41 (*post*, p. 798).

(*n*) 55 Vict. c. 6 (*post*, p. 803).

applicable to many British possessions, a list of which is given in the footnote (*p*). Attention is drawn to the fact that the provisions of the Act have *not* been extended to Quebec.

Application of the Act to British Courts in foreign countries.

The Act extends to authorise the sealing in England of grants made by a British Court in a foreign country (sect. 3).

Practice.

Practice.—The application is made in the principal registry by the executor or administrator or the attorney, lawfully authorised *for the purpose*, of such executor or administrator; either in person or through a solicitor (Rule 92, N.-C. B.).

A notice of the application in the prescribed form (see App. VII., Form 1) must be inserted once in the *Times* newspaper (see Rule 94, N.-C. B.).

The oath of the executor, administrator, or attorney must be in the prescribed form (see App. VII., Form 235), and must accompany the application (Rule 93, N.-C. B.).

On application to seal letters of administration the administrator or his attorney must give bond (App. VII., Forms 68, 69) to cover the personal estate of the deceased within the jurisdiction of the Probate Division. The same practice as to sureties and amount of penalty on bond is to be observed as on application for letters of administration (Rule 95, N.-C. B.).

Rules 96—105, N.-C. B., contain further instructions as to the practice to be observed on applications for resealing colonial grants, and to these the attention of the practitioner is directed.

A colonial grant resealed in Ireland and produced for resealing in England will be treated as an ordinary Irish grant, and will be resealed accordingly (*q*).

It was at one time considered that colonial grants could not be resealed under sect. 33 of the Customs and Inland Revenue Act, 1881, or under sect. 16 of the Finance Act, 1894; but since the 11th November, 1897, the contrary view has prevailed.

(*p*) Bahama Islands, Barbadoes, British Columbia, British Guiana, British Honduras, Cape of Good Hope, Falkland Islands, Fiji, Gibraltar, Gold Coast, Grenada, Hong Kong, Jamaica, Lagos, Leeward Islands, Manitoba, Natal, Newfoundland, New South Wales, New Zealand, North-western Territories, Ontario, Orange River Colony, Queensland, St. Helena, St. Vincent, Southern Rhodesia, South Australia, Straits Settlements, Tasmania, Transvaal, Trinidad and Tobago, Victoria, Western Australia.

(*q*) In *Sanders,* [1900] P. 292, a colonial grant was resealed in England although the deceased left no property in this country; but this decision would seem to be open to question; see *Roche,* (1861) 7 Jur. (N. S.) 784. In *Smith,* [1904] P. 114, a limited colonial grant was resealed.

CHAPTER VI.

PRACTICE AS TO THE REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

Revocation of grant on the application of grantee or with his consent.

A GRANT may be revoked on the application of the person to whom it was granted, or on the application of another with the consent of the grantee, on an affidavit (App. VII., Forms 49—51) showing that it has been wrongly or improperly obtained.

Application, where made.

In such cases the application for revocation is made at the Notation Department, and a registrar's order obtained (Form of Order: App. VII., Forms 273, 274).

The affidavit must be made by the grantee, or his written consent must accompany the affidavit sworn by the applicant.

Applications for the revocation of grants issued from a district registry are made to that registry, but if the new grant is to be taken out in the principal registry, the grant may be revoked there.

Revocation of grants where the grantee will not consent.

Where the parties interested will not consent to revocation by a registrar's order, application for the revocation of probate or of letters of administration is made to the Court on motion.

The grantee must be cited.

The Court will not revoke a grant upon the application of any person other than the grantee without the consent or citation of the grantee. And where a grantee has been cited to bring in a grant in order that the citor may proceed in due course of law for the revocation thereof, an action for revocation of the grant becomes necessary if the grantee resists the revocation. The procedure in such a case is dealt with in a later chapter.

Cancellation of revoked grant.

The Court requires the revoked grant to be brought into the registry for cancellation before the fresh grant is made. Its production is secured by citation of the grantee to bring it into the registry. But where the production of the revoked grant cannot be compelled owing to the grantee having left the jurisdiction, or because his whereabouts are unknown (*a*), or it has been lost or mislaid (*b*), or is in the hands of a solicitor who claims a lien over it for his costs (*c*), the Court will still revoke the grant, though it cannot cancel it.

When a grant has been revoked, and a fresh grant is subsequently applied for, search must be made from the date of the revocation.

Impounding grants.

Where a sole executor or administrator becomes insane after a grant has been made to him, and administration is granted to another for his use and benefit, the original grant is not revoked, but in most cases it must be brought into the registry to be impounded (*d*) (Form of Order: App. VII., Form 280).

Impounded grant delivered out.

Application for the fresh grant is made to the Notation Department (*e*), where the original grant is retained until such time as the lunatic recovers his senses, when, upon an order of the registrar (App. VII., Form 281) to be obtained at the Notation Department, the impounded grant will, with the consent of the interim grantee and upon satisfactory medical evidence, be delivered out to him.

(*a*) *Baker* v. *Russell,* (1752) 1 Lee, 167; *Scotter* v. *Field,* (1848) 6 N. C. 182; *Langley,* (1851) 2 Rob. 407.

(*b*) *Carr,* (1858) 1 S. & T. 111. In this case the grantee was required to give an undertaking that, if found, he would bring the grant into the registry and that it would not be acted upon.

(*c*) *Barnes* v. *Durham,* (1869) 1 P. & D. 728, where an undertaking was required from the person at whose instance the grant was revoked to bring it into the registry as soon as it came into his possession.

(*d*) *Vide ante,* pp. 379, 380; *Cooke,* [1895] P. 68.

(*e*) The *ad valorem* fees paid on the original grant are considered to be paid for work done, and no credit can be given in respect of them in the event of the grant being revoked, or the estate being afterwards sworn at a smaller amount.

CHAPTER VII.

PRACTICE AS TO ALTERATIONS IN GRANTS—ESTATES RESWORN—EXEMPLIFICATIONS AND DUPLICATE GRANTS.

Section 1.

ALTERATIONS IN GRANTS.

No alteration in a grant to be made without an order of a registrar of the principal registry.

No grant of probate or letters of administration is to be altered by a district registrar without an order of a registrar of the principal registry having been previously obtained (Rule 63, D. R.).

An affidavit of the facts required.

Application, where made.

Where for any reason a grant of probate or letters of administration requires to be altered or amended, an affidavit of the facts (App. VII., Form 53) is made by the grantee and is taken to the Notation Department at the principal registry. The evidence is submitted to the registrar, who will direct that the required alteration or amendment be made if the reason given and the evidence adduced is sufficient (Form of Order: App. VII., Form 277).

In what cases an alteration in the grant may become necessary.

Alteration of name, description, or address of the deceased.

An alteration in the grant may become necessary if the surname or christian name of the deceased has been misspelled, or her status, if a woman, misdescribed. Where a testator was described in the will, in the oath of the executors, and in the grant of probate as "of Highgate, in the county of Middlesex," and it was found that in most of his investments he was described as "of 33, Throgmorton Street, in the city of London," the Court allowed the probate to be amended by the addition of the words "and of 33, Throgmorton Street, in the city of London," to the description of the deceased. Lord Penzance said: "The practice is against the application. It would be very wrong to allow anything to be omitted that had been before introduced, as that might lead to complications;

but I am not asked to interfere with the present description, only to add to it, and that, I think, may be done" (*a*).

No alteration in the surname, etc., of the deceased will be made.

The registrar will not alter the surname or the first or only christian name of the deceased, except in cases of mere misspelling; in other cases the grant must be revoked. But an additional christian name, which has been omitted, may be introduced. Alterations in the name are inserted in the form of an alias, *i.e.*, the original name is left standing, and "otherwise ——" is added, where property is held in both names. The rules for the insertion of an alias in the original grant must be followed (*ante*, p. 444).

If the name of the deceased or the date of his death is altered, a new bond is required.

If the name of the deceased, or the date of his death, is altered, a new bond must be given or the original bond re-executed at the Notation Department by the administrator and the sureties.

Alteration of name of executor.

Where the christian names of an executor, called in the will and grant of probate "Frederick," were "Frederick John," and the Bank of England refused to transfer certain stocks, which formed part of the estate, into the names of the executors in consequence of the memorandum for the transfer having been signed by this executor: "F. J. Marsden," the Court directed that the description of the executor in the grant of probate should be altered into "Frederick John Marsden, called in the will 'Frederick Marsden'" (*b*).

Memorandum as to the true date of the will endorsed on the grant.

The Court may order a memorandum to be endorsed on the probate after it has issued as to the true date on which the will was executed if satisfied that the date given in the probate is erroneous (*c*).

Mistake in engrossing the will, how rectified.

The above enumeration of cases in which a grant may be altered is not exhaustive. Whenever a *bonâ fide* mistake has been committed by which an error has crept into the grant, on satisfactory evidence the necessary amendment may be made. Where a mistake has been made in the engrossment of the will, on application to the Superintendent of the Scrivenery Department, the engrossment will be re-examined and the alteration made.

(*a*) *Towgood*, (1872) 2 P. & D. 408.
(*b*) *Honywood*, [1895] P. 341.
(*c*) *Allchin*, (1869) 1 P. & D. 664.

Where the registrar refuses to make the alteration.

Where the registrar refuses to make the alteration applied for, application may be made to the Court on motion.

Section 2.

ESTATES RESWORN—CERTIFICATE OF ADDITIONAL SECURITY.

Value of estate resworn after administration granted.

Before accepting payment of the additional duty, the Inland Revenue authorities require a certificate of additional security and notation,

If it is discovered, after a grant has issued, that the amount at which the estate has been sworn was less than its actual amount, by reason of under-valuation, or from the fact that additional assets have been ascertained, additional duty must be paid to the Inland Revenue authorities under a "corrective affidavit" (*d*). If, however, the grant was one of administration or administration with the will annexed, the Inland Revenue authorities will refuse to endorse on the grant a certificate of payment of the additional duty, unless the applicant produces a *certificate of additional security* and a *notation* made on the grant by the probate registrar that full security has been given for the increased amount of the estate (*e*).

to be obtained from the Notation Department on affidavit.

Application for this certificate of additional security and notation is made to the Notation Department at the principal probate registry.

First, an affidavit must be sworn by the administrator stating the amount at which the estate was originally sworn, and that it has since been discovered that the estate exceeds that sum, being of the value of £——, and no more. (For form, see App. VII., Forms 26—28).

Affidavit, by whom made.

If there are joint administrators, both must join in the affidavit. A person acting under a power of attorney for an absent administrator may swear this affidavit, and execute the other necessary documents presently referred to, on his behalf. When the administrator was absent in Japan, the Court allowed another person to file an affidavit as to the increase of property, and to execute the bond to cover the amount which ought originally to have been included, on the under-

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(*d*) If the deceased died on or before the 1st August, 1894, the affidavit is in Form D; if after, in Form D—1.

(*e*) 55 Geo. III., c. 184, s. 42.

standing that as soon as possible the administrator would execute a similar bond (*f*).

Fresh bond must be given.

Penalty of bond.

The statute 55 Geo. 3, c. 184, s. 42, imposes upon the Court the duty of taking a fresh bond to cover the amount of the estate not included when the first bond was given. The penalty of this bond is in double the gross amount of the additional personal estate *plus* double the gross annual value of the additional real estate (*g*).

Further account and declaration, and justification of sureties.

When an account of the estate was required in the first instance, a further copy of the account of the estate must be filed; when the administrator was required to make a declaration of the estate, a further declaration of the estate must be filed; when the sureties to the first bond were required to justify, a further affidavit of justification is necessary. A certificate of delay is, however, unnecessary, whether such a certificate was filed in the first instance or not.

Practice.

The bond, affidavit, and such other of the above-mentioned documents as are necessary, together with the original grant, are taken to the Notation Department.

Notation and certificate.

A *notation* is made upon the grant, and is signed by the registrar, to the effect that the estate has been resworn and additional security given; and a *certificate* to the same effect is given by the registrar. (App. VII., Form 78).

Practice where additional property is to be included in a grant *de bonis non.*

Where the original administrator is dead, and it is found, when a grant *de bonis non* is applied for, that additional property is to be included in the grant, the foregoing procedure is unnecessary. The proper course to be followed in such a case is stated in the section on administration *de bonis non* (*ante*, p. 481).

Fees.

Fees.—The fees payable on reswearing the amount of the estate, will be found in Appendix V.

Where the grant issued under the reduced scale of fees payable under the Intestates' Widows and Children Acts (36 & 37 Vict. c. 52, and 38 & 39 Vict. c. 27) and the estate

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(*f*) *Ross*, (1877) 2 P. D. 274; and see *Sutherland*, (1862) 4 S. & T. 189.

(*g*) See *Weir*, (1859) 1 S. & T. 506. If the original grant was special or limited, the bond should be submitted in draft, before execution, to the Notation Department.

is subsequently resworn at a larger amount, the full fees which would have been payable had the full value of the estate originally been set out, and not merely the additional *ad valorem* fee, must be paid; but credit is given for the amount of fees actually taken. The same rule applies to grants made on personal application at the principal or district registry, on payment of the small fees authorised by the Amended Table of Fees, 1875 (*post*, p. 944), or where the estate was originally sworn at or under £100.

Where the grant was taken out under the Customs and Inland Revenue Act, 1881, s. 33, or under the Finance Act, 1894, s. 16, and the fixed fee of 15*s*. was paid to cover Court fees and expenses, and the value of the estate as resworn is such as to take the case out of the provisions of these sections, the fee of 15*s*. is forfeited, and no credit is given for that payment. The full fees on the amount of the estate as resworn must be paid.

No further *ad valorem* fees are demanded when the estate was originally sworn at over £100, and the full *ad valorem* fees were paid.

Value of estate increased after probate granted.

Where an executor who takes probate of a will swears the estate at a nominal amount, he is required to give an undertaking to pay the additional fees into the registry, if further estate is subsequently discovered.

Executor under double probate allowed to swear the value of the estate at a smaller amount than in the original probate.

Where one of two executors proved the will, swearing the property, the amount of which depended on the result of a pending suit in Chancery, at £60,000, and paying the duty thereon, the other executor was allowed to take a double probate, swearing the property at £2,000 (*h*).

Section 3.

EXEMPLIFICATIONS AND DUPLICATE GRANTS.

Exemplifications.

Exemplifications of grants of probate or letters of administration for use in foreign or colonial Courts may be obtained on application at the registry. These exemplifications are written upon parchment; they issue under the seal of the Court, and recite the grant, with a copy of the will, if any.

(*h*) *Bell*, (1871) 2 P. & D. 247.

Practice.

The practitioner must first search for the record of the grant, for which search a fee of 1*s.* is charged, and should then order the exemplification from the Clerk of the Calendars at the registry, who will supply him with the necessary parchment, which must then be taken to the Stamping Department of the Inland Revenue, to be impressed with the requisite duty stamp (£3).

The stamped parchment must be returned to the Clerk of the Calendars, together with a fee of £1 1*s.* on the exemplification and 1*s.* 6*d.* *per* folio for engrossing and collating the same. In due course the exemplification issues (App. VII., Forms 350, 351).

Duplicate grants.

Duplicate Grants.—A duplicate grant of probate or letters of administration may issue on application at the registry on payment of the proper fees (*vide* App. V.).

Practice.

No duplicate grant will be issued to any applicant other than the acting executors or administrators, or one of them, or their solicitors or lawful attorney under a power of attorney. A solicitor who applies for a duplicate grant must produce a written authority under the hand of one of such executors or administrators. The attorney of such executors or administrators must produce his letter of attorney and file a copy. A copy of the record of the original grant must accompany the application. If the application for the duplicate grant is made more than six months after the issue of the original grant, the sanction of the registrar is required. In all applications for duplicate grants, whether concurrent or subsequent, a letter showing the reason for which the duplicate is required must be filed (filing fee, 2*s.* 6*d.*), unless the reason is stated on affidavit. Where application is made to re-seal Scotch, Irish, or Colonial grants in duplicate, a similar letter must be filed, and the duplicate must be examined with the original copy filed in the registry.

CHAPTER VIII.

PRACTICE AS TO RENUNCIATION, CONSENT, AND RETRACTATION.

Section 1.

RENUNCIATION.

Renunciation defined.

Renunciation is a formal act in writing, entered and recorded in the registry, whereby an executor renounces all his right and title to the probate and execution of a will, or whereby a person, having by statute or by the practice of the Court a superior right to a grant of administration on intestacy or with the will annexed, renounces all his right and title to the letters of administration (*a*).

Form of renunciation.

By whom executed.

A renunciation may be withdrawn until recorded, and takes effect from its date.

When filed and recorded, it is final, and the renunciant need not again be cited.

A renunciation need not be under seal (*b*); indeed, it should not be, for if the renunciation is under seal, it is a deed, and must be stamped accordingly. It may be executed by the *jus habens* or by his attorney, provided the power of attorney expressly authorises the attorney to renounce on behalf of the constituent (*c*). Until the renunciation is filed and recorded it is not final, but may be withdrawn (*d*), but when recorded it takes effect from the date of it (*e*). And it was held in the case of *Harrison* v. *Harrison* (*f*) that, where an absolute renunciation has been recorded, it is not necessary again to cite the person who has renounced, when a subsequent grant is made in respect of the same estate, although he may have the right to retract his renunciation.

(*a*) For forms of renunciation, see App. VII., Forms 319—326. Forms of order for filing renunciation: App. VII., Forms 275, 276.

(*b*) *Boyle,* (1864) 3 S. & T. 426.

(*c*) *Rosser,* (1864) 3 S. & T. 490.

(*d*) *Morant,* (1874) 3 P. & D. 151.

(*e*) *Munday* v. *Slaughter,* (1839) 2 Curt. at p. 74.

(*f*) (1846) 1 Rob. 406.

Renunciation by an executor.

Renunciation by Executor.—In a preceding chapter (*g*) the power of an executor to renounce probate and execution of the will has been very fully discussed. It was there seen that, as a general rule, an executor may renounce at any time after the death of the testator; that he loses his right to renounce if he intermeddles with the estate; that he cannot renounce after he has taken probate; that the executor of an executor who has proved the will of his own testator cannot renounce the executorship of the remote testator; that the Court will not grant administration to another merely with the consent of an executor; and that the renunciation of an executor will not, as a general rule, be accepted unless at the same time he brings the will into the registry.

An executor may renounce at any time after the testator's death, unless he has intermeddled.

Renunciation by the executor of an executor.

Consent of the executor not equivalent to renunciation.

The will must be brought in.

Effect of renunciation by an executor.

It was further seen that on the renunciation of an executor, or on his failure to appear to a citation to accept or refuse probate, his right in respect of the executorship wholly ceases, and the representation of the testator devolves as if he had never been appointed executor.

It was pointed out that an executor who renounces probate waives his right to represent the deceased in any other capacity, but he may be permitted to take administration with the will annexed as attorney of the other executors. Finally, it was seen that an executor may, under special circumstances, be allowed to retract his renunciation.

It is necessary to recall these rules before dealing with the subject of renunciation by a person entitled to administration, which is governed by somewhat different rules. Before discussing these differences, however, there are certain further rules as to renunciation by an executor which demand attention.

Renunciation by executor to whom power has been reserved.

An executor to whom power has been reserved may renounce probate after the grant has been made to his co-executors. Such a course is now frequently necessary since the decision in *Pawley and the London and Provincial Bank* (*h*), in which case it was held that where a testator dies subsequently to the

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(*g*) *Vide ante*, pp. 268—275.

(*h*) [1900] 1 Ch. 58; and see *Cohen's Exors. and L. C. C.*, [1902] 1 Ch. 187. *Vide ante*, p. 17, *post*, pp. 523, 540.

1st January, 1898, having appointed executors, his real estate vests in all the executors, and not only in those who prove the will. Where, therefore, the executors who have proved the will wish to convey the legal fee simple without the concurrence of their co-executors to whom power is reserved, it is necessary to obtain the renunciation of the latter or to cite them to accept or refuse probate.

Practice.

The renunciation of an executor to whom power has been reserved cannot be filed without a registrar's order (App. VII., Form 279). The renunciation, together with the probate, is taken to the Notation Department, and the registrar's order made. The renunciation is *noted* on the act or record, but not upon the grant, and in order to prove the renunciation a copy of the act or, in certain cases, a copy of the renunciation must be obtained.

A person entitled to administration may renounce his right,

Renunciation by Person entitled to Administration.—A person entitled to a grant of administration on intestacy or with the will annexed may renounce his right and title to the letters of administration. As already stated, the rules as to renunciation in such a case differ in some respects from those as to renunciation by an executor.

even though he has intermeddled.

An executor who has intermeddled with the estate loses his right to renounce (*i*); he may be compelled to prove the will: but a person who is entitled to a grant of administration cannot be compelled to take the grant though he may have intermeddled with the estate (*k*).

His renunciation does not bind his representatives.

The renunciation of an executor binds his representatives (*l*): but the representatives of a person who has renounced administration may come in and take a grant *de bonis non.*

Effect of renunciation by a person entitled to administration.

Necessity for further citation.

The rights of an executor who has renounced or been cited and has failed to appear entirely cease, and in neither case need he again renounce or be cited when a subsequent grant becomes necessary (*m*). But though, where a person entitled

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(*i*) *Ante,* p. 269.

(*k*) *Ackerley* v. *Oldham,* (1811) 1 Phill. 248; *Ackerley* v. *Parkinson,* (1815) 3 M. & S. 411; *Fell,* (1861) 2 S. & T. 126; *Davis,* (1860) 4 S. & T. 213.

(*l*) *Perry,* (1840) 2 Curt. 655.

(*m*) *Vide ante,* p. 273.

to administration has *renounced* (*n*), he need not again renounce or be cited when a subsequent grant is required, if he has merely been cited and failed to appear on the occasion of the first grant, he must again be cited when the subsequent grant is applied for by a person with an inferior title (*o*).

The will must be brought into the registry.

A person entitled to a grant of administration with the will annexed must, on renouncing, deposit the will at the registry (*p*).

Where the person entitled to the grant is dead.

Procedure where he has no legal personal representative.

Where the person entitled to the grant of administration is dead, and his executor or administrator is entitled to the grant in his representative capacity, all his personal representatives must renounce before the grant can be made to another. If there is no legal personal representative appointed of the deceased person, all persons having an interest in his estate must renounce (*q*).

Renunciation by minors or infants.

Renunciation on behalf of Minors.—Minors and infants renounce by their guardians. A minor elects his guardian, to an infant a guardian is assigned by order of the registrar (*r*). The persons who are entitled to be appointed guardians of the minor or infant for the purpose of taking a grant for his use and benefit, are entitled to be appointed his guardians for the purpose of renouncing the grant (*s*). It must, however, be remembered where there are both minors and infants, that, although where the object in view is to take a grant the guardian elected by the minors may act for the infants without being specially assigned to them, if the object be to renounce a grant, a guardian must be specially assigned to the infants by order of the registrar (Rule 35, N.-C. B.).

If a minor wishes to elect a relative who is not his next of kin, a summons returnable before a registrar must be taken out and served on the next of kin.

Renunciation on behalf of a lunatic.

Renunciation on behalf of Lunatic.—A lunatic or person of unsound mind renounces probate or administration by his committee.

(*n*) *Harrison* v. *Harrison,* (1846) 1 Rob. 406.

(*o*) *Skeffington* v. *White,* (1828) 1 Hagg. at pp. 702, 703 ; *ante,* p. 362.

(*p*) *Fenton,* (1826) 3 Add. 35. *Vide ante,* p. 273.

(*q*) See Tristram & Coote, p. 201.

(*r*) *Vide ante,* p. 476.

(*s*) *Vide ante,* pp. 368—374, 476—478.

Where there is no committee a lunatic may renounce administration by his next of kin, but the next of kin cannot renounce *probate* on behalf of a lunatic executor; the lunatic executor must, if his renunciation is required, be cited to accept or refuse a grant (*t*).

Renunciation of guardianship.

Renunciation of Guardianship. — A person entitled, as guardian of a minor or infant, to a grant of administration for the use and benefit of the minor or infant, may renounce his right in order that a more distant relative or a stranger may be appointed guardian (see App. VII., Forms 322, 323).

Rule 50, N.-C. B. No person who renounces a grant in one character is permitted to take a representation to the same deceased in another character.

Rule 50, N.-C. B., provides: "No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character, is to be allowed to take a representation to the same deceased in another character."

Effect of the rule.

This rule prevents an executor who is also residuary legatee from renouncing probate as executor and taking administration with the will annexed as residuary legatee (*u*).

Nor can a person entitled to a grant of administration on intestacy as next of kin or heir-at-law, or of administration with the will annexed as residuary legatee or devisee, renounce his right in that capacity and take administration as a creditor.

The rule is capable of modification by the Court in a proper case.

But this rule has been treated by the Court as intended for the general guidance of the business in the registry, and capable of modification by the Court if sufficient reason be shown for departure from it (*x*). Accordingly, where two persons were appointed executors and residuary legatees in trust and guardians of the testator's children, and they renounced their right to a grant as executors and residuary

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(*t*) Tristram & Coote, p. 203. For practice as to citation, see *post*, p. 536.

(*u*) *Bullock,* (1847) 1 Rob. 275; *Richardson,* (1860) 1 S. & T. 515; *Morrison,* (1861) 2 S. & T. 129; but see *Wheelwright,* (1878) 3 P. D. 71. Where a man under a will occupies in reference to the testator two different characters, he shall not select either one he pleases as the basis of his grant, but must take administration on the largest ground. He cannot throw aside probate and take a more limited grant: *Russell,* (1869) 1 P. & D. at p. 635.

(*x*) *Per* Sir J. P. Wilde in *Loftus,* (1864) 3 S. & T. at p. 311.

legatees in trust, they were allowed to take a grant of administration with the will annexed *de bonis non* as testamentary guardians of the children for the use and benefit of the latter (*y*). And an executor who had renounced was allowed to take a grant of administration with the will annexed as the attorney of the other executors (*z*).

A husband was allowed to take a grant of administration with the will annexed as creditor, although he had signed a renunciation executed by his wife as residuary legatee (*a*).

Section 2.

CONSENT.

Consent.

Where several persons are equally entitled to the grant, and administration is granted to one of them, the renunciation of the others is not required. Where two of such persons contend for the grant, the position of either applicant is strengthened if he can obtain the consents of the persons equally entitled with himself to the administration. (For form of consent, see App. VII., Form 117.)

A form of consent by next of kin to a joint grant being made to the widow and one of the next of kin, will be found in Appendix VII. (Form 118).

Renunciation and consent.

Where there are several persons entitled to a grant as co-administrators, testamentary guardians, or as guardians appointed by the Court of Chancery, the Court will not grant the administration to one alone of such persons without the *renunciation and consent* of the others. (For a form of renunciation and consent, see App. VII., Form 326.)

Section 3.

RETRACTATION.

Retractation defined.

Leave to retract.

Retractation is the withdrawal of a renunciation which has been entered and recorded (see App. VII., Form 327). An order giving leave to retract a renunciation is obtained from the Court on motion (*aa*).

(*y*) *Loftus,* (1864) 3 S. & T. 307; and see *Gill,* (1873) 3 P. & D. at p. 115.

(*z*) *Russell,* (1869) 1 P. & D. 634.

(*a*) *Biggs,* (1868) 1 P. & D. 595.

(*aa*) *Melville* v. *Anketill,* (1909) 25 T. L. R. 655.

Under what circumstances an executor may be allowed to retract his renunciation.

Retractation by an Executor. — Only under very exceptional circumstances can an executor be allowed to retract his renunciation. Indeed it was at one time suggested that the effect of sect. 79 of the Court of Probate Act, 1859 (*b*), was to prevent retractation by an executor under any circumstances (*c*); and although it has now been held that there is nothing in that section to prevent the Court from allowing a retractation where, according to the old practice (*d*), it might have been allowed (*e*), such a retractation will not be permitted unless the executor can show that it will be for the benefit of the estate or of those interested under the deceased's will (*f*). Accordingly where one of two executors absconded after taking probate, the Court allowed his co-executor, who had renounced, to retract his renunciation and take probate (*g*). And the rule still holds good that a party may retract a renunciation at any time before it is filed and recorded at the registry (*h*).

Where the sole executrix and universal legatee renounced her rights as such to the grant, and administration with the will annexed was granted to one of the next of kin, on the death of the administrator, intestate and insolvent, the executrix was allowed to retract her renunciation as universal legatee and to take a grant of administration (will) *de bonis non* (*i*).

Practice where an executor who has renounced after intermeddling desires to take probate.

If an executor who has renounced after intermeddling in the effects, subsequently desires to take probate, his right course is to apply to the Court for a declaration that his renunciation was invalid (*k*).

Under what circumstances

Retractation by a Person entitled to Administration.— Retractation is much more freely allowed where the renun-

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(*b*) *Vide ante*, p. 273.

(*c*) By counsel in *Badenach*, (1864) 3 S. & T. at p. 466. *Vide ante*, p. 274.

(*d*) *Vide ante*, p. 274.

(*e*) *Stiles*, [1898] P. 12. *Vide ante*, p. 274.

(*f*) *Gill*, (1873) 3 P. & D. 113.

(*g*) *Stiles*, [1898] P. 12.

(*h*) *Morant*, (1874) 3 P. & D. 151.

(*i*) *Wheelwright*, (1878) 3 P. D. 71.

(*k*) *Badenach*, (1864) 3 S. & T. 465.

ciation is that of a person entitled to a grant of administration on intestacy or with the will annexed. For sect. 79 of the Court of Probate Act, 1857, which provides that on renunciation the rights of the renunciant shall wholly cease, only applies to executors, and, with respect to renunciation by persons entitled to administration, the ancient practice in allowing retractation which prevailed in the Ecclesiastical Court is unaltered by statute.

a person entitled to administration will be allowed to retract his renunciation.

According to the practice of that Court, a next of kin who had renounced his right to the original grant, which had thereupon been made to a creditor, was entitled on the death of the creditor administrator to retract his renunciation and claim the grant *de bonis non* (*l*). In a recent case (*m*), an intestate, whose estate was in the hands of an official receiver in bankruptcy, left a widow and six children, who duly renounced all rights to administration, which was granted to the official receiver. The administrator, having paid all the debts, desired to be relieved of his office. The Court allowed the widow and children to retract their renunciations, revoked the letters of administration, and made a joint grant to the widow and two of the children in respect of the unadministered estate (*n*).

A next of kin who has renounced his right to the original grant in favour of a creditor may, by leave of the Court, retract his renunciation and take a grant *de bonis non.*

And in *In the goods of Waters* (*o*) a residuary legatee who had renounced administration (will) *de bonis non*, was permitted to retract his renunciation and to take administration in preference to a creditor although the estate was alleged to be deeply insolvent. In that case Sir H. J. Fust said: "According to the practice of the Court, a residuary legatee is allowed to retract his renunciation before a grant be made to another" (*p*).

Retractation by residuary legatee.

Where a next of kin of an intestate had renounced his right, and had consented to a grant of administration for the use and benefit of the widow, who was a lunatic, until she should become of sound mind, he was held not to be entitled, on retracting his renunciation, to take a grant *de bonis non* in his

Retraction by a next of kin who renounces, and consents to a grant for the use and benefit of the widow, who is a lunatic.

(*l*) *Skeffington* v. *White,* (1828) 1 Hagg. at p. 702.

(*m*) *Thacker,* [1900] P. 15.

(*n*) See *Hoare,* (1833) 2 S. & T. 361, n.; and *vide ante,* p. 434.

(*o*) (1850) 2 Rob. 142.

(*p*) And see *Blake,* (1866) 14 L. T. 769.

own right on the death of the administrator; but the Court permitted him to take administration for the use and benefit of the widow, who remained a lunatic (*q*).

Practice where a person who has been cited and failed to appear desires to take the grant.

When a person, who has been cited to accept the original grant and has failed to appear, desires to take administration *de bonis non*, no retractation is required. But such a person is in no better position, with reference to his right to take a grant, than one who has formally renounced (*r*).

(*q*) *Penny*, (1846) 1 Rob. 426.
(*r*) Tristram & Coote, p. 208.

CHAPTER IX.

PRACTICE AS TO DECLARATION, INVENTORY, AND ACCOUNT.

Declaration of the estate, when required.

Declaration.—When any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee, a declaration of the estate and effects of the deceased must be filed in the registry (Rule 42, N.-C. B.). A declaration of the estate and effects is also required where the grant is made on the presumption of the death of the deceased or to the nominee of the Crown.

Form.

The form of this declaration, which is on oath, will be found in Appendix VII. (Form 119).

Inventory and account; who may claim.

Inventory and Account.—Any person (*a*) interested in the estate in process of administration, may call upon the executor or administrator to exhibit an inventory of the estate (App. VII., Form 130) and to render an account of his administration (*b*).

Practice.

By the present practice a person who desires an inventory and account may obtain an order on summons (*c*) returnable before a registrar. It is not necessary to enter a caveat.

Disobedience to the order, if made, is punishable by attachment (*d*).

(*a*) *E.g.*, a person entitled in distribution, a legatee, or creditor.

(*b*) See *Taylor* v. *Newton,* (1752) 1 Lee, 15; *Baker* v. *Baker,* (1860) 2 S. & T. 380. And see *Bouverie* v. *Maxwell,* (1866) 1 P. & D. 272.

(*c*) Formerly by citation. A form of affidavit to lead the summons will be found in Appendix VII. (Form 52).

(*d*) See *Baker* v. *Baker,* (1860) 2 S. & T. 380.

CHAPTER X.

PRODUCTION OF TESTAMENTARY PAPERS.

By what means production of testamentary papers can be enforced :—

THERE are two modes in which a person may be compelled to produce and bring into the registry any testamentary instrument shown to be in his possession or under his control :

(1) By a subpœna, issued by one of the registrars of the principal registry. This is the simpler and more usual mode.

(2) By an order of the Court made on motion (*z*).

(1) By subpœna.

Court of Probate Act, 1858, s. 23.

Registrar may issue subpœnas to produce testamentary papers.

(1) *Subpœna.*—Sect. 23 of the Court of Probate Act, 1858, provides: "It shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpœna requiring any person to produce and bring into the principal or any district registry, or otherwise, as in the said subpœna may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpœna, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing."

Practice in issuing subpœna.

The subpœna (*a*) issues on a registrar's order (*a*). An affidavit (*a*) stating that the will is in the possession, within the power, or under the control of the person against whom the subpœna is to issue, must be filed in the Contentious Department.

(*z*) It seems that this mode is still available, and is not superseded by s. 23 of the Court of Probate Act, 1858: *Shepherd*, [1891] P. 323.

(*a*) Form of subpœna: App. VII., Forms 333—335. Form of order: App. VII., Form 296. Form of *præcipe:* App. VII., Forms 317, 318. Form of affidavit: App. VII., Form 56.

Procedure on bringing in testamentary paper.

The procedure to be followed by a person who brings in a testamentary paper in obedience to the subpœna is laid down in Rules 84—86, N.-C. B., save that testamentary papers are now taken to the Record Keeper's Department, and not to the Clerk of the Papers. (Form of minute: App. VII., Form 134.)

Service of subpœna. Endorsement of notice.

The subpœna should be personally served, and should be endorsed with a notice under R. S. C., Order XLI., r. 5. It is stated to be very doubtful whether a subpœna can issue for service out of the jurisdiction (*b*).

Procedure where the person served has not the testamentary paper in his possession.

If the person served with the subpœna has not the will in his possession or control, he should file an affidavit to that effect (*c*).

Disobedience to subpœna punished by attachment.

If the subpœna is disobeyed, it may be enforced by process for contempt, or by attachment (*d*). But in *Parkinson* v. *Thornton* (*e*) the Court refused to order an attachment to issue in the first instance, as there might be some misapprehension, and the party might not have the will in his possession, but made a preliminary order that he should attend in court to be examined in reference to his possession of the paper.

(2) By order on motion. Court of Probate Act, 1857, s. 26. Order to produce any instrument purporting to be testamentary.

(2) *Order on Motion.*—Sect. 26 of the Court of Probate Act, 1857, provides: "The Court of Probate may, on motion or petition, or otherwise, in a summary way (*f*), whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person (*g*); and if it be not shown that any such paper or

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(*b*) Tristram & Coote, 211.

(*c*) *Rawlings* v. *Emmerson*, (1887) 57 L. J. P. 1.

(*d*) *Simmons* v. *Deane*, (1858) 27 L. J. P. 103.

(*e*) (1867) 37 L. J. P. 3; see *Floyd*, (1909) 53 Sol. Jo. 790, 801.

(*f*) These orders are now made on motion.

(*g*) See *Shepherd*, [1891] P. 323. If such person files an affidavit stating that the paper is not in his possession or control, he may be ordered to attend and be examined concerning his possession or knowledge of the paper: *Laws*, (1872) 2 P. & D. 458; *Banfield* v. *Pickard*, (1881) 6 P. D. 33; *Parkinson* v. *Thornton*, cit. *supra*; *Floyd*, cit. *supra*.

Order to attend to be examined as to knowledge of testamentary papers.

writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open court, or upon interrogatories respecting the same (*h*); and such person shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court and had made such default; and the costs of any such motion, petition, or other proceeding shall be in the discretion of the Court."

Service of order.

The copy of the order directing attendance or production of the testamentary papers should be personally served, and should be endorsed with a notice under R. S. C., Order XLI., r. 5.

Conduct money.

Conduct money must, it seems, be tendered to a person who is directed to attend for the purpose of being examined pursuant to an order under this section (*i*).

Where the attesting witnesses refuse information as to the execution of the will.

The Court will not, under this section, order the attendance for examination in open court of the attesting witnesses to a will because they have declined to give information as to the circumstances attending its execution to a person who is attacking the will (*k*). But where the attesting witnesses refused to make an affidavit as to the execution of a will, the Court, under 20 & 21 Vict. c. 77, s. 24, required their attendance in person to state what they knew about the execution (*l*).

(*h*) The examination must be either on interrogatories or in open court; the Court has no power to order a person to attend before the district registrar: *Laws*, (1872) 2 P. & D. 459; but the Court may order a person to attend to be examined *vivâ voce* before a commissioner: *Banfield* v. *Pickard*, (1881) 6 P. D. 33. As to the right of a person so examined to be represented by counsel, see *Cope*, (1867) 36 L. J. P. 83.

(*i*) *Townend* v. *Townend*, [1907] P. 239, n.; *Harvey*, [1907] P. 239; overruling *Wyatt*, [1898] P. 15.

(*k*) *Evans* v. *Jones*, (1867) 36 L. J. P. 70.

(*l*) *Sweet*, [1891] P. 400; *Bays*, (1910) 54 Sol. Jo. 200. For form of order, see App. VII., Form 246.

PART THE THIRD.

OF THE PRACTICE OF THE COURT WITH REGARD TO CAVEATS, CITATIONS, SUMMONSES, AND MOTIONS.

CHAPTER I.

OF CAVEATS.

Caveat defined.

A CAVEAT (*a*) is a caution entered in the registry of the Court to stop probate or administration from being granted without the knowledge of the party who enters it.

Any person intending to oppose the issuing of a grant of probate or letters of administration must enter a caveat (Rule 59, N.-C. B.; Rule 7, C. B.).

Object of entering a caveat.

The effect of the entry of a caveat is to prevent the grant of any probate or letters of administration with reference to the estate in question until the caveat has been removed.

The entry of the caveat thus affords the caveator—*i.e.*, the person entering the caveat—an opportunity of raising any question with reference to the grant. The person whose application for a grant has been stopped by the caveator, is compelled to warn the caveat, and in the warning to disclose his name and his interest in the estate of the deceased, and the caveator, in his appearance to the warning, makes a similar disclosure. The parties are thus put in possession of information which may lead either of them, should their interests conflict, to institute an action against the other for the purpose of establishing a claim to a grant.

The entry of a caveat is thus often a step preliminary to an

(*a*) For form, see App. VII., Form 76.

action. But it is not necessarily so, for even in cases where the applicant's right to a grant is not disputed there are frequently subsidiary questions, such as justification of sureties, which a person interested in the estate wishes to bring forward by summons or motion. His right course, before taking any further step, is to enter a caveat.

A person who enters a caveat may support the applicant's claim.

If, after entering a caveat, the caveator finds that his interests do not conflict with those of the applicant for a grant, it is open to him to support the latter's claim (*b*).

Form of caveat.

In form a caveat is a notice in writing signed by the person entering the caveat (see App. VII., Form 76). It sets forth the name of the deceased, his last place of abode, the day of his death, and the name and address of the person entering it.

How lodged.

It may be lodged either in the principal probate registry (*c*) or in a district registry, and by the caveator personally or by his solicitor or other agent (*d*). If it is entered in the principal registry, the person entering the caveat must also insert the name of the deceased in the index of the caveat book (Rule 59, N.-C. B.; Rule 7, C. B.).

Receipt for caveat.

A receipt for the caveat is given to the person who enters it, and this receipt must be produced if the caveat is subsequently subducted.

Date.

A caveat bears date on the day it is entered (Rule 60, N.-C. B.).

Notice to district registrar if caveat lodged at principal registry.

Notice of a caveat entered in the principal registry is sent by the registrars to the district registrar of any district in which it is alleged that the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death (Rule 61, N.-C. B.; see 20 & 21 Vict. c. 77, s. 53).

Notice to principal registry if caveat lodged at district registry.

When a caveat is entered in a district registry, the district registrar sends a copy to the principal registry, and also to the registrar of any other district registry in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the

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(*b*) *Ingram* v. *Strong*, (1815) 2 Phill. at p. 315.

(*c*) The caveat is entered at the Seat.

(*d*) See *Panton*, [1901] P. 239, as to the position of a person entering a caveat.

time of his death (Rule 74, D. R.; see 20 & 21 Vict. c. 77, s. 53).

The entry of a caveat prevents the grant of probate or administration.

The entry of a caveat prevents the grant of probate or administration in the estate to which it relates until it has expired or has been subducted, or until it has been warned and no appearance entered, or until the contentious proceedings consequent upon it have terminated (Rule 77, D. R.). But no caveat is to affect any grant made on the day on which the caveat is entered, or the day on which notice is received of a caveat having been entered in a district registry (Rule 62, N.-C. B.).

A caveat remains in force for six months, and may be renewed.

A caveat remains in force for six months from its date, and then expires and is of no effect; but a caveat may be renewed from time to time (Rule 60, N.-C. B.). Care should be taken when contentious proceedings are still pending at the expiration of six months from the entry of the caveat, to see that the caveat is duly renewed.

Subduction of caveat.

Subduction of Caveat.—A caveat may be subducted—*i.e.*, withdrawn by the person entering it—at any time before it has been warned; but after it has been warned it may only be subducted provided that the warning has not been served, and that six days have not expired from the date of the issue of the warning, and on filing an affidavit to that effect.

A caveat must be subducted at the registry where it was entered. A caveat is subducted by the party who entered it or his clerk, on producing the receipt given when the caveat was entered, writing on the margin of the caveat, "I subduct this caveat," and signing his name.

Warning of caveat.

Warning of Caveat.—A warning of a caveat is a notice to the caveator, signed by the registrar of the principal registry, to enter an appearance at the principal registry within six days (*e*) from the date of service and to set out his interest. The notice concludes with a warning that, in default of such entry of appearance, the Court will proceed to do all such acts, matters, and things as shall be necessary. The effect of the warning is that the caveat becomes void unless the person

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(*e*) This period is exclusive of Sunday, Christmas Day, and Good Friday (Rule 87, N.-C. B.), but includes the day of service.

who entered it appears within the specified time. If the person warned appears within the time limited, the caveat proceedings are at an end. But there is no *lis pendens* until a writ of summons is issued (*f*).

Practice.

All caveats must be warned from the principal registry (Rule 63, N.-C. B.). The warning must state the name and the interest of the party on whose behalf it is issued and, if he claims under a will or codicil, the date of such will or codicil, and must contain an address within three miles of the General Post Office, to which any notice requiring service may be sent. The form of warning (App. VII., Form 341) will be supplied in the registry (Rule 65, N.-C. B.).

Service of warning.

Service of Warning.—A warning is to be served by leaving the same or a copy thereof at the place mentioned in the caveat as the address of the person who entered it (see Rule 63, N.-C. B.); or the registrar may, if any difficulty arises, send by post a warning signed by himself and directed to the person who entered the caveat, at the address mentioned in it (Rule 64, N.-C. B.). When service has been effected an endorsement of service should be made on the warning.

Default of appearance to the warning.

If after the warning has been duly served, six days have elapsed, and no appearance has been entered by the caveator, the grant will be made to the applicant on his filing an affidavit of service, stating the manner of service, and an affidavit of search for appearance and of non-appearance (*g*) (Rule 67, N.-C. B.).

Appearance to warning, where entered.

The entry must set forth the caveator's interest.

Appearance to Warning.—An appearance to the warning is entered either by the caveator himself or by his solicitor at the Contentious Department of the principal registry in a book provided for the purpose. The entry must set forth the interest which the person on whose behalf it is entered has in the estate and effects of the deceased, and must be accompanied by an address within three miles of the General Post Office (Rules 26, 27, C. B.).

Time for appearance.

An appearance must be entered within six days from the service of the warning. After that time has expired the

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(*f*) *Salter* v. *Salter*, [1896] P. at p. 293: *vide post*, p. 520.

(*g*) For form, see App. VII., Form 31.

caveator may still apply by summons for leave to appear, provided the grant has not passed the seal.

Practice.

By the practice of the registry, all entries of appearance to warnings must set forth the name in full and the interest of the person or persons for whom the appearance is entered.

Without the permission of one of the registrars, no appearance can be entered for any person claiming an interest (*h*) otherwise than as—

(1) Executor;

(2) Legatee or devisee (residuary or otherwise) in trust or beneficial;

(3) Husband or wife, next of kin, or heir-at-law;

(4) A person entitled in distribution to the personal estate or a person interested in the real estate of the deceased in case of intestacy;

(5) Creditor;

(6) The legal representative of any of the above-mentioned persons.

The appearance entered on behalf of an executor, legatee or devisee, or the representative of a legatee or devisee, must state the date of the will or codicil under which he or she claims an interest.

The appearance entered for a next of kin or person entitled in distribution, or the representative of a next of kin or person so entitled, must set forth the relationship of such next of kin or person entitled to the testator or intestate.

A copy of the appearance should be sent to the plaintiff's solicitor.

After the entry of appearance to a warning the proceedings are contentious.

When an appearance has been entered in answer to the warning of a caveat, the matter is entered as a cause in the Court book, and the contentious business thereupon commences, and the expenses of the entry of the caveat and the warning are upon taxation considered as costs in the cause (Rule 12, C. B.).

(*h*) If the appearance to the warning discloses an interest insufficient to entitle the caveator to resist the grant, the applicant for a grant should take out a summons to discontinue contentious proceedings: *vide post*, p. 543.

But there is no *lis pendens* until the issue of the writ of summons.

Notwithstanding this rule, it has been held that on the entry of appearance to a warning there is no *lis pendens*. Since the Judicature Act, at all events, an action is commenced not by the entry of the caveat or the appearance of the caveator to the warning, but by the issue of the writ by the plaintiff (*i*).

Proceedings after appearance.

Summons to discontinue.

After the entry of appearance, if the caveator does not desire to proceed further with his opposition to a grant, he must give notice to the person warning the caveat, who can then take out a summons to discontinue contentious proceedings and for a grant to issue to him (*k*).

If, however, the caveator persists in his opposition, a writ of summons is issued, and an action commenced.

An executor cannot enter an appearance to a warning by his co-executor.

An executor who has entered a caveat cannot, as such executor, enter an appearance to a warning by another executor in respect of the same will, for both are equally entitled to a grant, and a grant to one executor cannot prejudice the position of another.

But one next of kin may enter an appearance to a warning by another next of kin.

It is otherwise in the case of two next of kin, who are both equally entitled to a grant. One of the two may enter an appearance in answer to a warning by the other, and a registrar's summons must then be taken out to decide to which of them the administration shall be committed (*k*).

The same rule applies to all cases where there are several persons equally entitled to a grant, with the exception in the case of co-executors mentioned above.

(*i*) *Moran* v. *Place*, [1896] P. 214; *Salter* v. *Salter*, [1896] P. 291.

(*k*) *Vide post*, p. 543.

CHAPTER II.

OF CITATIONS.

Citation defined.

A CITATION is an instrument in writing, signed by a registrar of the principal probate registry and issued under the seal of the Court, reciting a cause or matter which is before the Court and the interest therein of the person extracting the citation, calling upon the person named therein to enter an appearance and, in certain cases, to take some other steps in relation to that cause, to which is added an intimation that if the party does not appear, or, appearing, does not show cause to the contrary, the Court will proceed to do as therein set forth.

Citations no longer in use as a mode of instituting an action.

The ordinary way of commencing proceedings for proving a will in solemn form in the Ecclesiastical Courts was by citation, though that was not the only way. A suit might be commenced by caveat, and, on the caveat being warned and an appearance entered, the party upholding the will might proceed to propound it in a "common condidit" (*a*). But since the Judicature Act, 1873, an action in the Probate Division is no longer commenced by citation, for by R. S. C., Order I., r. 1, "all suits which, previously to the commencement of the principal Act, were commenced . . . by citation or otherwise in the Court of Probate shall be instituted by a proceeding to be called an action," and by sect. 100 of the Judicature Act, 1873, an action is defined as "a proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court" (*b*).

Kinds of citation.

Citations are still retained (*c*) for purposes other than the commencement of an action, and are of four kinds: (1) citations

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(*a*) *Peacock* v. *Lowe*, (1867) 1 P. & D. at p. 312; *Coplestone* v. *Nicholes*, (1863) 33 L. J. P. 57.

(*b*) See *Moran* v. *Place*, [1896] P. 214; *Salter* v. *Salter*, [1896] P. 291.

(*c*) See R. S. C., Order I., r. 2.

to accept or refuse a grant, (2) citations to bring in a grant, (3) citations to propound a testamentary instrument, and (4) citations to see proceedings.

Contentious citations.

The last three kinds of citation have reference to, or are preliminary steps in, an action, and are therefore called contentious citations. Citations to accept or refuse a grant are non-contentious citations (*d*).

Non-contentious citations.

Section 1.

CITATIONS TO ACCEPT OR REFUSE A GRANT (*e*).

Citations to accept or refuse a grant.

Reference has already frequently been made to the established rule of the Court which requires every person having a superior right to a grant to renounce or to be cited before the grant can be made to any other person (*f*). Where a person who has a superior right to a grant declines to assert, or delays in asserting that right, by proving the will in common form or taking out administration to the estate of the deceased, the Court may, at the instance of any party having an interest (which interest is proved by the oath of the party) (*g*) call upon him to accept the grant, and may, if he fails to do so, decree it to the person at whose instance the citation was issued.

Purposes served by citations to accept or refuse a grant.

A citation of this kind thus answers two purposes: it either compels a representation to be taken by those who are primarily entitled to it, or, where they do not take it, the process provides a substitute for a voluntary renunciation on their part (*h*).

(*d*) There are other forms of non-contentious citation—*e.g.*, an executor who has intermeddled may be cited to take probate (not accept or refuse), and refusal renders him liable to attachment: *vide ante,* p. 269. Form of citation: App. VII., Form 113; of order: App. VII., Form 250. Citations to exhibit an inventory and to render an account are practically obsolete, since an order to file an inventory and account may now be obtained on summons, and this latter course is generally adopted: *vide ante,* p. 511. Citations to show cause why a bond should not be assigned in order that it should be enforced against the sureties have, similarly, been displaced by summonses to the same effect: *vide ante,* p. 468.

(*e*) For forms of citations to accept or refuse a grant, *vide* App. VII., Forms 81—101.

(*f*) *Vide ante,* pp. 343, 457, 472. The rule may be relaxed in certain cases: *vide ante,* pp. 344, 412 *et seq.*

(*g*) Swinb., Part VI., s. 12.

(*h*) Wms. on Exors., p. 228.

Effect of failure by executor to appear to a citation to accept or refuse probate.

The failure of an executor to appear to a citation to accept probate amounts to an absolute renunciation of all his rights to a grant, binding upon his representatives, and he need not again be cited on the occasion of any future grant. For by the Court of Probate Act, 1858, s. 16, "whenever an executor named in a will is cited to take probate (*i*), and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." And it may here be stated that the executors who have proved the will may cite their co-executors, to whom power has been reserved, to accept or refuse probate; and if the latter do not appear to such citation, their rights in respect of the executorship wholly cease. Since the decision in *In re Pawley and the London and Provincial Bank* (*k*), where there are executors who have proved the will and others to whom power has been reserved, the former cannot convey the legal fee simple in real estate without the concurrence of their co-executors who have not proved, unless the latter renounce (*l*) or have been cited in the manner above indicated and have failed to appear (*m*).

Executors who have proved may cite their co-executors, to whom power has been reserved, to accept or refuse probate.

Effect of failure by a person entitled to a grant of administration or of administration (will) to appear to a citation to accept or refuse the grant.

Sect. 16 of the Court of Probate Act, 1858, applies only to executors, and not to persons who are entitled to grants of administration or administration with the will annexed. The failure of such persons to appear to a citation to accept or refuse a grant is not conclusive; it does not bind their representatives. And where a grant has been made to a legatee or creditor after citation of the residuary legatee or next of kin, on the death of the legatee or creditor administrator the residuary legatee or next of kin must again be cited or must renounce, before administration *de bonis non* is granted to

Such person must again be cited when a grant *de bonis non* is made.

(*i*) Failure to appear to a citation to *propound* the will has not the same effect: *vide post*, p. 575.

(*k*) [1900] 1 Ch. 58; *vide ante*, p. 17.

(*l*) *Vide ante*, p. 503.

(*m*) As to the procedure where the executors so cited fail to appear to the citation, *vide post*, p. 540. For form of citation, see App. VII., Form 84.

the representatives of the legatee or creditor administrator, or to another creditor or legatee. For a person who does not appear to a citation to accept letters of administration may, on the death of the administrator, come in and take a grant *de bonis non.* He is, however, in no better position than a person who has formally renounced his right, and must obtain the leave of the Court on motion before a grant will be made to him (*n*).

A person having an inferior interest must cite all persons having a superior right to the grant to accept or refuse the same.

Availing himself, therefore, of the rule that a citation to accept or refuse a grant either compels a representation to be taken by those who are primarily entitled to it, or, where they do not take it, provides a substitute for a voluntary renunciation on their part, a person having an inferior interest, but unable to procure the renunciation of the persons who have the superior interest, cites all those persons who have such superiority, to take the required grant or show cause why it should not be made to himself (*o*).

Examples.

Thus, in the case of a will, the residuary legatee or residuary devisee in trust cites the executor to accept or refuse probate of the will, or to show cause why letters of administration with the will annexed of all the estate which by law devolves to and vests in the personal representative of the deceased should not be granted to him (the said residuary legatee or residuary devisee in trust).

A beneficial residuary legatee or residuary devisee for life, similarly cites both the executor and the residuary legatee or devisee in trust, to accept or refuse probate or letters of administration with the will annexed; and a legatee or creditor cites both the executor and the residuary legatees and residuary devisees in trust or beneficially entitled, or the testator's next of kin and heir-at-law, if the residue has not been disposed of (*p*).

In cases of intestacy, where a person entitled in distribution is unable to obtain the voluntary renunciation of the intestate's widow, next of kin, and heir-at-law, he cites all those persons

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(*n*) *Vide ante,* pp. 509, 510.

(*o*) Wms. on Exors., p. 228.

(*p*) *Vide ante,* pp. 354, 355, 472.

to accept or refuse letters of administration. A creditor similarly cites the intestate's widow, next of kin, heir-at-law if there is real estate, and all persons entitled in distribution. In cases where the intestate left a husband her surviving, the husband alone is cited, unless the deceased left real estate, when the creditor must also cite the heir-at-law (*q*).

Who are to be cited where the intestate died without known relations.

In the case of persons dying intestate without any known relation, a citation must be issued against the next of kin, if any, and all persons having or pretending to have any interest in the estate of the deceased, and the service thereof is effected by advertisement in the manner prescribed by Rule 70, N.-C. B. Such citation must also be served on the King's Proctor or upon the Solicitor for the Duchy of Lancaster, as the case may require (Rule 76, N.-C. B.) (*r*).

The citation served on the King's Proctor in such a case.

Before a citation can issue in respect of a will, the will must be filed in the registry.

Before any citation can issue in respect of a will, that will must have been filed at the registry (*s*). The party citing must therefore lodge the will, if it is in his possession, at the Contentious Department of the principal registry. If the will is at a district registry, he must give notice to the district registrar to forward it to the principal registry. If the will is in the possession of a person who refuses to part with it, the party citing should issue a subpœna against such person to compel him to bring it into the registry (*t*).

Section 2.

CITATIONS TO PROPOUND A TESTAMENTARY INSTRUMENT (*u*).

Purposes served by citations to propound a testamentary instrument.

When the persons entitled to a grant of administration in the event of an intestacy know of the existence of a will of the deceased which they desire to have set aside, and the executors or beneficiaries thereunder neglect or decline to propound such will, the persons so entitled may cite the

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(*q*) *Vide ante*, p. 469; and see *Brown* v. *Wildman*, (1859) 28 L. J. P. 54.

(*r*) *Vide ante*, p. 470.

(*s*) Tristram & Coote, p. 259. See *Morton* v. *Thorpe*, (1863) 3 S. & T. 179, head-note.

(*t*) *Vide ante*, pp. 512—514.

(*u*) For form of citations to propound a testamentary instrument, *vide* App. VII., Form 102.

executors and all persons interested under the will to enter an appearance, and to propound the same should they think it in their interest to do so, or show cause why letters of administration of the estate of the deceased as having died intestate should not be granted to the persons extracting the citation.

Where persons interested under a testamentary paper have been cited to propound it, and have not appeared and propounded it, the Court will grant administration as to an intestate,

If an appearance is entered, and the will propounded, the persons claiming an intestacy are thus afforded an opportunity of attacking the will. If, however, the parties who are interested under the will, after having been personally served with the citation, neither appear nor propound the will, the Court may on motion (*x*), without requiring evidence as to the invalidity of the will, grant administration of the estate of the deceased as having died intestate to the persons entitled thereto in that event.

or probate of an earlier will in common form,

The same process may be adopted by persons interested under an earlier will, if a later will exists which they have reason to believe is invalid, or they may themselves propound the earlier will, making the parties interested under the later will defendants to their writ (*y*).

without requiring evidence of the invalidity of the will which was the subject of the citation.

For in the case of *Morton* v. *Thorpe* (*z*) it was laid down that where persons interested under a testamentary paper have been cited to appear and propound it, and have not appeared and propounded it, the Court will grant administration as to an intestate or probate of an earlier will in common form, as the case may be, although there is no evidence before it as to the invalidity of the will in question (*a*).

(*x*) The usual affidavits of search for appearance and of non-appearance must be filed (App. VII., Forms 30, 32).

(*y*) *Vide post*, p. 580.

(*z*) (1863) 3 S. & T. 179.

(*a*) The rule was first laid down by Sir H. J. Fust in *Palmer* v. *Dent*, (1850) 2 Rob. 284 ; and was followed in certain unreported cases cited 3 S. & T. at p. 180. In *Morton* v. *Thorpe*, (1863) 3 S. & T. 179, Sir C. Cresswell, after pointing out that Sir H. J. Fust in *Watts*, (1837) 1 Curt. 594, refused to set aside a will on the consent of the parties interested, observing that no person's consent can make a will no will, said: "I think there is a substantial distinction between citing persons interested to appear and propound a will and merely bringing in their consents to the will being passed over." In *Quick* v. *Quick*, [1899] P. 187, the rule

An executor who has proved in common form cannot cite the beneficiaries under the will to prove it in solemn form.

An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will. He has no right, therefore, to cite the persons interested under it to propound it in solemn form, or show cause why the probate in common form should not be revoked (*b*). The executor of an executor is in the same position in this respect as the original executor (*c*).

Executors of a will cannot cite beneficiaries under a codicil to propound the codicil.

Nor can the executors of a will cite the beneficiaries under a codicil, which they believe to be invalid, to propound and prove the codicil. Their right course is to proceed to prove the will in solemn form, and to cite the next of kin and the beneficiaries under the codicil to see proceedings (*d*).

Procedure when appearance is entered.

A person cited to propound a testamentary paper, who enters an appearance to the citation, and desires to prove the will in solemn form, should issue a writ of summons propounding the will, and make the party citing defendant thereto.

Section 3.

CITATIONS TO BRING IN A GRANT (*e*).

Object and nature of citations to bring in a grant of probate or of administration (will).

When probate in common form has issued to an executor, and a person whose interest is adversely affected thereby desires to compel proof of the will in solemn form of law, or desires on any ground to have such probate called in and revoked, and declared null and void in law, his right course is to cite the executor to bring into and to leave in the principal probate registry the probate of the will, in order that he (the person citing) may proceed in due course of law for the revocation of the same. If administration with the will annexed has

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seems to have been extended to cover cases where the persons interested under a will have entered no appearance to a writ of summons claiming an intestacy, although no citation to propound the will had been issued, but the head-note to that case makes this conclusion doubtful. In *Dennis,* [1899] P. 191, the rule in the text was followed, apparently on the authority of *Crosby* v. *Noton,* (1867) 36 L. J. P. 55; but *Crosby* v. *Noton* was a case of a citation to bring in a grant: *vide post,* p. 529; and in *Bootle,* (1901) 84 L. T. 570, the case of *Morton* v. *Thorpe* (*ubi supra*) was expressly followed.

(*b*) *Chamberlain,* (1867) 1 P. & D. 316; *vide post,* pp. 528, 589.

(*c*) *Ibid.*

(*d*) *Benbow,* (1862) 2 S. & T. 488.

(*e*) For forms of citations to bring in grants, *vide* App. VII., Forms 103—106, 109—111.

been granted, the administrator with the will is cited with a like intent.

At whose instance they may issue.

Such a citation will issue at the instance of any person interested in an intestacy, or under an earlier will, who claims that the will which has been proved in common form is invalid, or at the instance of a person alleging an interest under a will of later date to the will of which probate has been granted (*f*).

An executor who has proved in common form cannot cite the beneficiaries to show cause why the probate in common form should not be revoked.

But it will be seen hereafter (*f*) that no person is entitled to claim revocation of the probate of a will unless he has an interest which is adversely affected thereby. An executor, therefore, who has proved a will in common form cannot merely as such executor take proceedings to call in question the validity of that will. He has no right to cite the persons interested under it to propound it in solemn form or show cause why the probate in common form should not be revoked. For an executor has an interest under the will because he is executor of it, but his title stands or falls with the will; he has, therefore, no interest, merely as executor, in showing that the will is invalid. And the executor of an executor is in the same position in this respect as the original executor (*g*).

Citations to bring in a grant of administration.

Where a grant of administration on intestacy has issued, and it is desired to have it revoked and set aside, a person interested may similarly cite the administrator to bring into the principal probate registry the letters of administration in order that he (the person citing) may proceed in due course of law for the revocation of the same.

At whose instance they may issue.

Such a citation will issue at the instance of any person who alleges that administration has been wrongly granted since the deceased left a will under which he is a beneficiary or executor, or at the instance of an interested person who alleges that the grant was made to a person not entitled thereto or was irregularly or unlawfully made (*f*).

Citation to bring in grant must precede every action for revocation.

A citation to bring in the grant must precede every action for the revocation of probate or letters of administration. The person so cited must bring in the probate or letters of

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(*f*) *Post*, pp. 582—587.
(*g*) *Chamberlain*, (1867) 1 P. & D. 316.

administration and lodge them at the Contentious Department of the registry within the time limited in the citation, under pain of proceedings for contempt of Court (*h*).

Grant must be brought in.

A party cited to bring in a grant may be willing to consent to its revocation. In such a case, provided all persons interested consent to a registrar's order for revocation, the grant may be revoked on application at the Notation Department, supported by affidavit (*i*), otherwise a motion to the Court is necessary. And where a citation had been personally served upon the executor and universal legatee named in the will of the deceased, calling upon him to bring into the registry the probate thereof which had been granted to him, and to show cause why the probate should not be revoked and the will declared null and invalid, on the probate being brought into the registry, but no appearance entered to the citation, the Court, on motion, without requiring evidence as to the invalidity of the will, revoked the probate granted, and ordered probate in common form of an earlier will to issue to the executor therein named (*j*).

Revocation of grant by consent.

Where probate is brought in, and no appearance entered, the Court may revoke the grant without requiring evidence of the invalidity of the will.

An executor who is cited to bring in the probate must, therefore, if he wishes to prevent revocation of the grant, either issue a writ propounding the will against the party citing, or enter an appearance to the writ of summons issued by the party citing. For the party citing usually issues a writ, claiming revocation of the grant, concurrently with the citation, and thereby commences an action for the revocation of probate. The same courses are open to an administrator with the will. An administrator on intestacy who is cited to bring in the grant should, if he wishes to resist revocation, enter an appearance to the writ and citation in the same way (see *post*, pp. 582—587).

Proceedings where party cited resists revocation of grant.

If, after the grant has been brought in, the person citing does not commence an action for the revocation thereof, and

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(*h*) The citation should be endorsed with a notice under R. S. C., Order XLI., r. 5: *vide post*, p. 550.

(*i*) *Vide ante*, pp. 494, 495.

(*j*) *Crosby* v. *Noton*, (1867) 36 L. J. P. 55, on the authority of *Edwards* v. *Martyn*, (1850) 2 Rob. 285. See also *Palmer* v. *Dent*, (1850) 2 Rob. 284; *Dennis*, [1899] P. 191; and the cases cited *ante*, p. 526, note (*a*).

takes no step to have it set aside, the person cited may take out a summons for the discontinuance of proceedings and for the re-delivery out of the grant to him.

Section 4.

CITATIONS TO SEE PROCEEDINGS (*k*).

Object of citations to see proceedings.

When an action is instituted in the Probate Division, only those persons who were parties to the action, or who had full notice of the proceedings and an opportunity of availing themselves of the contest, are bound by the decree therein (*l*). It is therefore the care respectively of both parties to an action that all persons whose interests are or may be adversely affected by the decree should have notice of the proceedings, and an opportunity, should they choose to avail themselves of it, of intervening in the suit for the protection of their interests. This is effected by the issue of a citation (*m*) against such persons to appear in the action, should they think it for their interest so to do, at any time during the dependence of the action and before final judgment shall be given therein. The citation, which is known as a citation to see proceedings, concludes with a notice that, in default of the parties cited so entering an appearance, the Court will proceed and pronounce judgment in the action, their absence notwithstanding.

These citations formally notify the party cited of the pendency of a suit and his right to intervene therein.

Effect of citation to see proceedings.

A citation to see proceedings does not make the persons cited parties to the suit either as plaintiffs or defendants, but it gives them the opportunity of appearing and taking part in the proceedings either on the side of the plaintiff or the defendant, as their interests may incline them; or they may abstain from appearing and allow the suit to be determined in their absence (*n*). In either case they are bound by the

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(*k*) For forms of citation to see proceedings, *vide* App. VII., Forms 107, 108.

(*l*) *Ratcliffe* v. *Barnes,* (1862) 2 S. & T. at p. 487. See *Newell* v. *Weeks,* (1814) 2 Phill. 224; *Bell* v. *Armstrong,* (1822) 1 Add. at p. 372; *Wytcherley* v. *Andrews,* (1871) 2 P. & D. 327; and *vide ante,* pp. 277, 278; *post,* pp. 590, 593.

(*m*) Citations to see proceedings may be extracted from the registry on the application of any party to the cause: Rule 16, C. B.

(*n*) *Kennaway* v. *Kennaway,* (1876) 1 P. D. 148.

decree in the action, unless the suit terminates in a compromise to which they are not made parties (*o*).

Procedure where party cited desires to become a party to the suit.

A person cited to see proceedings who desires to become a party to the suit may apply on summons for leave to join in the proceedings and to adopt the pleadings of the party who represents his interest, or he may obtain leave to deliver separate pleadings, if he does not consider that his interest is sufficiently protected (*p*).

Court of Probate Act, 1857, s. 61.

Where a will affecting real estate is the subject of a contentious proceeding, the heir-at-law and persons interested in the real estate to be cited.

Citation of Persons interested in the Real Estate.—Sect. 61 of the Court of Probate Act, 1857, provided that "where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees and other persons having or pretending interest in the real estate affected by the will shall . . . be cited to see proceedings, or otherwise summoned in like manner as the next of kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate . . ." (*q*).

Special leave was formerly required before citation of persons interested in the real estate could issue.

And by Rule 78, C. B., it is ordered that "any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorising him to cite the heir or heirs-at-law or other person or persons having or pretending interest in such real estate to see proceedings; and the judge or registrar, on being satisfied by affidavit that the will in question does affect or purport to affect the real estate, will make an order authorising the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid: Provided always, that

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(*o*) *Vide ante*, p. 278; *post*, p. 671.

(*p*) *Vide post*, p. 541.

(*q*) See also Court of Probate Act, ss. 62—64, *post*, pp. 754, 755.

the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires."

But since the Land Transfer Act, 1897, no order from or leave of the judge is required.

Since the Land Transfer Act, 1897 (*r*), however, the heir-at-law and persons interested in the real estate are on the same footing as the next of kin and persons interested in the personal estate in respect of their right and liability to be made parties to an action, and may and should be cited to see proceedings both in probate and administration suits, if their interest can be affected by the decree. The practice is the same as in other cases of citations to see proceedings, and no order from or leave of the judge is required. The affidavit to lead the citation (*s*) should state that the will disposes of real estate, that the parties in question are interested in such real estate, and how they are interested.

Section 5.

PRACTICE AS TO CITATIONS.

SUB-SECTION 1.—*Practice in extracting Citations.*

Before a citation can issue in respect of a will the will must have been filed.

Before any citation can issue in respect of a will that will must have been filed at the registry. The party extracting the citation must therefore take the necessary steps to have the will in question lodged at the Contentious Department of the principal registry (*t*).

Citations, where extracted.

Citations can only be extracted from the principal registry (Rule 13, C. B.).

Draft citation to be prepared, and to be settled at the registry.

In cases both of contentious and non-contentious citations, a draft citation is first prepared by the practitioner. Typical forms will be found in the Appendix (*u*), and must be varied to suit the particular circumstances of the case. This draft is left at the Contentious Department, together with the will, if any, and any other necessary papers—*e.g.*, in the case of citations to accept or refuse a grant, the renunciations or consents of persons interested, and the nomination, if the grant is to be made to a nominee (see App. VII., Form 64). The

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(*r*) See Land Transfer Act, 1897, s. 2, sub-s. 2; and *vide post*, pp. 699, 700.

(*s*) *Vide post*, p. 533.

(*t*) *Vide ante*, p. 525.

(*u*) *Vide* App. VII., Forms 81—114.

draft citation is settled at the registry, and when settled is given out to the practitioner on his application, to be engrossed or printed on parchment or paper (Rule 17, C. B.).

Affidavit verifying citation.

Affidavit verifying Citation (*x*).—Citations issued by the Probate Division are not, like the writs issued at common law, at the service of any one who cares to ask for them. It is an inherent part of the practice of the Court that every one, before extracting a citation, should show on an affidavit which leads the citation the character in which he does it, and thereby the interest which justifies it (*y*). Accordingly Rule 13, C. B., provides that no citation is to issue under seal until an affidavit in verification of the averments it contains has been filed in the registry. The practitioner, therefore, *after he has received the citation so settled, but not before* (*z*), will proceed to prepare an affidavit verifying the averments in the citation clause by clause, and to have it sworn.

By whom sworn.

This affidavit must be sworn by the party, or one of the parties, extracting the citation (*a*).

Necessary averments.

If the party extracting a citation to accept or refuse a grant is a creditor, the affidavit should state the value of the estate (*b*) and the amount and character of the debt, and should contain an averment, if such be the case, that the applicant holds no security for the debt (*c*) (see App. VII., Form 42).

The affidavit verifying a citation to see proceedings must show how the interest of the persons cited is affected by the claim of the party cited.

(*x*) For forms, *vide* App. VII., Forms 41, 42. Other affidavits to lead citations follow the averments in the citation.

(*y*) *Chamberlain*, (1867) 1 P. & D. 316, at p. 318.

(*z*) Because an alteration in the draft citation may entail an alteration in the affidavit.

(*a*) Where the party extracting the citation was abroad, the Court allowed a citation to issue on an affidavit sworn by a person authorised by power of attorney to institute the suit on his behalf: *Hutley*, (1869) 1 P. & D. 596. But in *Luke*, (1909) 25 T. L. R. 825, an application for leave for the plaintiff's *solicitor* to swear the affidavits to lead the citation and writ in an action for revocation of probate,—the plaintiff being temporarily out of the jurisdiction,—was refused; see *post*, p. 600.

(*b*) This is not absolutely necessary where there has been personal service of the citation on the parties entitled to the administration in the first instance, but otherwise the Court always requires it: *Martineau* v. *Rede*, (1825) 2 Add. 455.

(*c*) *Vide ante*, p. 470.

It is convenient so to frame the affidavit verifying a citation to bring in a grant that, if a writ is subsequently issued, the same affidavit may serve as the affidavit to lead the writ. The affidavit should set out the interests of the respective parties and those of any other persons whom it is proposed subsequently to make defendants (*d*).

If the party cited be abroad, his address should be stated, if known, or a statement made that his address is unknown, if that is the case; and the affidavit should state whether he has any agent, attorney, or correspondent in England (*e*).

If it is alleged that there are no next of kin, the affidavit should state what efforts have been made to trace them (*f*).

Procedure on extracting citations.

Extracting Citations. — The citation, draft citation, the affidavit verifying the citation, together with a document known as a *præcipe*, are to be taken by the party extracting the citation, his solicitor or attorney, to the Contentious Department of the registry, where the *præcipe* is to be deposited, and the citation signed and sealed (Rule 17, C. B.).

Præcipe.

A *præcipe* is a document in the form to be found in the Appendix (*g*). The address for service given in the *præcipe* must be within three miles of the General Post Office (Rule 17, C. B.).

A caveat must be entered and renewed from time to time.

Before a citation is signed by the registrar a caveat must be entered against any grant being made in respect of the estate to which the citation relates (*h*), and notice thereof is to be sent to the district registrar of any district in which the deceased appears to have had a residence at the time of his death (Rule 66, N.-C. B.). Such caveat is to be renewed from time to time, so as to be kept in force so long as the proceedings arising from the service of the citation are pending (Rule 15, C. B.).

(*d*) *Vide post,* p. 600.

(*e*) See Rule 19, C. B.; and see *Kenworthy* v. *Kenworthy,* (1863) 3 S. & T. 64; *Evans* v. *Burrell,* (1859) 4 S. & T. 185.

(*f*) Tristram & Coote, 262.

(*g*) *Vide* App. VII., Form 314.

(*h*) This rule does not apply to citations or summonses to exhibit an inventory and to render an account, nor to citations or summonses to show cause why a bond should not be assigned: Rule 15, C. B.; and in cases of citations to see proceedings, where a caveat has already been entered in the action, no fresh caveat need be lodged.

No grants are to issue from a district registry after a citation without the production of an office copy of the decree or order of the judge or of one of the registrars of the principal registry authorising the same (Rule 80, D. R.).

Grant will not issue until proceedings under the citation terminate.

Citations by and against Minors or Infants.—If the party *citing* is a minor or infant the citation must be extracted on his behalf by his guardian. The same rules as to election or assignment of guardians, and as to the persons entitled to be elected or assigned, apply as in the case of guardians for the purpose of taking administration *durante minoritate* for the use and benefit of the minor or infant (*i*). If, however, the interests of the person entitled to be elected or assigned guardian in accordance with these rules and the interests of the minor or infant conflict, the former is not entitled to act as guardian, and may be passed over. In such a case, and in cases where the next of kin renounces or is not a fit or proper person, some other person may be elected or assigned as guardian on an affidavit of the facts and of the fitness of the proposed guardian being filed. Where there are both minors and infants, the guardian elected by the minors may act for the infants (*k*).

Citations on behalf of minors or infants, by whom extracted.

In these cases the citation should contain an averment of the minority of the party citing (his age need not be stated in the citation), and should state the name of the guardian (see App. VII., Forms 102, 112). In the affidavit verifying the citation the age of the minor or infant should be given.

Form of citation and affidavit.

If the party *cited* is a minor or an infant, that fact should be stated in the citation, and the citation should also state the name of the person who, in accordance with the rules discussed in an earlier chapter (*l*), is entitled to represent the minor or infant (see App. VII., Form 88). The affidavit verifying the citation should state the age of the minor or infant. If the minor or infant is a bastard, or without known relations, notice must be given to the King's Proctor (*m*).

Citations against minors or infants.

(*i*) *Vide ante*, pp. 368—374, 476—478.

(*k*) *Vide ante*, p. 477.

(*l*) *Ante*, pp. 368—374, 476—478.

(*m*) *Vide ante*, p. 478.

Citations on behalf of lunatics, by whom extracted.

Citations by and against Lunatics.—If the party *citing* is a lunatic or person of unsound mind, the citation must be extracted on his behalf by the committee of his estate. If there is no committee or person in the position of a committee (*n*), the citation is extracted by the next of kin of the lunatic. If their interests conflict with those of the lunatic, the citation may be extracted on behalf of the lunatic by a more distant relative or stranger on filing an affidavit of the facts and of his fitness (*o*).

Citations against lunatics.

If the party *cited* is a lunatic or person of unsound mind, that fact should be stated in the citation, and the citation should show whether there is a committee of his estate or person appointed under sect. 116 of the Lunacy Act, 1890, or, in default of these, should state who are the next of kin of the lunatic. If the lunatic has no known relations, the citation should be directed to the lunatic and his "next of kin, if any" (*p*). In such a case, and in cases where the lunatic is a bastard, it is advisable to serve the King's Proctor (*q*).

SUB-SECTION 2.—*Service of Citations.*

Personal service, how effected.

Citations are to be served personally when that can be done, the party cited being resident in Great Britain or Ireland, by leaving a true copy of the citation with the party cited, and showing such party the original, if required by him so to do (Rule 18, C. B.).

Substituted service by advertisement.

If personal service cannot be effected, the registrar may, if satisfied by affidavit that personal service is not possible, direct substituted service by advertisement in newspapers, or in such manner as he thinks fit (see Rule 18, C. B.). The affidavit should state what efforts, if any, have been made to effect personal service (see App. VII., Form 37).

Service on parties resident abroad.

Citations may be served on parties resident out of Great Britain and Ireland by the insertion of the same or of an abstract thereof, settled and signed by one of the registrars,

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(*n*) *Vide ante*, p. 375.

(*o*) *Vide ante*, p. 377.

(*p*) Tristram & Coote, p. 266; and *vide ante*, p. 378.

(*q*) *Ibid.*

as an advertisement, in such of the morning and evening London papers, and, if necessary, in such local papers, and at such intervals, as the judge or a registrar may direct: provided that in any case the judge or a registrar may direct a citation to be served personally. If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation (Rule 19, C. B.). Citations to see proceedings do not bind the party cited unless personally served upon him.

Citations to see proceedings must be personally served.

Where service is to be effected by advertisement, a draft abstract (App. VII., Form 114), a form of which may be obtained at the Contentious Department, is left with the original citation at the registry, to be settled by the registrar. The registrar, besides settling the abstract, decides in what papers and at what intervals it shall appear, and the time for appearance to the citation by the party cited.

Procedure where service by advertisement is permitted.

According to modern practice, a certificate of the service of the citation is endorsed on that instrument, setting forth the day and place of its service on the party, signed by the person who served it; an affidavit of the truth of the certificate is also required (*r*).

Endorsement of service.

Service on Minors and Infants.—Citations are to be served upon a minor or infant in the presence of the natural or legal guardian, or the person or persons upon whom the actual care and custody of the minor or infant, for the time being, has properly devolved (*s*). The citation must also be served upon the next of kin of the minor or infant.

Service on minors or infants, how effected.

Where a minor of the age of seventeen was living in service at a distance from her mother, her natural guardian, and a copy of the citation had been sent to the minor by post, and she had acknowledged the receipt of it, the Court held the service upon her to be sufficient (*t*).

Where a citation was served upon two minors in the house

(*r*) *Goodburn* v. *Bainbridge*, (1860) 2 S. & T. 4. See 3 Burn, E. L., p. 259, 9th ed. For form of certificate, see App. VII., Form 80; of affidavit: App. VII., Form 30.

(*s*) *Cooper* v. *Green*, (1825) 2 Add. 454; *Brown* v. *Wildman*, (1859) 28 L. J. P. 54.

(*t*) *Lainson* v. *Naylor*, (1860) 2 S. & T. 7.

where they resided, but their custodian declined to be present at the service, and an attempt was also made to serve the citation on the next of kin of the minor, but failed by reason of the process server not being allowed to see such next of kin, the Court held the service on the minors to be sufficient (*u*).

Endorsement and affidavit of service.

The endorsement of service on a minor or infant should show that special service has been effected in accordance with the practice in such a case; and the subsequent affidavit of service, besides stating that the minor was served in the presence of A., his guardian, should go on to show how A. became his guardian (*x*).

Service on lunatic, how effected.

Service on a Lunatic.—If a committee of a lunatic's estate has been appointed, the citation should be served upon the committee as well as upon the lunatic (*y*). If there is no committee, the practice of the Court requires the lunatic to be served in the presence of some medical man (*z*). The next of kin of the lunatic must also be served (*a*).

A doubt was expressed by the registry in *In the Goods of Surtees* (*b*) whether the practice of personally serving the lunatic in the presence of a medical man should be adhered to, and Sir C. Cresswell said that it appeared to be a mere unmeaning formality. So, too, in an Irish case (*c*), the learned judge said: "I see no use whatever in serving the citation in the presence of a medical man," and ordered the personal service of the citation on a lunatic in the presence of the proprietress of the asylum where he was confined.

Order IX., r. 5, of the Rules of the Supreme Court, provides that service of a writ of summons on the committee of a lunatic or on the person with whom a person of unsound mind resides or under whose care he is, shall, unless the Court or a judge otherwise orders, be deemed to be good service upon the lunatic or person of unsound mind; and in *In the Goods of*

(*u*) *Lean* v. *Viner*, (1864) 3 S. & T. 469.

(*x*) *Johnson* v. *Weldy*, (1861) 2 S. & T. 313.

(*y*) *Surtees*, (1859) 28 L. J. P. 89.

(*z*) *Ibid.*

(*a*) *Windeatt* v. *Sharland*, (1871) 2 P. & D. 217; *vide ante*, p. 378.

(*b*) (1859) 28 L. J. P. 89.

(*c*) *McCormick* v. *Heyden*, (1886) 17 L. R. Ir. 338.

Price (*d*) it was held that service of a citation in a probate action in accordance with the provisions of this rule was a sufficient service, although not absolutely the correct practice in such cases.

Endorsement of service.

The endorsement of service of the citation on a lunatic should show that special service has been effected in accordance with the foregoing rules.

SUB-SECTION 3.—*Entry of Appearance.*

Appearance to citations, where entered.

Appearances to citations to accept or refuse a grant, to propound a testamentary paper, and to bring in a grant (App. VII., Form 62), are entered at the Contentious Department of the principal registry in the same way as is an appearance to the warning of a caveat (*ante*, p. 518). Appearances to citations to see proceedings are entered in the same way as are appearances in probate actions (*post*, p. 608).

Time for entry of appearance.

The usual time limited for an appearance to a citation is eight days, exclusive of Sundays, Christmas Day, and Good Friday (Rule 87, N.-C. B.). If the party cited is abroad, or the citation is advertised, the time for appearance is fixed by the registrar.

The party cited, though in default, may enter an appearance at any time before a proceeding has been taken in default, or afterwards by leave of the judge or one of the registrars (Rule 29, C. B.).

A party cited to see proceedings may enter an appearance in the action at any time during the dependence of the action, before final judgment has been given therein (*e*).

Form of entry of appearance.

Appearances must set forth the interest which the party cited has in the estate and effects of the deceased, and be accompanied by an address within three miles of the General Post Office (*f*) (Rules 26, 27, C. B.).

Appearance by minors and lunatics.

Minors and lunatics appear by the person named in the citation as their guardian or custodian, or by any other person entitled to represent them (*g*).

(*d*) (1904) 20 T. L. R. 540.

(*e*) *Vide post*, p. 594.

(*f*) In the case of citations to see proceedings, within three miles of the Royal Courts of Justice.

(*g*) *Vide ante*, pp. 535, 536.

SUB-SECTION 4.—*Procedure in Default of Appearance.*

Procedure in default of appearance: an affidavit of service and of non-appearance to be filed.

Before a party can proceed after service of a citation in default of appearance by the party cited an affidavit of personal service and of non-appearance (App. VII., Forms 30, 32) must, together with the citation duly endorsed with the certificate of service, have been filed in the registry. If personal service has not been duly effected, the order of the judge or of one of the registrars in his absence, founded on an affidavit, and giving leave to proceed, must have been obtained (Rule 20, C. B.).

In case the citation has been advertised, the newspapers containing the advertisement, together with the original citation, the abstract, and an affidavit of non-appearance, must be filed in the registry (Rule 20, C. B.).

Affidavit of service where party cited is abroad.

If the person cited is abroad, the affidavit of service should state that he has no agent, attorney, or correspondent resident in England (*h*).

Annexures to the affidavit of service.

The citation, newspapers, etc., should be annexed as exhibits to the affidavit of service (*i*).

Procedure in default of appearance to citation to accept or refuse the grant.

In cases of citations to accept or refuse a grant, after these requirements have been complied with, the person citing will proceed to move the Court for the grant.

Procedure in default of appearance where executors to whom power has been reserved have been cited to accept or refuse probate.

In one case no motion is required. That is the case where a citation to accept or refuse a grant has been issued by the executors who have proved the will, against those to whom power has been reserved. If the citation has been *personally* served, and no appearance entered, the registrar will make the order (App. VII., Form 279) on affidavits of service and non-appearance being filed; but if the citation has been served by advertisement, a motion is necessary (*j*).

Renunciation after service.

If the person cited renounces after service of the citation, the party citing should apply for an order on summons for the grant, notwithstanding the caveat and citation.

Procedure in default of appearance: to citations to

If no appearance is entered to a citation to propound a

(*h*) *Evans* v. *Burrell,* (1859) 4 S. & T. 185; *Kenworthy* v. *Kenworthy,* (1863) 3 S. & T. 64.

(*i*) *Harenc* v. *Dawson,* (1863) 3 S. & T. 50.

(*j*) Tristram & Coote, p. 263; and *vide ante,* p. 504.

testamentary instrument or to bring in a grant, the party citing may apply for a grant as on intestacy or under an earlier will, or for revocation of the grant, on motion (*k*).

propound a will or bring in a grant;

If no appearance is entered to a citation to see proceedings, the action proceeds in its ordinary course.

to citations to see proceedings.

SUB-SECTION 5.—*Procedure after Appearance has been entered.*

Procedure after appearance: to citations to accept or refuse a grant;

Citations to accept or refuse a Grant.—If the party cited, or one of the parties cited, enters an appearance and is willing to accept the grant, the grant will be made to him on proof by affidavit that he has been cited, has appeared, and is willing to take the grant, that due notice has been given to the party citing, and that since the receipt of such notice the party citing has taken out no summons or other proceeding for the grant to go to himself (*l*).

If the party cited enter an appearance, but take no further step, the citor may apply on summons for an order directing the party cited to take the grant within a stated time, and if he neglects to do so, the grant may be made to the citor, notwithstanding the caveat, citation, and appearance (*m*).

to citations to propound a will;

Citations to propound a Testamentary Instrument.—If the party cited enters an appearance, his next course is to issue a writ of summons, propounding the testamentary paper and making the party citing defendant (*n*).

to citations to bring in grant;

Citations to bring in a Grant.—In these cases the citor usually issues a writ of summons concurrently with the citation, and commences an action.

If, after an appearance has been entered, and the grant brought in, the citor takes no further step, the party cited should take out a summons to discontinue contentious proceedings and for re-delivery out of the grant to himself (*o*).

to citations to see proceedings.

Citations to see Proceedings.—If the person cited to see proceedings wishes to appear and take part in the action, he

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(*k*) *Vide ante,* pp. 526, 529.

(*l*) Tristram & Coote, 264; for form of order see App. VII., Form 266.

(*m*) *Ibid.*

(*n*) *Vide post,* pp. 579, 580; *ante,* p. 526.

(*o*) *Vide ante,* p. 529.

enters an appearance, and applies under the summons for directions, with notice to the parties to the action, for leave either to adopt the pleadings of the side whose interest coincides with his own, or, if he thinks it necessary, to deliver separate pleadings.

Costs of citation.

If contentious proceedings arise from the service of a citation, the expenses of the citation and service thereof are, upon taxation, considered as costs in the cause (Rule 22, C. B.).

CHAPTER III.

OF SUMMONSES, APPLICATIONS IN CHAMBERS, ORDERS, AND ENFORCEMENT OF ORDERS.

Section 1.

SUMMONSES.

SUB-SECTION 1.—*What Applications are made on Summons.*

In what cases a summons is the appropriate procedure.

A SUMMONS may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding (Rule 98, C. B.).

Applications which may be made under the summons for directions are dealt with in a later chapter (*z*). There are, however, other applications, both in contentious and non-contentious business, which may be made on summons to the judge or to a registrar.

The chief of these are the following:—

(1) Summons to discontinue contentious proceedings.

(1) A summons to discontinue contentious proceedings (*a*) may be made to a registrar. The registrar has power to order contentious proceedings to be discontinued by consent at any time before the trial, and may give leave to file terms, but a registrar has not power to make the terms a rule of Court (*b*). Apart from consent, the registrar may, on application to him on summons, order contentious proceedings to be discontinued and a grant to issue to the applicant:—

(i.) Where a caveat has been entered, and the caveator in

(*z*) *Post,* Part IV., Chap. VI., pp. 611 *et seq.*

(*a*) Form of summons: App. VII., Form 340; of order: App. VII., Form 267.

(*b*) *Vide post,* p. 671.

his appearance to the warning discloses an interest insufficient to entitle him to oppose the grant (*c*);

(ii.) Where the defendant gives notice of not desiring to continue his opposition, either before or after writ issued;

(iii.) Where a writ has issued, and no appearance has been entered, and the party at whose instance the writ was issued does not desire to prove the will in solemn form;

(iv.) Where none of the defendants delivers a defence, and the plaintiff does not desire to proceed and prove the will in solemn form;

Where persons equally entitled to a grant of administration contend *inter se.*

(v.) Where a caveat has been entered, and from the appearance to the warning it appears that the caveator has merely an equal right with the applicant to a grant of administration. In this case the respective claims of the parties to the grant are adjudicated upon by the registrar on the hearing of the summons to discontinue, when affidavits may be read.

(2) Summons for an inventory and account.

(2) Applications for an order that the executor or administrator shall exhibit an inventory and account may be made to the registrar on summons (*d*).

(3) Summons for leave to give bond with foreign sureties.

(3) When the administrator desires to give sureties other than persons resident in the United Kingdom, the Isle of Man, or the Channel Islands, the leave of the judge in chambers must be obtained on summons (*e*).

(4) Summons for assignment of bond.

(4) Applications for an order to assign an administration bond are made on summons returnable before a registrar (*f*).

(5) Summons for justification of sureties.

(5) A person who desires to obtain an order that the sureties to the administration bond shall justify should apply on summons returnable before a registrar (*g*).

(6) Summons to review taxation.

(6) Applications to review a taxation are made to the judge on summons (*h*).

(*c*) *E.g.*, where an executor who has entered a caveat appears to a warning by another executor in respect of the same will: *vide ante,* p. 520.

(*d*) *Vide ante,* p. 510.

(*e*) *Vide ante,* p. 463, and note the exception there mentioned.

(*f*) *Vide ante,* p. 468.

(*g*) *Vide ante,* p. 466.

(*h*) *Vide post,* p. 704.

(7) Summons for directions by administrator *pendente lite.*

(7) Applications for directions by an administrator or receiver *pendente lite* are made on summons, which should, in matters of importance, be returnable before the judge (*i*).

(8) Summons to vacate writ of sequestration or *lis pendens.*

(8) Applications to vacate the registration of a writ of sequestration or to vacate the registration of a *lis pendens* are made to a registrar on summons.

(9) Summons for charging order.

(9) Applications for a charging order under the Solicitors Act, 1860, s. 28, are made to a registrar on summons (*j*).

SUB-SECTION 2.—*Jurisdiction of the Registrar.*

Registrar to have the same powers as a judge in chambers, except in certain matters.

Order LIV., r. 12, of the Rules of the Supreme Court, as amended by R. S. C., June, 1908, provides: "In the Probate, Divorce and Admiralty Division, a registrar may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act or these rules may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters (*k*); that is to say:—

"(1) All matters relating to criminal proceedings or to the liberty of the subject;

"(2) Granting leave for service out of the jurisdiction of a writ or notice of a writ of summons (*l*);

(*i*) *Vide ante,* p. 387.

(*j*) *Vide post,* p. 551.

(*k*) The original Rule 12 of Order LIV. was annulled by R. S. C., June, 1908, and the rule above printed, which came into force on the 1st July, 1908, was substituted for it. Besides the matters set out in the text, the *original* Rule 12 excepted from the jurisdiction of a registrar the following proceedings and matters: (1) the removal of actions from one division or judge to another division or judge; (2) the settlement of issues, except by consent; (3) inspection and other orders under Order L., rr. 1—5 (this sub-section was annulled by R. S. C., November, 1893, r. 31); (4) injunctions and other orders under sub-s. 8 of s. 25 of the principal Act (without the saving clause printed in the text, introduced by R. S. C., June, 1908); (5) awarding of costs, other than the costs of or relating to any proceedings before a registrar, and other than costs which by these rules, or by the order of a Court or a judge, he is authorised to award; and (6) orders absolute for charging stocks, funds, annuities, or share of dividends, or annual proceeds thereof. The effect of the new rule is thus further to extend the registrar's jurisdiction so as to include all the above-mentioned proceedings and matters except those injunctions and other orders under sub-s. 8 of s. 25 of the principal Act which are not within the exception printed in the text.

(*l*) *Vide post,* p. 606. A registrar has power to add parties out of the jurisdiction, though he cannot give the necessary leave to issue a concurrent writ and serve it, or notice of it, on the added parties: *Burt* v. *Bowen,* (1891) 8 T. L. R. 28.

"(3) Appeals from district registrars;

"(4) Prohibitions;

"(5) Injunctions and other matters under sub-s. 8 of s. 25 of the principal Act, other than orders for the appointment of receivers by way of equitable execution and injunctions so far, and so far only, as the same are ancillary or incidental to equitable execution (*m*);

"(6) Reviewing taxation of costs (*n*);

"(7) Acknowledgments of married women or applications to dispense with the concurrence of a husband in a disposition by a married woman."

SUB-SECTION 3.—*Practice as to Summonses.*

By what rules the practice is regulated.

The practice as to summonses in the Court of Probate was originally regulated both in contentious and non-contentious business by the Probate Contentious Rules, 1862.

The Judicature Act, 1875, s. 18, provides that all rules in the Court of Probate shall remain and be in force in the High Court and in the Court of Appeal respectively until they shall be altered or annulled by any rules of Court made after the commencement of that Act. But in *In the Goods of Tomlinson* (*o*) it was held that the Judicature Acts had no effect whatever upon the *non-contentious* branch of the jurisdiction of the Probate Division; the Act therefore apparently leaves untouched the Probate Contentious Rules, 1862, as applied in practice to summonses in non-contentious business.

These rules still apply to summonses in contentious business unless altered and annulled by the Rules of the Supreme Court. And it has been expressly held that Rule 100, C. B., has not been altered or annulled by R. S. C., Order LIV., r. 4E, and therefore is still in force (*p*).

Originating summonses.

Provision is made by R. S. C., Order LIV., for the adoption in the Probate Division of summonses, therein termed "originating summonses,"—*i.e.*, every summons other than a

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(*m*) *Vide post*, pp. 552, 665.

(*n*) *Vide post*, p. 705.

(*o*) (1881) 6 P. D. 209; see Judicature Act, 1875, s. 18.

(*p*) *Hopkinson* v. *Carter*, [1909] P. 118.

summons in a pending cause or matter—and rules are framed to regulate their form and issue, the appearance thereto, and attendance thereunder (Order LIV., rr. 4B, 4C, 4D, and 4F); but it is stated that in practice no distinction is drawn, in the Probate Division, between originating and other summonses, either in their issue, form, or hearing (q).

Issue of summons.

Issue.—The party issuing the summons (App. VII., Forms 337, 338) takes two copies to the Contentious Department. One copy is retained by the registry, with the fee stamps duly affixed thereto; the other, after the time and date of return, and the number have been inserted, is stamped with the signature of the President and returned to the applicant.

Service of summons.

Service.—A copy must be served on the party summoned one clear day at least before the summons is returnable (Rule 100, C. B.) (r). If counsel are to appear, the summons should be marked "Counsel."

Hearing: registrar's summons;

Hearing.—Summonses are heard by the registrars at the Principal Probate Registry, Somerset House, during the sittings on Tuesdays and Fridays, and on other days by appointment. There are two lists, one for counsel summonses at 11.30, the other for those without counsel at 12 o'clock.

judge's summons.

Summonses to the judge are heard by the judge in chambers once a week during the sittings, usually on Saturday mornings, but sometimes on Mondays before motions.

Certificate for counsel.

Summonses attended by counsel are heard before those attended by solicitors. Counsel should not omit to ask the registrar to certify for counsel, otherwise his fees are not allowed on taxation. On summonses before the judge, the certificate is usually given as of course.

Default in attendance.

Default in Attendance.—If the party summoned does not attend, the order may be made subject to an affidavit of service and non-attendance. (See Rules 101—104, C. B., and App. VII., Form 33.)

(q) Tristram & Coote, p. 356.

(r) This rule is in force notwithstanding the provision of Order LIV., r. 4E, R. S. C.: *Hopkinson* v. *Carter*, [1909] P. 118. The time of day within which the summons must be served is now probably fixed by R. S. C., Order LXIV., r. 11, and not by Rule 100, C. B.

Order.

Order.—Orders made on summons can be obtained on application at the Contentious Department. (See Rule 105, C. B.)

Consent.

Consent.—If the party summoned consents to the order, the summons, with the consent endorsed upon it, is taken to the Clerk of the Rules, if the summons is a judge's summons, or to the registrar's clerk, if a registrar's summons, when the order will be drawn up accordingly.

Hearing of summonses in vacation.

Vacation.—Summonses are heard by the registrars daily in the vacation, except on Saturdays. Summonses before the vacation judge are issued at the Contentious Department on leave of a registrar, and must then be entered in the list kept at the Royal Courts of Justice.

Section 2.

EX PARTE APPLICATIONS.

Ex parte applications to a judge in chambers.

Ex parte applications to a judge in chambers are chiefly for leave to issue a writ for service out of the jurisdiction or for leave to renew a writ. These are made, upon affidavit, in the first instance to the judge's clerk (*s*). Other *ex parte* applications to the judge in chambers may be made by *ex parte* summons returnable on the next summons day, or upon affidavit simply, at a convenient time to be arranged with the judge's clerk.

Ex parte applications to a registrar.

Ex parte applications may be made to a registrar at any convenient time.

Section 3.

ORDERS.

Orders, how obtained.

The original order made on motion, and decrees of the Court, are not given out to the parties, but copies may be obtained by application at the Copy Department. Original orders made on summons or on *ex parte* applications can be obtained on application at the Contentious Department two days after they are made.

SUB-SECTION 1.—*Service of Orders.*

Service of orders.

Service of orders is regulated by Order LXVII. R. S. C.

Order LXVII., r. 1, provides: Except in the case of an order

(*s*) *Vide post*, pp. 604, 606.

Showing original on service.

for attachment [*i.e.*, an order non-compliance with which may involve an application for an attachment], it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited.

Mode and time of service when not personal.

All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite shall be sufficiently served if left within the prescribed hours (see Order LXIV., r. 11), at the address for service of the person to be served as defined by Orders IV. and XII., with any person resident at or belonging to such place, or if posted in a prepaid registered envelope addressed to the person to be served at such address for service as aforesaid; provided that where service under this rule is made by registered post, the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof (Order LXVII., r. 2).

Service where no appearance or no address for service.

As to service where no appearance has been entered or where no address for service is given, see Order LXVII., r. 4.

Manner of personal service.

Where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons (*t*) (Order LXVII., r. 5).

Substituted service.

For substituted service of orders, etc., required to be served personally, see Order LXVII., r. 6.

Affidavits of service.

Affidavits of service shall state when, where, and how and by whom such service was effected (Order LXVII., r. 9).

Time to be stated for doing any act ordered to be done, and memorandum to be endorsed.

Order XLI., r. 5, provides: Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following, viz.:—

"If you, the within-named A. B., neglect to obey this

(*t*) *Vide post*, p. 605.

judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order]" (*s*).

SUB-SECTION 2.—*Enforcement of Orders.*

Enforcement of orders by attachment.

1. *By attachment.*—Applications for attachment are made to the Court on motion (Rule 107, C. B.).

For the practice as to writs of attachment the practitioner is referred to the notes to Order XLIV. in the Annual Practice. There are, however, some points with reference to the practice in the Probate Division which require special notice.

What orders may be enforced by attachment.

The Court may direct an attachment to issue against an executor who has intermeddled with the estate, and has failed to comply with a peremptory order to take probate (*t*); against an executor or administrator who has not complied with an order to file an inventory (*u*); against a person who has disobeyed a subpœna to bring in a will or a citation to bring in a grant (*x*); and generally for non-compliance with any order of the Court, except an order to pay money only (*y*), as to which see Order XLII., r. 3, and the note thereto in the Annual Practice.

Practice.

Writs of attachment (*z*), when ordered to issue, are to be prepared by the party at whose instance the order has been obtained and taken to the registry with an office copy of the

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(*s*) See *Evans* v. *Evans*, (1893) 67 L. T. 719, where it was held that a citation to bring in a grant could not be enforced by attachment unless so endorsed, and *Bristowe*, (1892) 66 L. T. 60, where an attachment was refused on the ground that this rule had not been complied with.

(*t*) See *Mordaunt* v. *Clarke*, (1868) 1 P. & D. 592; *Bristowe*, (1892) 66 L. T. 60; *Lister*, (1894) 70 L. T. 812; *Coates*, (1898) 78 L. T. 820.

(*u*) *Baker* v. *Baker*, (1860) 2 S. & T. 380; *Marshman* v. *Brookes*, (1863) 32 L. J. P. 95.

(*x*) *Simmons* v. *Deane*, (1858) 27 L. J. P. 103; *Parkinson* v. *Thornton*, (1867) 37 L. J. P. 3. As to citations to bring in a grant, in *Evans* v. *Evans*, (1893) 67 L. T. 719, Barnes, J., said that he doubted whether a citation could be said to be a "judgment or order." But in *Sage* (December 12, 1910) an attachment was ordered for default in complying with a citation to bring in a grant, the writ to lie in the registry for seven days. No question was raised as to whether a citation is a "judgment or order."

(*y*) An attachment issued to enforce payment into court by an administratrix of money received by her in that capacity: *Tinnuchi* v. *Smart*, (1885) 10 P. D. 184.

(*z*) For form, see App. VII., Form 346.

order and a *præcipe*, and when approved and signed by one of the registrars shall be sealed with the seal of the Court; and it shall not be necessary for the judge to sign such writs (Rule 108, C. B.).

Discharge of person in custody under a writ of attachment.

Any person in custody under a writ of attachment may apply for his or her discharge to the judge if the Court be then sitting, or in the vacation to the vacation judge.

Practice.

The application for discharge should be supported by an affidavit setting forth the facts and a certificate by the proper officer of the Court as to the performance of the act the non-performance of which was the ground of attachment. Notice must be given to the party at whose instance the writ of attachment issued. Since the Debtors Act, 1869, the Court cannot make the payment of the costs occasioned by his contempt a condition precedent to his discharge (*a*). For form of order for discharge, see Appendix VII. (Forms 247, 248).

Writs of sequestration, *fi. fa.*, or *elegit*.

2. *By writ of sequestration*, fi. fa., *or* elegit.—Writs of *fi. fa.*, *elegit*, or sequestration issue from the Contentious Department on production of the order, affidavits of service, and of non-compliance with the order, and of the draft writ and *præcipe*. For the practice, see R. S. C., Order XLII., and the notes thereto in the Annual Practice.

Garnishee orders.

(App. VII., Forms 300, 301.)

3. *Garnishee Orders.*—Application for a garnishee order *nisi* is made *ex parte* to a registrar, upon production of an affidavit of service of the original order for payment, and an affidavit by the party to whom payment was to be made showing that the order is still unsatisfied, and that some person within the jurisdiction of the Court is indebted to the party against whom the order was made. The order *nisi* attaching the debt will fix a date for the attendance of the garnishee, and the order is served on the garnishee. On delivery out of the order *nisi* to the practitioner, the fee of 5*s*. for the same, and a deposit of the further sum of 5*s*. for the order absolute, will be taken.

On the day appointed, the garnishee and the party making

(*a*) *Ayres* v. *Ayres*, (1901) 85 L. T. 648.

the application attend at the registry, when the parties are heard, and the registrar, unless cause is shown to the contrary, will make the order absolute. The *ordinary* costs of obtaining an order absolute, amounting to £3 15*s.* 8*d.* if the garnishee attends, and to £4 14*s.* if an affidavit of service of the order *nisi* is required, will be inserted in the order absolute. For practice, see R. S. C., Order XLV.

Charging orders.
(App. VII., Forms 302, 303.)

4. *Charging Orders.*—Applications for a charging order *nisi* are made in the same manner as those for garnishee orders *nisi* (see R. S. C., Order XLVI.). The order absolute can now be made by a registrar (*b*). An application for a charging order under the Solicitors Act, 1860, s. 28, is made by summons before a registrar (*c*).

Appointment of receiver by way of equitable execution.
(App. VII., Forms 304, 305.)

5. *Receiver by way of Equitable Execution.*—Applications for a receiver by way of equitable execution are now made by summons to a registrar (*b*), supported by affidavit of service of the order, of the amount of the debt due, and of the nature of the property in respect of which the receiver is to be appointed. The affidavit should also state that the debtor has not any property which can be recovered by *fi. fa.*, *elegit*, or other ordinary process of execution. The practice of the King's Bench Division has been adopted by the Probate Division in regard to these orders (see Judicature Act, 1873, s. 25 (8), and R. S. C., Order L.).

(*b*) *Vide* Order LIV., r. 12, *ante*, p. 545, note (*k*).

(*c*) By a direction of the President, the practice of the King's Bench Division is to be followed. And see *The Birnam Wood*, [1907] P. 1.

CHAPTER IV.

OF MOTIONS.

Section 1.

WHAT APPLICATIONS ARE MADE ON MOTION.

What applications are made on motion.

Applications in certain matters should or may be made to the Court on motion both in non-contentious and contentious business. Before dealing with the practice as to motions, it is necessary to enumerate the cases in which a motion is the appropriate form of procedure. The chief of these are the following :—

(1) Motions on behalf of the Crown for administration to a bastard intestate or person without known relations.

(1) Applications on behalf of the Crown for administration of the estate of a bastard intestate (*a*).

Where the intestate is a bastard who has died leaving no lawful issue and no husband or widow, the Court will on motion grant administration of his *personal* (*b*) estate to the Solicitor to His Majesty's Treasury as nominee of the sovereign as king, or to the Solicitor to the Duchy of Lancaster as nominee of the sovereign as Duke of Lancaster, or to the Solicitor to the Duchy of Cornwall as nominee of the Prince of Wales as Duke of Cornwall, according as the intestate had his fixed place of abode without or within the two respective duchies (*c*).

A motion is also necessary where a person has died without known relations, and a grant of the personal estate is made, after citation, to the nominee of the Crown, or of the Duke of Lancaster or Cornwall (*d*). Strictly, these cases fall under the next heading.

(*a*) *Vide ante,* p. 339. Forms of order: App. VII., Forms 236—238.

(*b*) The Land Transfer Act, 1897, does not bind the Crown, and accordingly the grant, when made to its representative, does not extend to the real estate, which vests in the Crown without a grant: *Hartley,* [1899] P. 40 ; *Best,* [1901] P. 333. In Duchy of Lancaster cases, also, the grant is as to the personal estate only : Direction of the President, 1900.

(*c*) *Vide ante,* p. 339.

(*d*) *Vide ante,* p. 339.

(2) Motions for a grant to persons having an inferior title after citation of those having a prior right.

(2) Applications for a grant to persons having an inferior title, after citation of those having a prior right (*e*).

When all persons whose title to be appointed administrator is superior to that of the applicant, have failed to appear and take the grant after having been cited to appear and accept or refuse it (*f*), the grant may be decreed on motion to the applicant after he has filed affidavits of service of the citations and of search for an appearance thereto (*ante*, p. 450).

Under this head are included cases where a creditor of an intestate applies for a grant after citation of the next of kin, the heir-at-law, and persons entitled in distribution (*g*), and also cases in which a grant *de bonis non* is made to a person having a derivative title, after citation of those having a direct title, *e.g.*, to the personal representative of the deceased administrator, who was sole next of kin, after citation and non-appearance of persons entitled in distribution (*h*).

(3) Motions for a grant notwithstanding the existence of an alleged will where the persons interested have been cited to propound the will.

(3) Applications for a grant after persons interested in an alleged will have been cited to propound it, and have not appeared and propounded it (*i*).

The Court, on proof that the persons interested under an alleged will have been cited to propound it and have taken no step to put it forward for proof notwithstanding such citation, may grant administration to the next of kin of the deceased, or probate in common form of an earlier will, as the case may be. Such grants are made on motion (*i*).

(4) Motions for a grant where the proof of death is presumptive.

(4) Applications for probate or administration when the proof of the death is presumptive (*k*).

Where the applicant for a grant of probate or letters of administration is unable to state in his oath to lead the grant the precise day on which the deceased died, but the fact of the death is merely presumed from circumstances

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(*e*) *Vide ante*, p. 540. Form of order : App. VII., Form 243.

(*f*) No motion is necessary if they have formally renounced : *vide ante*, p. 457.

(*g*) *Vide ante*, p. 469.

(*h*) See *Carr*, (1867) 1 P. & D. 291 ; *Johnson*, (1880) 7 L. R. Ir. 1 ; *Shaw*, (1895) 73 L. T. 192. *Vide ante*, p. 361.

(*i*) *Vide ante*, p. 526.

(*k*) *Vide ante*, pp. 421—424. Forms of order : App. VII., Forms 241, 242, 268, 269 ; of oath : App. VII., Form 221.

which justify the inference that he is no longer alive, application must be made to the Court for leave to depose on oath that the presumed deceased died on or since the last date on which he is known to have been alive.

Applications for leave to depose on oath to the death of a presumed deceased are made to the Court on motion, except in the two following cases, where the order may be made by a registrar of the principal registry:—

(i.) Where the gross value of the estate of the presumed deceased does not exceed £100;

(ii.) Where the testator or intestate is presumed to have perished in a shipwreck, and a similar motion has already been granted by the Court in the estate of some other person who has died in the same wreck. In such cases, an office copy of the order already made as to the same ship must be lodged with the affidavits in support. The "Ships' Book," *i.e.*, a book of lost ships in respect of which orders have been made, may be consulted in the Contentious Department of the registry.

Affidavits in support.

Where the Court is asked to infer death in consequence of the disappearance or departure from home of the presumed deceased, coupled with the fact that he has not been heard of since by his relatives and friends, the affidavit of the applicant should state (*l*)—

(i.) The description, circumstances, and age of the presumed deceased and the circumstances of his disappearance or departure.

(ii.) That the applicant verily believes him to be dead (*m*).

(iii.) What advertisements have been inserted, in what newspapers, for information concerning the deceased, and with what result. The newspapers should be annexed to the affidavit.

(iv.) Whether any letters have been received from the deceased since his disappearance or departure. If so, they must be annexed to the affidavit, or their absence explained (*n*).

(v.) What other inquiries have been made; and other facts

(*l*) Assistance in drafting the affidavits will be derived from the precedent of the case on motion: App. VIII., Precedent 40.

(*m*) *Hurlston,* [1898] P. 27. This is essential.

(*n*) *Clarke,* [1896] P. 287.

rendering his death probable, *e.g.*, that he was aware that he was entitled to a fund, and has never claimed it.

(vi.) Whether he was insured. If so, the name of the insurance office must be stated, and notice of the motion must be given to that office (*o*). Their reply must be filed (*p*), or if they have made no reply, and do not appear, an affidavit of service of the notice of motion must be filed (*p*).

(vii.) Whether the deceased died intestate or testate, in the first case stating the names of his next of kin and of his heir-at-law, if there is real estate; in the latter case the will must be filed.

(viii.) Particulars of the value and nature of the estate of the presumed deceased.

The affidavit of the applicant should be corroborated by some other member of the family, and also by some disinterested person who can speak to the facts (*q*). Each affidavit should state in terms that the deponent verily believes that the presumed deceased is dead (*r*).

Where the presumed deceased is supposed to have been lost at sea, besides the above averments, the affidavits must prove—

(i.) That the deceased was on board when the vessel left port;

(ii.) The date and place where the vessel was last seen, her non-arrival at the port for which she was bound, and the fact that no tidings have been received of the vessel since.

(iii.) The affidavits must state whether the vessel and cargo were or were not insured. If insured, proof of the payment by the underwriters of the amount for which the ship was insured is very strong evidence in support of the application (*s*).

(5) Motions for a grant under sect. 73 of the Court of Probate Act, 1857.

(5) Applications for a grant under sect. 73 of the Court of Probate Act, 1857 (*t*).

In all cases where applications are made for a grant of letters of administration under sect. 73 of the Court of Probate Act,

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(*o*) *Barber*, (1886) 11 P. D. 78.

(*p*) *Saul*, [1896] P. 151.

(*q*) *Clarke*, [1896] P. 287.

(*r*) *Hurlston*, [1898] P. 27.

(*s*) *Main*, (1858) 1 S. & T. 11. See also *Dodd*, (1897) 77 L. T. 137.

(*t*) *Vide ante*, pp. 409—420. For forms of order, see App. VII., Forms 255—259.

1857, the application must be made to the Court on motion. Motions of this description are not heard by the registrars in vacation.

Whenever the Court under sect. 73 appoints an administrator other than the person who, prior to the Court of Probate Act, 1857, would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator (*u*), in the letters of administration, and in the administration bond (*v*) (Rule 31, N.-C. B.).

(6) Motions for the revocation of grants.

(6) Applications for revocation of probate or letters of administration (*w*).

Applications for the revocation of grants of probate or letters of administration on the ground that they have been obtained by an erroneous suggestion or have been granted *per incuriam* to the wrong person, or otherwise irregularly, are made to the Court on motion, unless the parties interested consent to their revocation by order of the registrar.

But where it is sought to obtain revocation of probate in common form on the ground of the invalidity of the will, or of letters of administration on the ground of the administrator's want of interest, and the revocation is resisted by the grantee, an action for revocation of the grant becomes necessary (*x*).

(7) Motions for probate of a lost will.

(7) Applications for probate of a lost will in common form (*y*).

The contents of a will which has been lost or destroyed *sine animo revocandi* may be proved on motion; but, as a general rule, the Court will not entertain a motion for this purpose unless all persons whose interests are adversely affected by probate of the will are of full age and consent. Where this consent is not given, or, owing to some of the persons interested being under age, cannot be given, it is the practice to require the will to be propounded in an action (*z*).

In certain cases of lost wills, where the estate was small, the

(*u*) App. VII., Form 175.

(*v*) App. VII., Form 71.

(*w*) *Vide ante,* pp. 430—435, 494, 495. Forms of order: App. VII., Form 254.

(*x*) *Vide post,* pp. 582—587.

(*y*) *Vide ante,* pp. 304—306. Forms of order: App. VII., Forms 244, 245.

(*z*) *Barber,* (1866) 1 P. & D. 267; *Pearson,* [1896] P. 289; and see *Carter,* (1908) 52 Sol. Jo. 600.

Court has modified the practice, and has not insisted that all persons interested under an intestacy should be *sui juris* and should consent to the matter being disposed of on motion (*a*). And in *In the Goods of Brassington* (*b*) the Court upon motion granted probate of a will which had been torn up and afterwards pasted together, notwithstanding the fact that the persons interested on intestacy were not *sui juris*, and no guardian *ad litem* had been appointed by the Court to represent them.

Practice.

Probate is granted of the contents of the lost or destroyed will as contained in a draft or a copy, or the substance thereof as set out in an affidavit. If the will has been lost since the testator's death, probate may be granted of a copy limited until such time as the original shall be recovered and deposited at the registry, on proof by affidavit of the due execution of the will, of its existence and loss after the death of the testator, and that the copy is accurate. The Court may direct advertisements to be published for the missing will, and if no reply is received that fact should be stated on affidavit (*c*).

A complete copy of the document which the Court is asked to admit to probate should be filed.

What has been said as to probate of the contents of lost or destroyed wills applies equally to grants of administration with such wills annexed.

These applications are also, in clear cases, entertained by the registrars without a motion to Court, provided all parties interested consent and are *sui juris* (*d*).

(8) Motions for a grant *de novo* owing to the incapacity of one of several co-executors or co-administrators.

(8) Applications for a grant *de novo* owing to the incapacity of one of several co-executors or co-administrators (*e*).

A motion is the appropriate form of procedure in cases where one of several executors or administrators, who has taken a grant, becomes insane, and it is desired that a fresh grant shall be made to the sane executors or administrators after revocation of the existing grant.

(*a*) *Apted*, [1899] P. 272.

(*b*) [1902] P. 1. See also *Crandon*, (1901) 84 L. T. 330; *O'Brien*, [1900] P. 208.

(*c*) *Entichnap*, (1876) 35 L. T. 427. For form of affidavit, see App. VII., Form 40.

(*d*) Tristram & Coote, 273. Form of order: App. VII., Form 272.

(*e*) *Vide ante*, pp. 378—380.

(9) Applications for a grant of administration for the use and benefit of a sole executor or administrator who has become insane after taking the grant (*f*).

(9) Motions for grants for the use and benefit of executor or administrator who becomes insane.

Grants for the use and benefit of a sole executor or administrator who has become insane after taking the grant, limited until such time as he shall become of sound mind, are made on motion.

(10) Applications for probate in common form when a question arises as to whether a paper is entitled to probate (see form of order: App. VII., Form 239).

(10) Motions for probate where a question arises as to whether the paper is entitled to probate.

Where it is doubtful whether a paper is entitled to probate—for example, where there is a question as to whether the paper is intended to be testamentary (*g*), or is or is not a contingent will (*h*), or the privileged will of a soldier or seaman (*i*)—the applicant for probate may take the opinion of the Court, on motion. But the Court sometimes requires that persons whose interests are adversely affected by the decision of the Court, should consent to the question in doubt or dispute being determined on motion. In the absence of such consent, the Court may, in any of these cases, refuse to determine the question on motion, and may order the document to be propounded in an action.

(11) Applications to exclude some portion of a testamentary paper from probate.

(11) Motions to exclude words or clauses in the will from the probate as having been introduced by mistake,

Subject to what has been said under the preceding head as to the necessity of the consent of persons interested, a motion may be made to the Court to omit certain words in the will from the probate as introduced by mistake (*k*).

or as gratuitously libellous and scandalous.

So, too, the Court may on motion order to be omitted from the probate of the will, and from the copy kept at the registry, scandalous, offensive, and libellous words in the will, which, while in no way affecting the disposition of the testator's property, gratuitously and vindictively attack the character

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(*f*) *Vide ante*, pp. 378—380.

(*g*) *Vide ante*, pp. 142—149.

(*h*) *Vide ante*, pp. 285—290.

(*i*) *Vide ante*, pp. 295—300.

(*k*) *Vide ante*, pp. 100—111.

of another person (*l*). But this power is exercised with caution, and only in a very strong case (*m*).

(12) Motions for a grant in cases referred to the Court by the registrar, or where the registrar has refused to allow the grant to issue.

(12) Applications for a grant in cases referred to the Court by a registrar, or where the registrar has refused to allow a grant to issue (see form of order: App. VII., Form 240).

Rule 20, D. R., provides that if it be doubtful whether any will or codicil be entitled to probate, or whether any interlineation, alteration, erasure, or obliteration ought to prevail, or whether any deed, paper, memorandum, or other document ought to form part of a will or codicil, or if any doubt arises in consequence of the appearance of the paper, or on any other point, the district registrar must communicate with the registrars of the principal registry.

The registrar of the principal registry to whom application for a grant has been made direct in the first instance, or to whom a district registrar has applied for directions under the rule quoted above, may consider that there are difficulties in the matter which ought to be referred to the Court. The directions of the Court in such cases are obtained on motion by the applicant.

As to the procedure as to transmission of papers, etc., when the application for a grant was originally made in a district registry, see Rules 90—92, D. R.

Where a registrar refuses to allow a grant to issue, application for the grant may be made to the Court on motion.

In any case the applicant for a grant may apply direct to the Court on motion, without first applying at the registry.

(13) Motions for a limited grant to a person entitled to the general grant.

(13) Applications for a limited grant to a person entitled to a general grant (*n*).

No person entitled to a general grant of administration will be permitted to take a limited grant, except under the direction of the judge, to be obtained on motion (Rule 30, N.-C. B.) (*o*).

(*l*) *Wartnaby*, (1846) 1 Rob. 423; *Marsh* v. *Marsh*, (1860) 1 S. & T. 528, at p. 536. See *Curtis* v. *Curtis*, (1825) 3 Add. 33.

(*m*) *Honywood*, (1871) 2 P. & D. 251.

(*n*) *Vide ante*, pp. 392—398.

(*o*) See *Patteson* v. *Hunter*, (1860) 30 L. J. P. 272.

As an example of cases under this head, grants of administration limited to a trust estate which would pass under a general grant may be referred to (*p*).

(14) Motions for limited grants of administration.

(14) Applications for limited grants of administration after citation of persons entitled to the general grant (*q*).

Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge (Rule 29, N.-C. B.).

In all cases, with one exception, the Court must be moved for a limited grant, unless the persons entitled to a general grant have renounced or consented.

The exception applies to a case in which application is made for a grant limited to the only portion of the estate left unadministered. In such a case, notwithstanding that those entitled to a general grant have neither renounced nor been cited, a motion is unnecessary; the registrar reports the application to the judge, and the grant issues under the judge's direction, without a motion (*r*).

(15) Motions for a temporary grant of administration under 38 Geo. III., c. 87.

(15) Applications for a grant of temporary administration under 38 Geo. III., c. 87 (*s*).

Applications for a temporary grant of administration for a special purpose during the absence abroad of the executor or administrator under 38 Geo. III., c. 87, as amended by sect. 74 of the Court of Probate Act, 1857, and sect. 18 of the Court of Probate Act, 1858, are made to the Court on motion.

(16) Motions for grants *ad colligendum bona.*

(16) Applications for a grant *ad colligendum bona* (*t*).

Applications for a grant of administration *ad colligendum bona* are made to the Court on motion; they are not now frequently made, the more usual course being to apply for a general grant under sect. 73 of the Court of Probate Act, 1857. A grant *ad colligendum* is, however, sometimes made under sect. 73, though there appears to be no reason for invoking the aid of this section.

(*p*) *Vide ante,* pp. 395—398.

(*q*) *Vide ante,* pp. 392—398; see forms of order: App. VII., Forms 251, 252.

(*r*) Tristram & Coote, 280.

(*s*) *Vide ante,* pp. 403—406.

(*t*) *Vide ante,* pp. 401, 402; see form of order: App. VII., Form 253.

(17) Motions for grants under the Land Transfer Act, 1897.

(17) Applications for grants under the Land Transfer Act, 1897 (*u*).

Applications for a grant of administration to the heir-at-law under the Land Transfer Act, 1897, Part I., s. 2, sub-s. 4, may, if complications arise, be made to the Court on motion.

(18) Motions for orders in respect of an administration bond:

(18) Applications in respect of an administration bond (*x*).

Applications for orders in respect of an administration bond should, in the following instances, be made to the Court on motion:—

for reduction of penalty;

(i.) Applications for the reduction of the penalty of an administration bond (*y*);

to increase number of bonds;

(ii.) Applications to limit the liability of a surety to a part of the sum at which the estate is sworn (*z*);

to dispense with sureties;

(iii.) Applications to dispense with sureties to an administration bond (*a*);

to allow the bond to be executed by a person other than the administrator.

(iv.) Applications to allow an administration bond to be executed by a person other than the administrator (*b*).

(19) Motions for an order to bring in a testamentary paper under the Court of Probate Act, 1857, s. 26.

(19) Applications for an order against a person to bring a testamentary paper into the registry (*c*).

As will be seen on reference to an earlier chapter (*c*), one of the two modes of compelling the production of a testamentary paper is by application to the Court on motion for an order under sect. 26 of the Court of Probate Act, 1857.

(20) Motions for attachment.

(20) Applications for attachment are made to the Court on motion (*d*).

(21) Motions for appointment of administrator and receiver *pendente lite*.

(21) Applications for the appointment of an administrator or receiver pending suit are made to the Court on motion (*e*).

(22) Motions for injunctions.

(22) Applications for injunctions and other orders under the Judicature Act, 1873, s. 25, sub-s. 8 (*f*), other than orders for the appointment of receivers by way of equitable execution

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(*u*) *Vide ante*, p. 321.

(*x*) *Vide ante*, pp. 461—469.

(*y*) *Vide ante*, pp. 466, 467.

(*z*) *Vide ante*, pp. 467, 468.

(*a*) *Vide ante*, p. 464.

(*b*) See *Ross*, (1877) 2 P. D. 274. *Vide ante*, p. 462.

(*c*) *Ante*, pp. 513, 514.

(*d*) *Vide ante*, p. 550.

(*e*) *Vide ante*, pp. 381—388, 480, *post*, pp. 662—664; see form of order: App. VII., Form 249.

(*f*) *Vide post*, pp. 665, 666.

and injunctions so far as the same are ancillary or incidental to equitable execution (*g*), are made to the judge on motion (*h*).

Section 2.

PRACTICE AS TO MOTIONS.

Practice as to motions.

Applications to the Court on motion are made by counsel in open court. The evidence is placed before the Court on affidavits. There must be filed, in addition to the affidavits, in every case a document, which is termed the "case on motion," setting out in summary form the substance of the affidavits and the nature of the order prayed. When the motion arises out of or is made during the pendency of an action, the other side must be served with notice of motion.

An order obtained without due notice to opposite parties may be rescinded.

If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded on the application of the parties upon whom notice of motion should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the judge shall otherwise direct (Rule 112, C. B.).

The Court may adjourn the motion in order that notice may be given.

And if on the hearing of a motion the Court is of opinion that any person to whom notice has not been given ought to have had such notice, the Court may either dismiss the motion, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court may think fit to impose (see R. S. C., Order LII., r. 6).

Case on motion.

Case on Motion.—Cases on motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause and the dates of the same; the prayer of the party on whose behalf the motion is made, and, briefly, the circumstances on which it is founded (Rule 124, C. B.).

If the cases tendered are deficient in any of the above respects, the same shall not be received in the registry without permission of one of the registrars (Rule 125, C. B.).

In drafting the case on motion the practitioner will find the

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(*g*) *Vide* R. S. C., Order LIV., r. 12, *ante*, pp. 545, 546.

(*h*) Injunctions have been granted by a judge in chambers, but a motion appears to be the correct procedure.

precedents in the Appendix (*i*) of assistance. The case on motion is headed, as are the affidavits and the notice of motion, "In the estate of A. B., deceased"; and when there is an action, the names of the parties to the action follow—*e.g.*, "C. D. *v.* E. F." The facts of the case are then set forth in chronological order in short numbered paragraphs, the concluding one of which should state: "The above averments are proved by affidavits." Then follows "The Court will be moved by counsel on behalf of C. D. (the applicant) for an order that," etc.

Entering motions for hearing.

Entering Motions for Hearing.—All papers for motions on the Monday, the day upon which motions are heard, must be left in the Contentious Department of the principal probate registry before 2 o'clock p.m. on the preceding Wednesday. If the motion is to be made to a registrar in the Long Vacation, the papers must be left before 2 p.m. on the preceding Friday for hearing on the Wednesday, the day on which motions are taken in the Long Vacation.

On depositing the case in the registry and giving notice of the motion, the affidavits in support, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must also be left at the registry; or, in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the judge (Rule 126, C. B.). Where the will has been proved, arrangements must be made with the Record Keeper at the principal registry for its production in court; and where it has been proved in a district registry, the practitioner must also communicate with the district registrar and arrange for its transmission to the principal registry.

Where the affidavits or papers lodged are defective or incomplete, the registrar may refuse to put the motion into the list until the irregularities are rectified. If it is considered that his refusal is unreasonable, an application should be made to the judge.

Additional affidavits, which have not been filed with the papers, are handed to the registrar on the hearing of the motion.

(*i*) App. VII., Form 139; App. VIII., Precedents 40—42.

Notice of motion.

Notice of Motion.—A form of notice of motion will be found in the Appendix (*k*). It should state in general terms the grounds of the application (Order LII., r. 4), and a copy of any affidavit intended to be used should be served with the notice of motion (*l*) (Order LII., r. 4). In drafting the notice of motion, the practitioner will find the forms of orders in Appendix VII. (Forms 236—259) of assistance. Unless the Court or a judge give special leave to the contrary, there must be at least two clear days between the service of the notice of motion and the day named in the notice for hearing the motion (Order LII., r. 5). This rule supersedes Rule 111, C. B., which required a four days' notice (*m*). If special leave to serve short notice of motion is obtained, the fact should be stated in the notice of motion.

Service of notice of motion.

Service of Notice of Motion.—Notices of motion are served in the modes prescribed by R. S. C., Order LXVII. For service of notice of motion with the writ of summons, see R. S. C., Order LII., r. 9. The practice of the Chancery Division is to be followed.

A copy of the notice of motion should be filed in the registry with the case on motion, but no proof of the service of the notice will be required unless by direction of the judge (Rule 111, C. B.).

Hearing.
In term.
In vacation.

Hearing.—Motions are heard in court at 11 o'clock on Mondays during the sittings. During the Long Vacations motions by counsel are heard by the registrars sitting for the judge at Somerset House on days named in the cause list published at the end of the Hilary term. Motions for grants under sect. 73 of the Court of Probate Act, 18~~7~~3, are not dealt with by the registrars during the Long Vacation.

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Adjournment.

Adjournment.—If the motion is adjourned, the solicitor must attend at the principal registry, restore the motion to the list, and file a notice of adjourned motion.

Order.

Order.—The order is entered in the Court minute book, and copies can be obtained at the principal registry on application.

(*k*) App. VII., Form 144.

(*l*) This *must* be done in motions for attachment; it *should* be done in all cases: see Order LII., r. 4.

(*m*) *Donovan* v. *Donovan*, (1891) 91 L. T. Jour. 56.

PART THE FOURTH.

OF THE PRACTICE OF THE COURT IN CONTENTIOUS BUSINESS.

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CHAPTER I.

INTRODUCTORY.

Section 1.

CONTENTIOUS BUSINESS DEFINED.

Business of the Court either contentious or non-contentious.

THERE has already been occasion to point out (*z*) that the business of the Court is either (1) non-contentious or common form or (2) contentious business.

Non-contentious and contentious business distinguished.

By the Court of Probate Act, 1857 (*a*), s. 2, "common form business" shall mean "the business of obtaining probate and administration when there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration."

And by Rule 3, C. B., all proceedings in the Court of Probate or in the registries thereof in respect of business not included in the Court of Probate Act, 1857, under the expression "common form business," except the warning of caveats, shall be deemed to be contentious business.

Contentious business includes all proceedings in action.

Contentious business includes all proceedings in an action from its commencement to its termination.

(*z*) *Ante*, p. 409.

(*a*) 20 & 21 Vict. c. 77.

Since the Judicature Act, 1873, the entry of a caveat, its warning, and the appearance of the caveator to the warning do not constitute the commencement of an action. The action is commenced by the issue of the writ of summons, and until the issue of the writ of summons there is no *lis pendens* (*b*).

An action commences with, and not until, the issue of the writ of summons.

Section 2.

SOURCES OF PRACTICE.

The Court of Probate Act, 1857, s. 29, provides: "The practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will permit, according to the present practice in the Prerogative Court."

Court of Probate Act, 1857, s. 29.

The practice of the Court of Probate to be, except where otherwise provided, according to the practice in the Prerogative Court.

By sect. 30, rules and orders are to be made for regulating the procedure and practice of the Court, and the duties of the registrars, district registrars, and other officers thereof, and for determining what shall be deemed contentious and what shall be deemed non-contentious business, and, subject to the express provisions of the Act, for fixing and regulating the time and manner of appealing from the decisions of the said Court, and generally for carrying the provisions of the Act into effect; and the judge of the Court of Probate, with the concurrence of the Lord Chancellor and other judges, is empowered to repeal, amend, add to, or alter such rules and orders.

Sect. 30. Rules and orders to be made for regulating the procedure of the Court.

Under the powers conferred by this section, rules and orders for the Court of Probate in respect of contentious business (*c*) were framed in the year 1862, and these rules, as altered and added to from time to time, governed the practice of the Court until the year 1875, when the Judicature Acts came into operation.

Probate Rules, 1862, Contentious Business.

By sect. 16 of the Judicature Act, 1873, there was transferred to the High Court, *inter alia*, the jurisdiction of the Court of Probate; and sect. 23 of this Act provides that this jurisdiction "shall be exercised (so far as regards procedure and practice)

Judicature Act, 1873, s. 23. Rules as to exercise of jurisdiction in

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(*b*) *Moran* v. *Place*, [1896] P. 214; *Salter* v. *Salter*, [1896] P. 291. *Vide ante*, p. 520.

(*c*) See Appendix III., pp. 908 *et seq.*

Probate Division in procedure and practice.

in the manner provided by this Act, or by such rules and orders of Court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such rules or orders of Court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred, or by any of such Courts."

Judicature Act, 1875, s. 18. Rules of Probate Court to remain in force until altered or annulled by rules of Court made after the Act.

Sect. 18 of the Judicature Act, 1875, provides that all rules in the Court of Probate "shall remain and be in force in the High Court and in the Court of Appeal respectively until they shall respectively be altered or annulled by any rules of Court made after the commencement of this Act."

Rules of the Supreme Court, 1883.

Probate Rules, 1862, Contentious Business, not repealed, but in certain cases expressly overridden.

Unless expressly overridden by the Rules of the Supreme Court, Probate Rules, 1862, Contentious Business, remain in force.

In the year 1883, Rules of the Supreme Court were framed. These rules, by Appendix O, repealed a great number of rules therein specified, but among them were not included the Probate Rules of 1862. The Rules of the Supreme Court contain many provisions which apply expressly to the Probate Court, and to that extent they override the Probate Rules of 1862. They also contain other provisions which have nothing to do with the Probate Court practice, and it has been held that when distinct rules exist in the Probate Court, dealing with a particular subject-matter, they remain in force notwithstanding that there may be a different rule dealing with that subject-matter in the Rules of the Supreme Court (*d*).

Rules by which the present practice in contentious business is regulated.

Practice in contentious business, therefore, is now regulated by the Judicature Acts and the Rules of the Supreme Court framed thereunder, and by the Probate Rules of 1862 in so far as these have not been superseded, altered, or annulled by the Rules of the Supreme Court.

In the following chapters it will be made clear which set of rules governs each particular point of practice. The Rules of the Supreme Court are not set out *in extenso*, unless, from their particular bearing upon probate practice, it has been thought expedient so to do. The Probate Rules of 1862, Contentious Business, will be found in the Appendix, but must

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(*d*) *Hopkinson* v. *Carter*, [1909] P. at p. 120.

not be relied upon as governing the present practice unless incorporated in the text or referred to as still in force.

Mode of citation.

The Rules of the Supreme Court are cited thus: Order I., r. 1 (*e*). The Probate Rules of 1862 as to Contentious Business are thus cited: Rule 1, C. B. (*f*).

Section 3.

GENERAL OUTLINE OF AN ACTION IN THE PROBATE DIVISION.

General outline of a typical action for probate in solemn form.

It is proposed in this section to give a general sketch of the forms to be observed in the conduct of an action in the Probate Division. For the purpose of illustration, an action for probate in solemn form, as the most usual form of action, has been selected.

Entry of caveat.

Warning.

Appearance to warning.

John Styles has been appointed executor of the will of William Roe, deceased. In due course he lodges papers at the principal registry for a grant to him of probate in common form. He finds that Richard Roe, the second son and one of the next of kin of the testator, has entered a caveat, thereby preventing a grant of probate in common form. John Styles proceeds to warn the caveat as sole executor of the will of William Roe, thus disclosing his interest, and in due course Richard Roe appears to the warning as the natural and lawful son and one of the next of kin of the said William Roe, thus disclosing his interest.

Writ of summons.

John Styles thereupon issues a writ of summons propounding the will and making Richard Roe defendant. The writ is issued against "you, the above-named Richard Roe, as the natural and lawful son and one of the next of kin of the said deceased, and because you have entered a caveat."

Summons for directions.

Order thereon.

The writ having been duly served and an appearance entered thereto by Richard Roe, the next step is for John Styles to take out a summons for directions. Upon this summons the registrar makes the following orders: indorsement on writ to stand for statement of claim; statement of defence to be

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(*e*) *I.e.*, Rules of the Supreme Court, Order I., rule 1.

(*f*) *I.e.*, Probate Rules of 1862 as to Contentious Business, rule 1. Contract "Rule 1, N.-C. B.," by which abbreviation the Probate Rules as to Non-contentious Business are cited.

delivered "in ten days from to-day"; affidavits of scripts to be filed "within seven days from to-day"; after delivery of statement of defence, affidavit of documents to be filed by either party within ten days from service of notice; inspection within four days from filing affidavit; place of trial, Middlesex; mode of trial, common jury; liberty to apply.

Affidavits of scripts.

The next step is the filing of the affidavits of scripts by the respective parties, each stating what scripts—*i.e.*, testamentary papers, whether wills, codicils, drafts, or written instructions for the same—have at any time come to his possession or knowledge, and annexing to his affidavit any script in his possession or under his control. The affidavit of scripts of either party may be inspected by the other, but not until his own affidavit of scripts is filed.

Delivery of defence.

It not infrequently happens that the production of these documents puts an end to the suit, but in the imaginary case under discussion Richard Roe, who has been cut off with a shilling by the will propounded, at the expiration of the ten days delivers his defence, alleging that the will propounded was not duly executed; that the testator at the time of the execution of the will was not of sound mind, memory, and understanding, and did not know and approve of its contents; that the will was procured by the undue influence of John Styles, the executor named therein; and claiming that the Court shall pronounce against the said will.

Substance of the case.

In many cases in practice it happens—and it shall be assumed to happen in this imaginary case—that the defendant neglects to comply with Order XIX., r. 25A: "In probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely." Accordingly the plaintiff, John Styles, applies by notice under the summons for directions for an order that the defendant, Richard Roe, do furnish the substance of the case on which he intends to rely under paragraphs 1—4 of his defence.

Reply.

In the case under consideration no reply is necessary, for if no reply is delivered, all the allegations in the defence are put in issue. If it is desired to deliver a reply, the leave of the registrar under the summons for directions must be obtained.

Motion for the appointment of an administrator and receiver *pendente lite.*

At this stage (he might have taken this step at any time after the issue of the writ) Richard Roe applies to the Court on motion for the appointment of an administrator and receiver *pendente lite*. He serves notice of the motion on John Styles, the plaintiff, and upon his own elder brother, as heir-at-law of the testator. If his affidavits show that his application is a reasonable one, having regard to the character and amount of the estate, it is granted.

Issue of citations to see proceedings.

This is the time, if they have not done so before, for the plaintiff and defendant to consider whether all the necessary parties are before the Court, in order that they may be bound by the decree. The plaintiff, John Styles, will therefore cite to see proceedings the testator's widow, and all other his next of kin and persons entitled in distribution, and also his heir-at-law, as there is real estate. If there had been an earlier will, it would have been advisable to cite the executor and beneficiaries thereunder to see proceedings. Any of these persons, who are already before the Court as parties to the suit, it is unnecessary to cite.

The defendant, on his part, will cite to see proceedings all the beneficiaries under the will which he is attacking, and thus ensure that, if he succeeds in obtaining the sentence of the Court against the will, no question as to its validity shall again be raised at a later date.

Notice giving particulars of specific instances of delusion.

Since the defendant intends to adduce evidence, in support of his plea of incapacity, to show that the testator suffered from delusions, he must comply with the second part of Order XIX., r. 25A, which provides: "Where it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion must be delivered before the case is set down for trial, and, except by leave of the Court or a judge, no evidence shall be given of any other instances at the trial."

Action set down for trial.

It shall be assumed in the case under discussion that none of the persons cited to see proceedings enters an appearance to the citation, but that they are content to leave the question as to the validity of the will to be litigated between the original plaintiff and defendant. Accordingly, the pleadings having been closed, the action is set down for trial, and in due course comes into the day's list. When it is called on for hearing, counsel on behalf of the plaintiff, John Styles, opens his case and calls his witnesses in support of the will. He must call at least one of the attesting witnesses, if either is alive and available, and if that witness fails to prove due execution, he must call the other, although the latter is known to be hostile to the will. When the plaintiff's witnesses have been examined, cross-examined, and re-examined, counsel for the defendant, Richard Roe, opens his case, calls the witnesses for the defendant, and addresses the jury. After counsel for the plaintiff has addressed the jury in his turn, the judge sums up. The jury return their verdict, which, since a normal case has been chosen for illustration, is against the defendant on all the issues and in favour of the will. The Court pronounces for the will. The defendant is condemned in costs (*g*).

Hearing.

Verdict.

Sentence.

Costs.

Issue of probate.

Upon production at the registry of a copy of the decree and the lodging of the necessary papers to lead the grant, probate will issue at the registry to John Styles as executor.

Actions for the revocation of grants.

The preliminary steps in an action for the revocation of a grant are somewhat different (*h*), but after the issue of the writ the proceedings take a course in many respects similar to that indicated above.

Administration actions.

Administration actions, of which only interest suits are now of importance, commence by the entry of a caveat, warning and appearance thereto, and the issue of a writ of summons. There are some special rules as to the pleadings, which will be dealt with in a later chapter.

(*g*) The plaintiff's counsel should not ask for costs in this case. Costs follow the verdict of the jury, unless the Court otherwise orders.

(*h*) *Vide post*, pp. 582—587.

CHAPTER II.

ACTIONS IN THE PROBATE DIVISION.

Suits in the Ecclesiastical Courts commenced by citation or caveat.

THE ordinary mode of commencing a suit in the Ecclesiastical Courts was by a process known in the Consistorial Courts as a citation, in the Prerogative Court as a decree; or the suit might have been commenced by the entry of a caveat, the effect of which proceeding was that the person who applied to the Court to grant probate of a will or letters of administration must warn the caveat; and then the person who entered the caveat must appear and set forth his interest. The suit then proceeded in the same manner as if it had originally begun by decree (*a*).

Person wishing to oppose the issue of a grant must still enter a caveat.

The practice of commencing a suit by citation or decree has been put an end to by the Judicature Acts (*b*), but every person intending to oppose the issuing of a grant of probate or letters of administration must still enter a caveat (*c*), and enter an appearance to the warning, in the manner indicated in an earlier chapter (*d*).

But actions in the Probate Division are now commenced by writ of summons.

Order I., r. 1, of the Rules of the Supreme Court provides that all suits which, previously to the commencement of the principal Act, were commenced by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action; and by sect. 100 of the Judicature Act, 1873, an action is defined to mean "a proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court."

Actions in the Probate Division, therefore, are now commenced by writ of summons. The entry of a caveat and the appearance of the caveator to the warning do not constitute

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(*a*) See 3 Burn, E. L., pp. 187, 192, 9th ed.

(*b*) *Vide ante*, p. 521.

(*c*) Rule 59, N.-C. B.; Rule 7, C. B.

(*d*) *Ante*, pp. 515—520.

No *lis pendens* until writ issued.

the "institution" of an action. There is no *lis pendens* until the issue of the writ of summons by the plaintiff (*e*).

Probate actions defined.

By Order LXXI., r. 1, the words "probate actions," when used in the Rules of the Supreme Court, are to include actions and other matters relating to the grant or recall of probates or of letters of administration other than common form business.

Forms of action.

Probate actions are of three kinds: (1) actions for probate in solemn form, (2) administration actions (including interest suits), and (3) actions for the revocation of probate or of letters of administration.

Section 1.

ACTIONS FOR PROBATE IN SOLEMN FORM.

Actions for probate in solemn form defined.

Actions for probate in solemn form include all actions in which the Court is called upon to determine the question whether a testamentary paper is or is not, in whole or in part, a valid testamentary instrument, and to decree or to refuse probate of the whole or any part thereof in solemn form of law. Actions of this description which are commenced after the will in question has in the first instance been proved in common form are dealt with in a later section (*f*).

A will is proved in solemn form when it has been propounded in an action and pronounced for.

A testamentary paper is said to be proved in solemn form when it has been propounded in an action and has received the sentence of the Court pronouncing for its force and validity (*g*).

Will pronounced for and probate in solemn form decreed.

If, in the event, the testamentary instrument propounded or any part thereof is found to be valid, the Court will pronounce for its validity, and will decree probate of the instrument in whole or in part in solemn form of law. Upon such decree being pronounced, probate or letters of administration with the will annexed will issue in the registry to the executor, or person entitled to administration with the will, on his filing a copy of the decree, and lodging the necessary documents to lead a grant.

(*e*) *Moran* v. *Place*, [1896] P. 214; *Salter* v. *Salter*, [1896] P. 291. *Vide ante*, p. 520.

(*f*) *Post*, pp. 582—587.

(*g*) As to the distinction between probate in solemn form and probate in common form, and as to the binding effect of a decree on the parties and privies to the suit, *vide ante*, pp. 276—278.

Will pronounced against.

If, in the event, the testamentary instrument is found to be invalid, the Court will pronounce against its validity (*h*). Upon such a decree being pronounced, a grant of probate of a valid testamentary instrument or of administration as on an intestacy, as the case may be, will issue in the registry on the person entitled thereto applying for the same, filing a copy of the decree, and lodging the necessary papers. Forms of decree will be found in Appendix VII. (Forms 120, 124).

SUB-SECTION 1.—*Persons entitled to propound a Will.*

The proper person to propound a will is the executor.

The proper person to propound a will for proof in solemn form is the executor named therein, or, if there is no executor, the person entitled to administration with the will annexed.

An executor is not bound to propound a will, but may renounce probate,

An executor, however, is not bound to propound a will; he may renounce probate if he chooses, unless he has intermeddled with the estate (*i*). And if it is made to appear that an executor, when propounding a will, must have known that he was attempting to obtain the sanction of the Court to a document which could not be supported, he may be condemned in costs (*j*). An executor, however, may not desire to renounce probate. Though indisposed to be a party to an action in which the will is propounded for proof in solemn form, and thus to run the risk of being condemned in costs, he may be quite prepared to accept probate if the will is, in the event, established. If such be the case, he will, if served with a citation to propound the will, or if made defendant to a writ of summons in which the validity of the will is put in issue, enter no appearance to such citation or writ, but stand aside and allow the persons interested under the will to propound it, if they choose. If, at the termination of the litigation, the will is pronounced for, he may still accept probate; for it has been held that the failure of an executor to appear to a citation to propound and prove a will *in solemn form of law* is not equivalent to a renunciation by him of his right in respect of the executorship, as would have been the case had he failed to

or stand aside and allow the question of the validity of the will to be litigated by others,

and accept probate if in the event the will is pronounced for.

(*h*) The Court will *not*, as a general rule, pronounce that the deceased died intestate; still, for some reason, this finding is often claimed.

(*i*) *Vide ante*, p. 269.

(*j*) *Vide post*, p. 693.

The person entitled to administration with the will annexed is in the same position.

appear to a citation to accept or refuse probate *in common form*, by virtue of sect. 16 of the Court of Probate Act, 1858 (*k*). A person entitled to administration with the will annexed may renounce even though he has intermeddled with the estate (*l*), or he, too, may stand aside and refuse to become a party to an action for probate in solemn form, and accept a grant if in the result the will is established.

If the executor refuses, any person interested under the will may propound it,

If the executor named in the will refuses to propound it, any person interested under the will, whether as residuary legatee or residuary devisee, legatee or devisee, or the representative of any such person, is entitled to propound it *loco executoris*. And it is said (*m*) that, if the residue has been left wholly or partially undisposed of, any person interested under an intestacy in such undisposed-of residue is entitled to propound the will, as having, in a sense, an interest in obtaining probate of it.

even though his interest is greater in the event of an intestacy.

A person interested under a will may propound it, if he chooses, although his interest in the deceased's estate is greater in the event of an intestacy or under an earlier will.

SUB-SECTION 2.—*Persons entitled to compel Proof in Solemn Form.*

Persons entitled to compel the executor to prove the will in the first instance in solemn form.

The following persons are, on account of their interest, entitled to take the necessary steps to compel the executor or the beneficiaries under a will to prove the will in the first instance in solemn form of law. It will be pointed out in a later section (*n*) that, if the will has in the first instance been proved in common form, the same persons and certain others are entitled to cite the executor or person to whom administration with the will annexed has been granted to bring the grant into the registry, and thus, in effect, to compel him to prove the will in solemn form.

(1) All persons entitled to share in the deceased's estate in the event of an intestacy.

(1) Any person entitled to share in the deceased's real or personal estate in the event of an intestacy—whether as widow, husband, next of kin, person entitled in distribution or as heir-at-law—or the representative of any of such persons, is

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(*k*) *Bewsher* v. *Williams*, (1861) 3 S. & T. 62.

(*l*) *Vide ante*, p. 343.

(*m*) Tristram & Coote, p. 313.

(*n*) *Post*, pp. 584, 585.

entitled to compel the executor or beneficiaries under the will to prove it in the first instance in solemn form.

(2) The King's Proctor where the deceased died a bastard, or without known relation.

(2) Where the deceased died a bastard or without known relation, and in the event of an intestacy any part of his estate would lapse to the Crown, the King's Proctor (*o*) is entitled to compel probate in solemn form.

(3) The executors and beneficiaries under any other will or codicil.

(3) The executors, devisees, and legatees named in any other will or codicil of the deceased, and their representatives may, if their interests are adversely affected by the will in question, require the same to be proved in solemn form of law.

(4) A creditor-administrator or any other person to whom administration has been granted.

(4) A creditor has no interest to oppose probate of a will, or to require the executor to prove it in solemn form, for it is indifferent to him whether he shall receive his debt from an executor or an administrator (*p*). A creditor to whom administration has actually been granted may, however, if proceedings are taken to revoke the grant on the ground of the existence of an alleged will, contest the will and compel the executor to prove it in solemn form (*q*). This right he has as the appointee of the Court, in common with any person to whom administration has actually been granted, and irrespective of any question of interest (*r*).

SUB-SECTION 3.—*Preliminary Steps in an Action for Probate in Solemn Form.*

(1) The executor may desire, for his own protection, to prove the will in solemn form as a measure of precaution.

(1) The executor, or, if there is no executor, the person entitled to administration with the will annexed, may desire, for his own protection, to prove the will in solemn form in the first instance. For, should probate in common form be taken, at any time thereafter—it may be when the witnesses to the will and to the testamentary capacity of the testator are all dead — such probate may be called in at the instance of any person adversely affected by it, and the

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(*o*) Or the Solicitors of the Duchies of Cornwall or Lancaster, if the deceased died domiciled in Cornwall or Lancaster.

(*p*) *Burroughs* v. *Griffiths,* (1754) 1 Lee, 544; *Menzies* v. *Pulbrook,* (1841) 2 Curt. 845. *Vide ante,* p. 334.

(*q*) *Dabbs* v. *Chisman,* (1810) 1 Phill. at pp. 159, 160.

(*r*) *Menzies* v. *Pulbrook,* (1841) 2 Curt. at p. 851.

executor compelled to prove the will in solemn form (*s*). And in such a case, should the probate be revoked, the executor or administrator with the will is liable to account for legacies paid under the will, nor has he any protection other than his right of recourse against the recipients of such payments (*t*); whereas if the will is proved in solemn form, and there is no irregularity in the process, the will cannot be set aside afterwards, or the executor again put to the probation of it, unless, indeed, the sentence of the Court was obtained by fraud or a later will is found (*u*).

Procedure in such a case.

An executor who desires on his own initiative to prove the will in the first instance in solemn form (*x*), should issue a writ of summons propounding the will and making all persons whose interests are adversely affected by the will—*e.g.*, all persons entitled to share in the deceased's real or personal estate in the event of an intestacy, and the executors and beneficiaries under any earlier will,—defendants to the writ, or alternatively making some only of such persons defendants, and citing the others to see proceedings (*y*). The latter is a convenient course, and is in practice usually adopted (*z*).

If none of such persons enters an appearance to the writ, or if some of them appear, but none delivers a defence, the action may be entered as a "short cause," and the sentence of the Court pronouncing for the will in solemn form obtained (*a*). If, on the other hand, defences are delivered, the action proceeds to trial in the usual way (*b*).

Procedure where executors of the will question the validity of a codicil.

If the executors of a will have reason to believe that a codicil thereto is invalid, their right course is to propound the will and to cite the next of kin and the legatees interested under

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(*s*) *Vide ante*, p. 276.

(*t*) Tristram & Coote, p. 313. *Vide ante*, pp. 436—438.

(*u*) *Vide ante*, p. 277.

(*x*) And also an executor who has proved in common form, and desires subsequently to prove in solemn form on his own initiative: *vide post*, p. 584.

(*y*) If the deceased was a bastard, the King's Proctor should be served with the citation.

(*z*) *Vide ante*, pp. 530, 531; *post*, p. 590.

(*a*) *Vide post*, pp. 580, 670.

(*b*) See the outline of an action for probate in solemn form, *ante*, pp. 569—572.

the codicil to see proceedings (see App. VIII., Precedent 4). They cannot cite the beneficiaries under the alleged codicil to propound and prove the codicil (*c*).

(2) Procedure where persons whose interests are adversely affected by the will desire to compel the executor to prove it in solemn form.

(2) But, in the great majority of instances, an action for probate in solemn form is commenced by the executor or other person entitled to propound the will, in consequence of a challenge to prove the will in solemn form by persons whose interests are adversely affected by the will. The executor, on lodging papers for a grant in common form, discovers that a caveat has been entered, preventing the issue of the grant. He warns the caveat as executor, thus disclosing his interest, and an appearance is entered to the warning, in which the interest of the caveator is disclosed. The executor cannot then proceed to take a grant in common form; he has no option, if he desires to prove the will, but must issue a writ of summons propounding the will, making the caveator defendant thereto. The defendant then enters an appearance to the writ. An action for probate in solemn form is commenced and follows the course outlined in an earlier chapter (*d*).

A. Procedure where persons interested on an intestacy know of the existence of a will which they desire to have set aside, but the executors and beneficiaries thereunder refuse to bring it forward for probate,

(3) These are the two modes by which an action for probate in solemn form usually commences. There is, however, a third mode, which is appropriate where the persons interested under an intestacy know of the existence of a will, which they have reason to believe is invalid, but the executor and beneficiaries thereunder refuse to take any steps to bring it forward for probate. Two courses are open to the persons interested under an intestacy in such a case. They may issue a subpœna against the executor to bring the will into the registry, enter a caveat, and then cite the executor and beneficiaries to prove the will in solemn form (*e*). If no appearance is entered to the citation by the executor or any of the beneficiaries under the will, a grant of administration as on intestacy will be ordered, on application on motion by the persons entitled to such grant (*f*). If any of the beneficiaries

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(*c*) *Benbow*, (1862) 2 S. & T. 488.
(*d*) *Ante*, pp. 569—572.
(*e*) *Vide ante*, pp. 525—527.
(*f*) *Vide ante*, p. 526.

under the will appear to the citation, they will issue a writ propounding the will and making the persons citing defendants, and an action for probate in solemn form is thus commenced and follows the course outlined in the preceding chapter (*g*). What has been said as to the procedure to be adopted by persons interested under an intestacy, applies, *mutatis mutandis*, to the course to be followed by the executors or beneficiaries under an earlier will, when the executors and beneficiaries under a later will neglect or refuse to take any steps to bring it forward for probate.

or where the beneficiaries under an earlier will know of the existence of a later will, but the executors and beneficiaries thereunder refuse to bring it forward for probate.

The alternative course in such cases, where the persons interested under an intestacy desire to obtain the sentence of the Court pronouncing *against* the validity of a will, and the executors and beneficiaries under the will refuse to take any steps to bring it forward for probate, is as follows: The person entitled to a grant of administration in the event of an intestacy issues a writ of summons making the executors and beneficiaries under the alleged will defendants, and claiming a sentence against the will on the ground of its invalidity (*h*). If any of the defendants appear to the writ, they will in their pleadings set up the will under which they are interested, and an action for probate in solemn form is thus commenced and takes the course indicated in the preceding chapter (*g*). If no one appears, and the action is undefended, the action may be set down as a "short cause" (*i*), and on production by the plaintiff at the hearing of sufficient evidence to justify the Court in pronouncing against the will, sentence is given accordingly, and administration on intestacy will issue at the registry to the person entitled, on his filing a copy of the decree and lodging the necessary papers to lead the grant.

Under similar circumstances the executor or beneficiaries under an earlier will may issue a writ of summons propounding such will, and making the executors and beneficiaries under a later will defendants.

(*g*) *Ante*, pp. 569—572.

(*h*) See App. VII., Form 343.

(*i*) *Vide post*, p. 670.

Section 2.

ADMINISTRATION ACTIONS, INCLUDING INTEREST SUITS.

Administration actions described.

Administration actions include all actions in which the Court is called upon to determine which of two or more claimants is entitled to a grant of administration. Actions of this description which arise after administration has actually been granted are dealt with in the next section (*j*).

Administration actions no longer brought to determine questions as to the relative fitness of two or more claimants for a grant,

Formerly, where two persons were admittedly equally entitled to a grant of administration, and one of them desired to question the fitness of the other to be appointed administrator, the question of the relative fitness of the rival claimants was determined in the course of an administration action. Administration actions of this description are no longer brought. Where several persons, all equally entitled to a grant, contend *inter se* for administration, the question of their relative fitness is, by the present practice, decided by a registrar on summons (*k*). And where the Court is asked, under special circumstances, to pass over a person having admittedly a superior legal right to the grant, in favour of a person having an inferior title, the application is made to the Court on motion under sect. 73 of the Court of Probate Act, 1857 (*l*).

or to obtain the order of the Court passing over the person primarily entitled to a grant.

Administration actions now necessary only in cases in which the interest of the claimant is disputed, and the issue is one of legitimacy or pedigree.

The only questions between rival claimants which are, by the present practice, determined in an action are questions of legitimacy or of pedigree. When the interest of the applicant for administration, as heir-at-law or next of kin of the deceased, is disputed on grounds of legitimacy or of pedigree, the question of his legitimacy or relationship to the deceased is determined in an administration action. Administration actions of this description are known as interest suits.

Such actions known as "interest suits."

Preliminary steps.

The preliminary steps in an action of this description are as follows: Richard Roe applies for letters of administration as sole next of kin of William Roe, deceased. He finds that John Roe has entered a caveat. The caveat is warned, and John Roe enters an appearance to the warning as sole next of kin of the deceased. Richard Roe thereupon issues a writ of

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(*j*) *Post*, pp. 586, 587.

(*k*) *Vide ante*, pp. 458, 544.

(*l*) *Vide ante*, pp. 409—420, 556.

summons (App. VIII., Precedent 12) making John Roe defendant, and claiming to be the brother and sole next of kin of William Roe, deceased, who died intestate, and to have as such a grant of administration to the estate of the intestate. The indorsement on the writ concludes: "This writ is issued against you, the above-named John Roe, because you have entered a caveat and have alleged that you are the sole next of kin of the deceased." John Roe enters an appearance to the writ, and an interest suit is commenced.

In interest causes each party is at liberty to deny the interest of the other; and the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant (Rules 61, 62, C. B.).

Estoppel.

When a question of fact arises in an administration action as to which of two persons is next of kin of a deceased, and is determined, the parties to such suit or persons claiming through them are estopped from afterwards reopening the same question in the Probate or any other Court. This restriction does not, however, extend to other persons who were neither parties to the suit nor actually claim through one of the parties, even though their interest is almost identical with that of one of such parties (*m*).

Section 3.

ACTIONS FOR THE REVOCATION OF GRANTS.

Actions for revocation of grants described.

Actions for the revocation of grants may be classified according as the question at issue between the parties is the validity of a will, or the interest of the person appointed administrator.

A. Actions for the revocation of probate, brought by persons adversely affected, to have the will pronounced against, and to obtain

A. An action for the revocation of probate (or administration with the will annexed) may be brought by the persons whose interests are adversely affected by the will which has been proved, for the purpose of having the grant revoked and the will pronounced against, in order that they may obtain probate of an earlier will or a grant of administration on intestacy, as the

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(*m*) *Barrs* v. *Jackson*, (1845) 1 Phillips, Ch. R. 582; *Spencer* v. *Williams*, (1871) 2 P. & D. 230; and cases there cited.

case may be. The contest between the parties is as to the validity of the will, and the action differs from an action for probate in solemn form only in this respect, that the will which is the subject of litigation has already been proved in common form.

probate of an earlier or later will, or administration on intestacy, as the case may be.

Will pronounced for and grant redelivered out.

If, in the event, the will which has been proved in common form is found to be valid, the Court will pronounce for its validity, and will decree probate of the instrument in solemn form of law. On his filing a copy of the decree at the registry, the probate will be delivered out to the executor or person who has proved the will (Form of decree: App. VII., Form 121).

Will pronounced against and probate revoked.

If, in the event, the will which has been proved in common form is found to be invalid, the Court will pronounce against its validity, and for the validity of such other will, if any, as is satisfactorily proved. Upon such decree being pronounced, the original grant of probate will be revoked, and a grant of probate of the valid testamentary instrument, or of administration as on intestacy, as the case may be, will issue in the registry, on the person entitled thereto filing a copy of the decree, and lodging the necessary papers to lead the grant (Form of decree: App. VII., Form 123).

Preliminary steps where persons adversely affected by the will institute proceedings to obtain revocation of probate.

All persons whose interests are adversely affected by a will which has been proved in common form may, without limitation as to time (*n*), cite the executor or person who has proved the will in common form to bring the grant into the registry, in order that they (the parties citing) may proceed in due course of law for the revocation of the same. The effect of such citation is to compel the executor to bring in the grant, and, if he desires to support the will, to enter an appearance to a writ of summons attacking the validity of the will issued by the parties citing. Thus, an action in which the validity of the will is put in issue is commenced.

The preliminary steps in an action where the parties whose interests are adversely affected by the will desire to obtain revocation of probate, or to compel the person who has

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(*n*) *Vide ante*, pp. 277, 431.

proved the will in common form, to propound it for proof in solemn form, may be thus summarised :—

John Styles has proved a will in common form. Richard Roe enters a caveat, cites John Styles to bring the grant into the registry (*o*), and issues a writ of summons (App. VIII., Precedent 8) making John Styles defendant, alleging, as his ground for revoking the grant, the invalidity of the will. John Styles lodges the grant in the registry, enters an appearance to the writ, and an action commences.

Where executor who has proved will in common form propounds the will for probate in solemn form on his own initiative.

The executor or person who has proved a will in common form may subsequently on his own initiative desire to prove the will in solemn form as a measure of precaution. The procedure in such a case is the same as in cases where the executor desires on his own initiative to prove the will in solemn form in the first instance (*p*).

Who are entitled to institute proceedings for the revocation of probate.

The following persons in particular are entitled, on account of their interest, to commence an action for the revocation of probate, and thus to compel an executor or person who has proved the will in common form, to prove the will in solemn form :—

(1) Persons interested in the event of an intestacy.

(1) Any person entitled to share in the deceased's real or personal estate in the event of an intestacy—whether as widow, husband, next of kin, person entitled in distribution, or as heir-at-law—or the representative of any of such persons.

Next of kin who has accepted a legacy.

A next of kin who has acquiesced in probate of a will being taken in common form, and has even received a legacy thereunder, may still call in probate and put the executor to proof of the will in solemn form (*q*); but he must bring into court the amount of the legacy paid to him, to abide the result of the suit (*r*).

(*o*) The citation must either precede or issue simultaneously with the writ: *vide post*, p. 601.

(*p*) *Vide ante*, pp. 577, 578. The executor must, however, lodge the probate in the registry: see *Riley*, [1896] P. 9.

(*q*) *Merryweather* v. *Turner*, (1844) 3 Curt. 802; *Bell* v. *Armstrong*, (1822) 1 Add. 365. As to what *shall* amount to waiver of his rights by the next of kin, see *Hoffman* v. *White*, (1805) reported 2 Phill. 230, n.; *Braham* v. *Burchell*, (1826) 3 Add. at p. 257. See *Goddard* v. *Smith*, (1873) 3 P. & D. 7; and *vide ante*, p. 276, note (*b*).

(*r*) *Braham* v. *Burchell*, (1826) 3 Add. at p. 256; *Bell* v. *Armstrong*, (1822) 1 Add. 365. *Secus* when the legatee is a minor: *Goddard* v. *Norton*, (1846) 5 N. C. 76.

(2) A legatee or devisee (or his representatives) named in the will which has been proved, whose legacy or devise has been omitted from the probate in common form—*e.g.*, as given by an interlineation not sufficiently attested (*s*); or a legatee or devisee under a codicil, where the will only has been proved (*t*).

(2) Legatee, etc., under the will, if his legacy is omitted from probate.

Legatee, etc. under codicil, if will only proved.

(3) The executors, legatees, and devisees named in any other will or testamentary paper of the deceased, and the representatives of any of such persons.

(3) Executors and beneficiaries under any other will

An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will. He has no right, therefore, to cite the persons interested under it to propound it in solemn form or show cause why the probate in common form should not be revoked. The executor of an executor is in the same position in this respect as the original executor (*u*).

Secus the executor who has proved in common form.

B. An action for the revocation of letters of administration (*u*), granted on an intestacy, may be brought by persons claiming an interest under an alleged will of the deceased, for the purpose of having the grant revoked, in order that they may obtain probate of the will under which they are interested. The contest between the administrator and the parties alleging the existence of a will, is as to the validity of the will propounded.

B. Actions for revocation of administration by persons interested under an alleged will.

If, in the event, the will which is propounded is found to be invalid, the Court will pronounce against the will, and, on his filing a copy of the decree at the registry, the grant of administration will be delivered out to the administrator.

Will pronounced against, grant redelivered out.

If, in the event, the will which is propounded is found to be valid, the Court will pronounce for its validity, and will decree probate of the instrument in solemn form of law. Upon such decree being pronounced, the grant of administration will be revoked, and a grant of probate of the will will issue in the registry, on the person entitled thereto filing a copy of

Will pronounced for, grant of administration revoked.

(*s*) See App. VIII., Precedent 7; and, for forms of citation, see App. VII., Forms 109, 110.

(*t*) See App. VIII., Precedents 9, 21; and, for form of citation, see App. VII., Form 111.

(*u*) *Ante*, p. 528.

the decree and lodging the necessary papers to lead the grant.

Preliminary steps.

The preliminary steps in an action of this description are as follows: Richard Roe has obtained letters of administration as on intestacy. John Styles claims to be executor of the will of the deceased. John Styles enters a caveat, cites Richard Roe to bring the grant into the registry, and issues a writ of summons propounding the will and claiming revocation of the grant of administration, making Richard Roe defendant (*v*). Richard Roe lodges the grant in the registry, enters an appearance to the writ, and an action commences.

Creditor in possession of administration may oppose probate of a will.

A creditor in possession of administration can both deny an interest and oppose a will. He is not bound to submit to the revocation of his grant without opposition (*w*). This right he has, in common with any person who has been actually appointed administrator, as appointee of the Court and apart from any question of interest (*x*).

C. Action for revocation of administration on the ground of the administrator's lack of interest.

C. An action for the revocation of letters of administration may be brought in order to obtain an order for the revocation of the grant, on the ground that it has been made to a person without sufficient interest in the estate of the intestate. The contest between the parties is as to the relationship of the administrator to the intestate, and involves a question of legitimacy or pedigree.

If, in the event, the administrator succeeds in establishing such relationship to the intestate as entitles him to the grant, the Court will pronounce accordingly, and the letters of administration will be delivered out of the registry to the administrator.

If, on the other hand, it is proved that the administrator is not related to the deceased in such a way as to entitle him to a grant, the Court will order the grant to be revoked, and letters of administration will issue at the registry to the

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(*v*) See App. VIII., Precedents 10, 11.

(*w*) *Dabbs* v. *Chisman,* (1810) 1 Phill. at pp. 159, 160: *vide ante,* pp. 334, 577.

(*x*) *Ibid.*; *Menzies* v. *Pulbrook,* (1841) 2 Curt. at p. 851: *vide ante,* pp. 334, 577.

person entitled, on his filing a copy of the decree (*y*), and lodging the necessary papers to lead the grant.

Preliminary steps.

The preliminary steps in such an action are these: Richard Roe has obtained letters of administration as brother and sole next of kin of William Roe, deceased intestate. John Roe claims to be nephew and sole next of kin of the intestate, alleging that Richard Roe is illegitimate. John Roe enters a caveat, cites Richard Roe to bring in the grant, and issues a writ of summons propounding his interest, claiming revocation of the grant, and a grant to himself of administration to the estate of the intestate. Richard Roe enters an appearance, and an interest suit commences.

(*y*) For form of decree, see App. VII., Form 122.

CHAPTER III.

PARTIES TO PROBATE ACTIONS (*a*).

Section 1.

WHO MAY BE A PARTY.

Who may be parties to a suit.

In the preceding chapter it was pointed out, with some particularity, what persons are entitled to be parties to the various forms of probate action. It there appeared that the basis of the right to be a party to a probate action is interest. As Lord Stowell said with reference to the civil action in the Ecclesiastical Court, so it may be said of an action in the Probate Division, that such an action is open to every one showing an interest (*b*). Any person whose interest in the estate of the deceased may be affected by the decree of the Court in any action in the Probate Division, is entitled to be a party to that action, in the character either of plaintiff, defendant, or intervener. On the other hand, no person is entitled to be a party to a probate action unless he has an interest in the estate of the deceased (*c*), and unless his interest can be affected by the decree in the suit (*d*).

A person, in order to be entitled to be a party, must have an interest in the estate which can be affected by the decree in the action.

Persons who oppose a will must have some interest in having it set aside.

A person who opposes probate of a will, therefore, must have some interest in having the will set aside. Any interest, however slight, will suffice, even, it seems, the bare possibility of an interest; but some interest, however remote, there must be (*e*). The next of kin as such may oppose *all* the testamentary dispositions of the deceased, for he has an interest

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(*a*) Here and elsewhere the term "probate action" is used as a generic term, including the three forms of action.

(*b*) *Turner* v. *Meyers*, (1804) 1 Hagg. Consist. 415, n.

(*c*) An apparent exception to the rule is an administrator appointed under s. 73 of the Court of Probate Act, 1857, without any interest in the estate. But he sues or is sued as the appointee of the Court: *vide ante*, p. 577.

(*d*) *Wright* v. *Rutherford*, (1756) 2 Lee, 266.

(*e*) *Kipping* v. *Ash*, (1845) 1 Rob. 270, at p. 273; *Dixon* v. *Allinson*, (1864) 3 S. & T. 572. But see *Crispin* v. *Doglioni*, (1860) 2 S. & T.

in having them set aside as a whole, but he cannot oppose one testamentary paper, leaving others unassailed, unless he has some interest, however small or remote, in having that particular paper set aside (*f*). The executor of a former will has the same right as the next of kin to put an executor of a later will upon proof in solemn form and to interrogate his witnesses (*g*). But an executor of a will, as such, has no interest to oppose probate of a will of which he is appointed executor. He cannot, therefore, merely as executor, take proceedings to call in question the validity of that will. And the executor of an executor is in the same position in this respect as the original executor (*h*).

Next of kin as such may oppose all, but not some only, of the testamentary papers of the deceased.

Executor of a will may oppose probate of a later will, but not probate of the will by which he is appointed executor.

A creditor cannot controvert the validity of a will or deny the interest of a claimant for administration, for it is indifferent to him whether he should receive his debt from an executor or administrator (*i*); but a creditor to whom administration has been granted has the same right as the next of kin have to deny an interest, or oppose probate of a will (*k*).

A creditor cannot deny an interest or oppose a will, but a creditor in possession of administration may do both.

On the other hand, no person may propound a will unless he be executor or have an interest under it (*l*).

None may propound a will save the executor or a person interested under it.

Before a party is permitted to contest a will, the party propounding the will may call upon him to show his interest; but when two persons are contesting a will, the one cannot call upon the other to show his interest (*m*). In practice the interest of the plaintiff in an action is disclosed in his warning

Procedure where party propounding a will denies the interest

17, where Sir C. Cresswell, referring to the case of *Kipping* v. *Ash* (*ubi supra*), said: "The possibility of interest alluded to in that case did not apply to the possibility of a party filling a character which would give him an interest, but to the possibility of his having an interest in the result of setting aside the will." An interest acquired subsequently to the testator's death by purchase of part of the estate from the administrator was held sufficient to entitle a person to intervene in a suit for revocation: *Lindsay* v. *Lindsay*, (1873) 42 L. J. P. 32.

(*f*) *Baskcomb* v. *Harrison*, (1849) 2 Rob. 118. But see *Kipping* v. *Ash*, (1845) 1 Rob. 270.

(*g*) *Boston* v. *Fox*, (1860) 4 S. & T. 199.

(*h*) *Chamberlain*, (1867) 1 P. & D. 317.

(*i*) *Menzies* v. *Pulbrook*, (1840) 2 Curt. 845; *Burroughs* v. *Griffiths*, (1754) 1 Lee, 544. *Vide ante*, pp. 334, 577.

(*k*) *Dabbs* v. *Chisman*, (1810) 1 Phill. at pp. 159, 160. *Vide ante*, pp. 334, 577.

(*l*) *Parton* v. *Johnson*, (1868) 1 P. & D. 549.

(*m*) *Hingeston* v. *Tucker*, (1862) 2 S. & T. 596.

of another to oppose probate.

of the caveat, and that of the defendant in his appearance of the warning.

If a plaintiff in a probate suit disputes the interest of the defendant, he must allege in his statement of claim that he denies that the defendant is next of kin or heir-at-law, etc., of the deceased (*n*). Application should then be made to the Court that, before the question of the validity of the will is tried, the defendant should propound and prove his interest as next of kin, etc., of the deceased (see Order XXXVI., r. 8). An interest suit then commences.

A deed executed by the deceased, in which the defendant was described as his sister, was held to be sufficient evidence of relationship to entitle her to contest his will (*o*).

If the appearance of a caveator to the warning discloses no interest sufficient to justify him in opposing the issue of the grant, the applicant for probate or administration should apply on summons before the registrar for an order for the discontinuance of contentious proceedings (*p*).

Importance of bringing all necessary parties before the Court in order that they may be bound by the decree, by making them parties to the action or by citing them to see proceedings.

When a probate action is instituted, it is a matter of the utmost importance that all persons who are entitled to be parties to the action should be bound by the decree. It is, therefore, the duty of the person who propounds a will to ensure that all persons whose interests may be adversely affected by probate of the will in question, should be given an opportunity of becoming parties to the suit. This he may do by making them defendants in the action or by citing them to see proceedings (*q*). The plaintiff, who propounds the will, should, therefore, join as defendants or cite to see proceedings all persons who are interested in the deceased's real or personal estate in the event of an intestacy, and also the executors, legatees, and devisees under any earlier wills. If he omits to do so, he runs the risk of the suit being ineffectual to bind some necessary party, and of the litigation being reopened at a later date; though if a person is aware of the existence of the

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(*n*) Order XX., r. 9.

(*o*) *Smith* v. *Tebbitt*, (1867) 1 P. & D. 354.

(*p*) *Vide ante*, pp. 520, 543, 544.

(*q*) *Vide ante*, pp. 530, 531, *post*, p. 602.

suit and knows of his right to intervene in the action, and refrains from doing so, he is bound by the result even though not cited to see proceedings, unless the action terminates in a compromise to which he is not a party (*r*).

On the other hand, the defendant, who opposes the will, should cite to see proceedings all persons interested as executors, devisees, or legatees under the will in question.

The persons cited to see proceedings need not appear to the citation and take part in the proceedings, and if they do so, they do so at their own risk as to costs; but if they are content to stand by and allow the action to be fought by others, they are bound by the result (*s*).

Any person entitled to be a party to the action may intervene either in the character of plaintiff or defendant.

Rules as to parties which obtained in the Prerogative Court retained in the Court of Probate,

The practice as to parties which obtained in the Prerogative Court has been retained in the Court of Probate under Rules 4, 5, and 6, C. B.

Rule 4, C. B., provides: "Executors or other parties who, previously to the passing of the Court of Probate Act, 1857, might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities, and effect as heretofore."

By Rule 5, C. B., "next of kin and others who, previously to the passing of the said Act, had a right to put the executors or parties entitled to administration with the will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore."

Rule 6, C. B., provides: "Parties who previously to the passing of the said Act had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore."

and in the Probate Division.

Order XVI., r. 10, provides: "Subject to the provisions of the Acts and these rules, in all probate actions the rules as

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(*r*) *Wytcherley* v. *Andrews*, (1871) 2 P. & D. 327. See *ante*, pp. 277, 278, *post*, pp. 670—673.

(*s*) *Vide ante*, p. 278.

to parties in use in the Court of Probate previously to the commencement of the principal Act shall continue to be in force."

Section 2.

PARTIES IN GENERAL.

Parties to probate actions are either plaintiffs, defendants, parties cited, or interveners.

Plaintiffs.

Plaintiffs.—The Judicature Act, 1873, s. 100, provides that the term "plaintiff" shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

For the rules as to joinder of plaintiffs, see Order XVI., rr. 1 *et seq.*

Defendants.

Defendants.—The term "defendant" includes every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings (*t*).

As to joinder of defendants, see Order XVI., r. 4.

Interveners.

Who may intervene in a suit.

Interveners.—"In probate actions any person not named in the writ may intervene and appear in the action as heretofore, on filing an affidavit showing how he is interested in the estate of the deceased" (Order XII., r. 23).

Interveners in a suit are unknown to the common law. According to the practice of the Prerogative Court, when a suit was pending, any person whose interest might be affected by the decree in the suit might intervene to protect his interest at any time before the decree had been pronounced (*u*). For it was said, "*tertius intervenire potest pro interesse suo in omni causâ quæ tangit bona aut personam suam*" (*u*). Such person was called an intervener.

And now by Rule 6, C. B., parties who previously to the passing of the Court of Probate Act, 1857, had a right to intervene in a cause may do so, with leave of the judge or

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(*t*) Judicature Act, 1873, s. 100. It should be borne in mind that, in probate actions, the person propounding the will may often be defendant in the suit: *vide post*, p. 703.

(*u*) Oughton, Ordo. Judic., p. 28, tit. xiv. See 3 Burn, E. L., p. 186, 9th ed.

one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore.

Pleadings by an intervener.

The old rule as to pleading by an intervener was that he must take the cause as he found it at the time of his intervention; he could as of right only do what he might have done had he been a party in the first instance, or had his intervention taken place at an earlier stage. An intervener who intervened after the pleadings had been closed could not, therefore, without the leave of the Court, deliver a plea (*x*).

Present practice.

By the present practice, leave to intervene is obtained on summons before a registrar, supported by an affidavit setting out the intervener's interest (*y*). The summons should be served on the parties to the action. The question of the intervener's right to plead is dealt with on such summons.

If, being cognizant of the proceedings and capable of making himself a party by intervening, a person fails to do so, he will be bound by the proceedings (*z*).

Parties cited.

Parties cited.—By the practice of the Probate Court, inherited from the Prerogative Court, a party to a suit, whether plaintiff or defendant, might cite to see proceedings persons whose interest was adverse to his own. This process did not make the persons so cited parties to the suit, either as plaintiffs or defendants, but it gave them an opportunity of appearing and taking part in the proceedings either on the side of the plaintiff or defendant, as their interests might incline them, or they might abstain from appearing and allow the suit to be determined in their absence, in which case they were bound by the result. And it has been held that the practice as to citations to see proceedings has not been altered by the Judicature Acts and the rules therein contained (*a*).

(*x*) *Clements* v. *Rhodes*, (1825) 3 Add. at p. 40.

(*y*) An interest acquired subsequently to the testator's death by purchase of part of the estate from the administrator is sufficient to entitle a person to intervene in a suit for revocation: *Lindsay* v. *Lindsay*, (1873) 42 L. J. P. 32.

(*z*) *Wytcherley* v. *Andrews*, (1871) 2 P. & D. at p. 328; *Young* v. *Holloway*, [1895] P. 87. *Vide ante*, p. 278.

(*a*) *Kennaway* v. *Kennaway*, (1876) 1 P. D. at p. 149.

Practice.

The practice as to such citations has been discussed in an earlier chapter (*b*).

Party cited allowed to carry on the opposition to a will on appeal.

After a verdict had been found establishing a will, and a rule *nisi* had been granted for a new trial, the next of kin who opposed the will abandoned his opposition. Two other next of kin, who had been cited to see proceedings, and had entered an appearance, but had not pleaded, were allowed to plead and to adopt the proceedings up to the time of the order, in order to carry on the opposition (*c*).

Section 3.

PARTIES UNDER A DISABILITY.

Infants and minors.

Procedure where it is desired to institute an action or enter an appearance on behalf of a minor or infant.

Infants and Minors.—Order XVI., r. 18, as to the appearance by an infant to an action, does not apply to probate actions. By a direction of Hannen, P., in 1883, when it is desired to institute an action or enter an appearance on behalf of a minor or an infant, the procedure prescribed by Rule 74, C. B., is to be adhered to. That rule provides:—

"A minor (*d*) may elect a guardian for the purpose of carrying on, defending, or intervening in a suit, in the same manner and subject to the same rules as in respect of non-contentious business (*e*), and without having such guardian assigned to him; but guardians are to be assigned to infants (under the age of seven years) for the above purposes by the judge, or by an order of one of the registrars, founded on an affidavit to the effect required for such assignment in non-contentious business."

Who may be appointed guardian *ad litem.*

A minor must elect his next of kin as guardian *ad litem*, unless the latter is disqualified.

The next of kin of an infant is

Unless he already has a testamentary guardian or a guardian of his estate appointed by the Court of Chancery, a minor (*i.e.*, a person between the ages of seven and twenty-one) must elect his next of kin as his guardian *ad litem.* A next of kin is disqualified, and some other proper person may be elected, if his interest in the suit conflicts with that of the minor, or if he renounces, or is under any disability—*e.g.*, a married woman (*f*) or an infant. The same persons, with the same

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(*b*) *Ante*, pp. 530—542.

(*c*) *Boulton* v. *Boulton*, (1867) 1 P. & D. 456.

(*d*) *I.e.*, a person over seven and under twenty-one years of age: *vide ante*, p. 369.

(*e*) *I.e.*, Rules 33—36, N.-C. B. *Vide ante*, pp. 476—478.

(*f*) See *Re Somerset*, (1887) 34 Ch. D. 465.

reservations, will be assigned as guardians *ad litem* to an infant—*i.e.*, a child under the age of seven years.

assigned as guardian *ad litem*, unless disqualified.

Where there are both minors and infants.

If there are both minors and infants, the guardians elected by the minors may act for the infants without being specially assigned to them, provided the interests of the minors and the infants do not conflict (*g*).

No assignment or election is required in cases where the mother, after the death of the father, or her appointee under the Guardianship of Infants Act, 1886, is the proposed guardian, but an affidavit showing that there is not any contrary interest must be filed (*h*).

Practice.

The consent of the proposed guardian *ad litem* should be exhibited to an affidavit by the solicitor, which should show that the guardian (1) is a fit and proper person, (2) has no contrary interest, (3) that he is next of kin of the minor or infant, or that the next of kin has renounced or is under a disability, and (4) that no testamentary guardian or guardian of the estate of the minor or infant appointed by the Court of Chancery exists.

The affidavit, election, and consent must be taken to the registrar, who will either make an order (in the case of an infant: see App. VII., Form 265), or indorse his fiat on the appearance (in the case of a minor).

The Court may inquire whether a suit is for the benefit of minors, and may appoint a new guardian *ad litem*,

and may pass over the next of kin in a proper case.

Where a will is disputed by a guardian *ad litem* on behalf of minors or infants, the Court has power to inquire whether the suit is for the benefit of the minors or infants, and may appoint a new guardian *ad litem* should it think fit (*i*). The Court may, in appointing a guardian *ad litem*, pass over the next of kin in a proper case (*k*), but before doing so will usually require notice to be given to the next of kin (*l*).

Default of appearance by minors or infants.

Where a minor who is a necessary party to a suit refuses to elect a guardian and to have anything to do with the proceedings, the official solicitor may, under Order XIII., r. 1, be appointed the minor's guardian *ad litem* (*m*).

(*g*) *Vide ante*, p. 477.

(*h*) *Vide ante*, p. 370.

(*i*) *Percival* v. *Cross*, (1882) 7 P. D. 234.

(*k*) *Quick* v. *Quick*, (1864) 33 L. J. P. 177.

(*l*) *Jenkins*, (1869) 1 P. & D. 690.

(*m*) *White* v. *Duvernay*, [1891] P. 290. *Vide post*, pp. 609, 610.

Compromise on behalf of minors or infants.

Special procedure, designed to safeguard the interests of minors and infants, must be followed when such persons are to be bound by a compromise in an action (*n*).

Married women.

Married Women.—Married women may sue and be sued as provided by the Married Women's Property Act, 1882 (Order XVI., r. 16).

Sect. 1, sub-sect. 2, of that Act provides that a married woman shall be capable of suing and being sued . . . in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action . . . brought by or taken against her (*o*).

Lunatics.

Procedure where persons of unsound mind sue or defend.

Lunatics.—Order XVI., r. 17, provides: "Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the principal Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose."

Who may be appointed guardian *ad litem.*

The practice of the Probate Division is to appoint as guardian *ad litem* of a lunatic or person of unsound mind the person who would be entitled to a grant of administration for the lunatic's use and benefit—*i.e.*, the committee of the lunatic, or the person appointed under the Lunacy Acts to control his estate, or failing such person, the husband, wife, next of kin, or heir-at-law of the lunatic (*p*), provided that such person has no interest contrary to that of the lunatic and is under no disability.

Practice as to appointment of guardian *ad litem.*

Where there is no committee or person appointed under the Lunacy Acts to control the estate of the lunatic, application for the appointment of a guardian *ad litem* should be made *ex parte* to a registrar, supported by an affidavit in similar

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(*n*) *Vide post*, p. 672.

(*o*) As to the extent of her liability for costs, see the remainder of this sub-section; the Married Women's Property Act, 1893, s. 2; and *Crickitt* v. *Crickitt*, [1902] P. 177; *post*, p. 700.

(*p*) *Vide ante*, pp. 374—378, 479.

form to that required when a guardian is assigned to an infant (q).

Consent by infant or lunatic as to procedure.

Consent of Persons under Disability to Procedure.—Order XVI., r. 21, provides: "In all causes or matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability, is a party, any consent as to the mode of taking evidence or as to any other procedure shall if given with the consent of the Court or a judge by the next friend, guardian, committee, or other person acting on behalf of the person under disability, have the same force and effect as if such person were under no disability and had given such consent: Provided that no such consent by any committee of a lunatic shall be valid between him and the lunatic unless given with the sanction of the Lord Chancellor or Lords Justices sitting in Lunacy."

Section 4.

PROCEEDINGS BY OR AGAINST PAUPERS.

Suing or defending as a pauper.

Order XVI., r. 22, provides: "Any person may be admitted in the manner heretofore accustomed to sue or defend as a pauper on proof that he is not worth £25, his wearing apparel and the subject-matter of the cause or matter only excepted."

Practice in the Probate Division: suing *in formâ pauperis.*

The practice in the Probate Division is as follows: The person desirous of suing as a pauper must lay a case before counsel and obtain an opinion that he or she has reasonable grounds for proceeding (Rule 23, C. B.; Order XVI., r. 23).

The case laid before counsel, and his opinion thereon, with an affidavit by the applicant stating that the said case contains a full and true statement of all the material facts to the best of his or her knowledge and belief, and further that he or she is not worth £25 after payment of his or her just debts, save and except his or her wearing apparel, should be left in the Contentious Department (Rule 24, C. B.; Order XVI., r. 24).

The affidavit should show the nature of the applicant's employment and the amount of his wages, and in the case of a married woman the employment and wages of her husband (*r*).

(q) *Ante*, p. 595; and see note to Order XVI., r. 17, in the Annual Practice.

Upon these papers being lodged the registrar will, if satisfied, make an order giving leave to proceed *in formâ pauperis.*

Defending *in formâ pauperis.*

The procedure is the same in the case of a defendant who wishes to defend *in formâ pauperis*, save that, instead of merely leaving the papers at the registry, he must obtain his order on summons before a registrar, supported by the case, opinion, and affidavit as above mentioned (*s*).

A person erroneously admitted as a pauper may be dispaupered (*t*).

With these modifications, it seems that Order XVI., rr. 22—31, applies to the practice in the Probate Division.

Section 5.

CHANGE OF PARTIES BY DEATH, ETC.

Procedure where, owing to the death, etc., of one of the parties or the coming into existence of some person interested, it becomes necessary to join new parties.

Order to carry on proceedings.

Order XVII., r. 4, provides : " Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or a judge, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence."

Practice.

The application is in the Probate Division made *ex parte* to a registrar, supported by an affidavit of facts showing the

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(*r*) See *Roberts*, (1886) 33 Ch. D. 265.

(*s*) Tristram & Coote, 324.

(*t*) 3 Burn, E. L. 185, 9th ed. The application is made by summons to the registrar.

stage at which the action has arrived, the change that has occurred, and the interest or liability of the party against whom it is proposed to carry on the action (*u*).

Service of order and appearance by new parties.

Order XVII., r. 5, provides for the service of the order to carry on and for appearance by the new parties.

Procedure where person entitled to proceed fails to proceed.

Order XVII., r. 8, provides for cases in which the plaintiff or defendant dies, and the person entitled to proceed fails to proceed.

(*u*) Annual Practice, note to Order XVII., r. 4.

CHAPTER IV.

WRIT OF SUMMONS.

Probate actions commenced by writ of summons.

Every action in the Probate Division is commenced by a writ of summons (*z*), issued at the instance of the plaintiff against the defendant, "which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and shall specify the Division of the High Court to which it is intended that the action should be assigned" (Order II., r. 1).

Section 1.

FORM AND ISSUE OF WRIT OF SUMMONS.

Distinctive features of writs of summons in probate actions.

It may be well to summarise, for the convenience of the practitioner, the distinctive features of writs of summons in probate actions. They will be discussed at length in the succeeding sections of this chapter.

(1) The issue of the writ must be preceded by an affidavit verifying the indorsement, and, in actions for the revocation of a grant, must be preceded by or issued simultaneously with a citation to bring in the grant, and to show cause why it should not be revoked.

(2) The indorsement must show the plaintiff's interest, and also the interest of the defendant.

(3) Every writ of summons in a probate action must be headed "In the Estate of A. B., deceased," preceding the names of the plaintiffs and defendants (direction of the Senior Registrar, 13th June, 1907).

Affidavit to lead writ.

Affidavit to lead Writ.—The issue of a writ of summons in probate actions shall be preceded by the filing of an affidavit made by the plaintiff or one of the plaintiffs (*a*) in verification of

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(*z*) If a plaintiff desires a declaration of legitimacy, it cannot be joined with the claim on a writ in a probate action, the procedure to obtain it being by petition: *Warter* v. *Warter*, (1890) 15 P. D. 35.

(*a*) An application for leave for the plaintiff's solicitor to swear the necessary affidavits to lead the citation and writ in an action for revocation of probate, the plaintiff being temporarily out of the jurisdiction, was refused: *Luke*, (1909) 25 T. L. R. 825; *vide ante*, p. 533.

the indorsement on the writ (Order V., r. 16). A form of affidavit to lead writ will be found in the Appendix (*b*).

Must set out the interest of the parties, and should include the names and interests of all persons whom it is intended to cite to see proceedings.

This affidavit, as well as verifying the plaintiff's claim, should set out the interests of the defendants as stated in the indorsement on the writ. If, in addition to the defendants, there are other persons whose interests are or may be affected by the decree claimed, whom it is proposed to cite to see proceedings at a later date, the names and interests of all of them should be included in this affidavit, for it will then serve as the affidavit to lead any subsequent citation.

Certificate that affidavit has been filed.

No writs are to be issued in Probate Division causes unless on a certificate that the affidavit required by Order V., r. 15, has been filed (Practice Master's Rules, 5). The form of this certificate is printed on the writ.

Writ of summons in a revocation action must be preceded by a citation to bring in grant.

Citation to bring in Grant.—The issue of a writ of summons in actions for the revocation of probate or letters of administration, must also be preceded by or contemporaneous with the issue of a citation against the executor or administrator to bring in the grant, in order that the plaintiff may proceed in due course for the revocation of the same. A caveat must be entered before the citation can issue (Rule 15, C. B.), and the averments in citation must be verified by affidavit (Rule 13, C. B.), which should be so framed as to serve as the affidavit to lead the writ (*c*).

Indorsement of claim.

Indorsement of Claim.—Order III., r. 1, provides: "The indorsement of claim shall be made on every writ of summons before it is issued."

Must state the capacity in which the plaintiff claims and the interest of the defendant.

By Order III., r. 5, in probate actions the indorsement shall show whether the plaintiff claims as creditor, executor, administrator, residuary legatee, legatee, next of kin, heir-at-law, devisee, or in any and what other character. The interest of the defendants must also be indorsed on the writ.

Form.

Precedents of indorsement of claim will be found in the Appendix (*d*). The following is a typical indorsement of claim in an action by an executor for probate in solemn form:—

(*b*) App. VII., Form 55.

(*c*) *Vide ante*, pp. 527—530, 532—535.

(*d*) App. VIII., Precedents 1—12.

Indorsement of claim by an executor propounding a will in solemn form.

"The plaintiff claims to be executor of the last will, dated the 26th day of January, 1900, of Charles William Arnold, late of 10, North Bedford Street, Salford, in the county of Lancaster, solicitor, deceased, who died on the 17th day of July, 1904, and to have the said will established.

"This writ is issued against you as the natural and lawful son and one of the next of kin of the said deceased and because you have entered a caveat."

The indorsement must show the grounds for bringing the defendants into the action.

When the defendant has entered a caveat, the indorsement should set out the defendant's interest as disclosed in his appearance to the warning and state that the writ is issued against him because he has entered a caveat. In all cases the indorsement should show the grounds for bringing the defendants into the action by stating their interest or alleged interest, whether as next of kin, widow, husband, heir-at-law, or person entitled in distribution, or as executor, residuary legatee, legatee, devisee, etc., under another will; in the latter case the date of the will should be given.

Who should be made defendants.

Choice of Defendants.—There has already been occasion to point out that, while all persons whose interests are or may be affected by the decree claimed should have an opportunity given to them of becoming parties to the action, if the plaintiff wishes to obtain an irrevocable grant, yet it is not necessary for the plaintiff to join all such persons as defendants in the action (*e*). In practice this would often be difficult or impossible. It may be, and often is, impossible to ascertain at the time when a writ issues the names, residences, and precise interests of all persons whose interests might by possibility be affected by the decree claimed, so as to make them defendants to the action in the first instance. In such a case some only of the proposed defendants, preferably the executors of an earlier will or the person who has entered a caveat, should be made parties to the writ, and the remainder brought in at a later stage, either by issuing a citation against them to see proceedings (*f*) or (though this course is seldom adopted in probate suits) by proceeding under Order XVI.,

It is seldom possible in the first instance to join as defendants to the writ all persons entitled to become parties to the action.

Some only of such parties may be made defendants, and the others cited to see proceedings,

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(*e*) *Vide ante*, p. 530.

(*f*) *Vide ante*, pp. 530—532.

r. 13, which provides: "Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered by the Court or a judge, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served."

or added as defendants at a later stage.

Nature of the Claim.—The claim may be either (1) for probate of a will in solemn form, or (2) for probate of a will (or letters of administration) and revocation of probate of a pretended will, or (3) for probate of a will and revocation of a grant of administration, or may be (4) for a grant of administration by a person whose interest is disputed.

Nature of the claim.

The claim may be in the alternative, *e.g.*, for probate of a will and in the alternative for probate of an earlier will.

The claim may be in the alternative.

Precedents of these various indorsements of claim will be found in the Appendix (*g*).

Indorsement of Address.—The practitioner's attention is directed to Order IV., rr. 1 and 2, which requires the address of the plaintiff and his solicitor to be indorsed on the writ, and also an address for service within three miles of the Royal Courts of Justice, when the solicitor's place of business is beyond that limit. Where a solicitor is acting as agent of another solicitor, the name and place of business of both principal and agent must be indorsed.

Indorsement of address.

A plaintiff who sues in person must indorse his place of residence and occupation, and also an address for service (Order IV., r. 2).

Issue of Writs of Summons.—The practice as to the issue of writs in the Probate Division is as follows: The affidavit to lead the writ (*h*) should be taken with the writ (see App. VII., Forms 342—345) properly filled in to the registrar, who will sign the certificate, printed on the writ, that a sufficient affidavit in verification of the indorsement to authorise the sealing thereof has been produced to him.

Practice as to the issue of writs of summons.

The affidavit is left with the registrar. The writ is then

(*g*) App. VIII., Precedents 1—12.
(*h*) *Vide ante*, p. 600.

taken to the Writ Department (*i*), Royal Courts of Justice, where a sealed copy is issued by the proper officer (*k*).

A copy of the writ is to be filed at the Contentious Department of the registry. For further information as to the issue of writs of summons the practitioner is referred to Order V. of the Rules of the Supreme Court.

Issue of concurrent writs. Order VI., R. S. C.

Concurrent Writs.—The plaintiff may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked "Concurrent." (See Order VI., r. 1.)

Such writs are issued for service within or without the jurisdiction. (See Order VI., r. 2.)

Change of solicitor. Order VII., R. S. C.

Change of Solicitor.—In probate proceedings notice of change of solicitor (App. VII., Forms 140—143) must be filed at the Central Office (Order VII., r. 2), and a copy of the notice must be lodged by the incoming solicitor in the Contentious Department of the registry.

Renewal of writ. Order VIII., R. S. C.

Renewal of Writ.—An original writ is in force for twelve months, but may be renewed for six months by leave. (See Order VIII., r. 1.)

An affidavit is required showing (1) the date of issue of the original writ; (2) that the defendant is not yet served, and what efforts have been made to serve him, and stating the grounds on which renewal is asked; (3) means of knowledge.

The writ, together with the affidavit, is taken to the registrar for his indorsement; the affidavit is filed in the registry, and the writ taken to the Writ Department, where it is sealed "Renewed" (*l*).

Section 2.

SERVICE OF WRIT OF SUMMONS.

Service of writ of summons. Order IX., R. S. C.

Undertaking to accept service.

No service is required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance (Order IX., r. 1).

(*i*) A to K, Room 68; L to Z, Room 69.

(*k*) See note to Order V., r. 2, in the Annual Practice; and see Order V., r. 11.

(*l*) See note to Order VIII., r. 1, in the Annual Practice.

When service required, how effected.

When service is required, the writ shall, wherever it is practicable, be served in the manner in which personal service is now made (Order IX., r. 2), that is, by delivering to and leaving with the defendant a copy of the writ, and showing the original writ to him at the same time, if he so requires (*m*).

Service on particular defendants.

Defendant in prison.

Service on Particular Defendants.—Personal service on a defendant in prison is effected by means of an order to visit the prisoner, which is granted on application to the Home Office (*m*).

Husband and wife.

When husband and wife are both defendants to an action, they shall both be served unless the Court or judge otherwise orders (Order IX., r. 3).

Infant.

Order IX., r. 4, provides: "When an infant is defendant in an action, service on his father or guardian, or if none, then upon the person with whom the infant resides or under whose care he is, shall, unless the Court or a judge otherwise orders, be deemed good service on the infant; provided that the Court or judge may order that service made or to be made on the infant shall be deemed good service."

Lunatic.

When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he is, shall, unless the Court or a judge otherwise orders, be deemed good service on such defendant (Order IX., r. 5).

The practice as to service of *citations* on a lunatic, etc., in probate actions is slightly different (*n*), but service in accordance with this rule has been held sufficient (*o*).

Partners and corporations.

As to service on partners, the attention of the practitioner is directed to Order XLVIIIA., rr. 1, 3, and 4, and as to service on corporations, to Order IX., r. 8 (see App. VII., Form 35).

Indorsement on service.

Indorsement on Service.—Order IX., r. 15, provides: "The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff

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(*m*) See note to Order IX., r. 2, in the Annual Practice.

(*n*) *Vide ante*, p. 538.

(*o*) *Price*, (1904) 20 T. L. R. 540.

shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made. This rule shall apply to substituted as well as other service." Forms of affidavits of service will be found in Appendix VII. (Forms 34, 35).

Substituted service. Order X., R. S. C.

Substituted Service.—If it be made to appear to the Court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may seem just (Order IX., r. 2).

Application for substituted service to be supported by affidavit.

Every application to the Court or a judge for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit (App. VII., Form 37) setting forth the grounds upon which the application is made (Order X., r. 1).

In probate actions an order for substituted service may be made by a registrar (*p*).

Service out of the jurisdiction. Order XI., R. S. C.

Service out of the Jurisdiction.—In probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or a judge be allowed out of the jurisdiction (Order XI., r. 3).

Application to be supported by affidavit.

Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit (*q*) or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or judge that the case is a proper one for service out of the jurisdiction under this order (Order XI., r. 4).

(*p*) See further, on the question of substituted service, the notes to Order X. in the Annual Practice. For form of order, see App. VII., Form 284.

(*q*) Form of affidavit: App. VII., Form 36.

Practice.

The affidavit should be taken to the judge's clerk, who will obtain the necessary indorsement. The order (*r*) is drawn up at the registry upon production of the indorsed affidavit. The time limited for appearance is inserted in the order, which must be produced at the Writ Department at the Central Office (*s*).

Notice in lieu of writ.

When the defendant is neither a British subject nor in British dominions, notice of the writ (*t*), and not the writ itself, is to be served upon him (Order XI., r. 6).

(*r*) App. VII., Forms 283, 285; forms of writ: App. VII., Form 344.

(*s*) See note to Order XI., r. 3, in the Annual Practice; and see the Table of Times for Appearance after Service out of the Jurisdiction, *post*, pp. 721, 722. Form of letter forwarding request for service abroad: App. VII., Form 328; of request for service abroad: App. VII., Form 329; of letter forwarding request for substituted service: App. VII., Form 330.

(*t*) App. VII., Form 325.

CHAPTER V.

APPEARANCE.

Appearances to writs of summons, to citations to see proceedings, and by intervener, where entered.

In probate actions appearances to writs of summons, to citations to see proceedings, and appearances by interveners are entered in the Writ Department at the Central Office. (See Order XII., r. 2.)

Appearance to a citation to see proceedings is entered on production of the copy citation, an appearance by an intervener on production of the order giving leave to intervene.

Notice of the entry of appearance is given by the Central Office to the probate registry (Order XII., r. 3).

Appearances to warnings, to citations to accept or refuse a grant, and to subpœna to bring in script.

Appearances to warnings, to citations to accept or refuse a grant, and to subpœnas to bring in scripts are entered in the Contentious Department of the principal registry.

Practice on entering appearance.

A form of memorandum of appearance to a writ of summons will be found in the Appendix (*a*). The original, duly stamped for a fee of 2*s.* for each defendant, and a duplicate, must be presented. The original is filed, and the duplicate sealed and returned to the party entering an appearance (Order XII., r. 8). Notice of appearance (App. VII., Form 61) must be given to the plaintiff's solicitor on the day that appearance is entered, and such notice must be accompanied by the sealed duplicate memorandum (Order XII., r. 9). There must be an address for service (Order XII., r. 10).

Appearance by persons under a disability.

Minors or infants appear by their guardian *ad litem*, having first obtained the order or fiat of a registrar (*b*); lunatics by their committee (*c*); persons of unsound mind not so found by inquisition appear as if adults of sound mind, and an order appointing a guardian *ad litem* is subsequently applied for (*d*).

(*a*) App. VII., Form 60.

(*b*) *Vide ante*, pp. 594, 596.

(*c*) *Vide ante*, pp. 596, 597.

(*d*) Note to Order XII., r. 1, in the Annual Practice; *vide ante*, pp. 596, 597.

The same solicitor cannot appear on both sides in a probate action without the leave of a judge.

Same solicitor cannot act for both plaintiff and defendant.

For further information as to entry of appearance the practitioner is referred to Order XII. of the Rules of the Supreme Court, and the notes thereto in the Annual Practice.

Time for appearance.

A defendant may appear at any time before judgment. If he appear at any time after the time limited by the writ for appearance, he shall not, unless the Court or a judge shall otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ (Order XII., r. 22).

A party cited may appear at any time during the dependence of the action, before final judgment.

Proceedings in default of appearance to the writ.

Proceedings in Default of Appearance.—Order XIII., r. 12, which applies to probate actions, provides that, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, the action may proceed as if such party had appeared.

Where plaintiff desires to proceed to prove the will in solemn form.

Affidavit of service.

Certificate of non-appearance.

Action entered as "short cause."

If the plaintiff in a probate action, to which no defendant has entered an appearance, desires to prove the will in solemn form (*e*), he must file his affidavit of scripts and two copies of the writ, together with an affidavit of service of the writ and of the citations to see proceedings, if any, in the registry, where a note will be made on the form of certificate of non-appearance. The certificate of non-appearance is then to be obtained at the Central Office. Application should then be made to the judge for leave that the action be heard as a "short cause." It is usual for counsel to make these applications at the rising of the Court (*f*). The action is entered in the usual way. The present practice is to hear short causes on Mondays after motions (*g*).

(*e*) Or desires to obtain the decree of the Court pronouncing against a will: *vide ante*, p. 580.

(*f*) See *Sugden*, [1904] W. N. 70. For form of order, see App. VII., Form 260.

(*g*) *Vide post*, p. 670.

Proceedings in default of appearance by infants and persons of unsound mind.

Application for assignment of guardian *ad litem*.

Notice of application.

Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff shall, before further proceeding with the action against the defendant, apply to the Court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the Court or judge at the time of hearing such application shall dispense with such last-mentioned service (Order XIII., r. 1).

Position of official solicitor if appointed guardian *ad litem*.

This rule (and not Rule 74, C. B.) governs the practice in default of appearance by an infant or person of unsound mind in a probate action (*h*). If the official solicitor of the Court is appointed guardian *ad litem* under this rule, he has no greater rights and is in no better position than any other solicitor appearing for a party in a probate suit, save that he will probably be allowed out of the estate costs properly incurred in the conduct of the defence (*i*).

Application, to whom made.

The application should, it seems, be made to the registrar (*k*).

(*h*) *White* v. *Duvernay*, [1891] P. 290.

(*i*) *Gill* v. *Gill*, [1909] P. 157: *vide post*, p. 701.

(*k*) See *White* v. *Duvernay*, [1891] P. 290.

CHAPTER VI.

SUMMONS FOR DIRECTIONS AND MATTERS DEALT WITH THEREUNDER.

Section 1.

SUMMONS FOR DIRECTIONS.

Summons for directions. Order XXX., R. S. C.

Plaintiff to take out summons for directions after appearance before any fresh step except for injunction or appointment of receiver.

In every probate action to which an appearance has been entered, the plaintiff must take out a summons for directions, returnable in not less than four days. Such summons is to be taken out after appearance, and before the plaintiff takes any fresh step in the action other than an application for an injunction, or for the appointment of an administrator or receiver *pendente lite* (Order XXX., r. 1).

Form and place of issue.

Service.

Vacation.

The form (App. VII., Form 336) may be obtained at the registry, and the summons is issued from the Contentious Department. The summons is returnable before a registrar, and must be served not less than four days before the return day. (See Order XXX., r. 1, and note thereto.) A summons for directions may be taken out during the Long Vacation by consent.

Plaintiff failing to take out summons within fourteen days from appearance.

If the summons is not taken out by the plaintiff within fourteen days from the entry of the defendant's appearance, the defendant may apply for an order to dismiss the action, and upon such application the registrar may either dismiss the action on such terms as may be just, or he may deal with such application as if it were a summons for directions (Order XXX., r. 8).

Affidavits not allowed on hearing without leave.

Affidavits are not allowed to be used on the hearing, except by leave of the registrar (Order XXX., r. 3); but upon applications for security for costs, for trial at a County Court or assizes, and for the examination of witnesses out of court before the trial, affidavits are usually allowed, and indeed required.

Subsequent applications by notice under the summons for directions.

Any application subsequently to the original summons *and before judgment* (*a*) for any directions as to any interlocutory matter or thing by any party shall be made under the summons for directions by two clear days' notice (App. VII., Form 339) to the other party stating the grounds of the application (Order XXX., r. 5). As to costs of subsequent applications which might have been made at the hearing of the original summons, see Order XXX., r. 6.

Costs of subsequent applications.

Actions in which the summons is unnecessary.

No summons for directions need be taken out in default of appearance by the sole defendant or by all the defendants.

The practice in such a case has been discussed in an earlier chapter (*b*).

Section 2.

MATTERS DEALT WITH UNDER THE SUMMONS FOR DIRECTIONS.

What matters are dealt with under the summons for directions.

Upon the hearing of the summons the Court or a judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to the following matters:—Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial (Order XXX., r. 2).

In the following sub-sections those interlocutory matters which are dealt with under the summons for directions, either at the hearing of the original summons, or subsequently by notice thereunder, will be discussed in detail.

SUB-SECTION 1.—*Affidavit of Scripts.*

Affidavit of scripts.
Definition of "script."

In testamentary causes both plaintiff and defendant must file what is known as "an affidavit of scripts"; that is, an affidavit as to all testamentary papers of the deceased, executed or unexecuted, which have at any time come to the possession

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(*a*) Applications after trial or after judgment cannot be made on a notice under the summons for directions; a separate summons must be taken out: *Brown* v. *Haig*, [1905] 2 Ch. 379, 382.

(*b*) *Vide ante*, p. 609, *post*, p. 670.

or knowledge of the parties. Such affidavit is exhibited by each of them with the scripts in their possession annexed.

The term "script" is a technical term used in probate suits to include any paper writing which is or purports to be, or has the form or effect of a will or codicil or other testamentary disposition of the testator, or instructions for or the draft of any will or codicil or other testamentary disposition. If the will be destroyed or lost, a copy or any paper embodying its contents, whether made by or at the direction of the testator or not, is a script, and should be disclosed as such.

Both parties are to file an affidavit of scripts.

Rule 30, C. B., provides: "In testamentary causes the plaintiff and defendant, within eight days of the entry of an appearance on the part of the defendant (*c*), are respectively to file their affidavits as to scripts, whether they have or have not any script in their possession."

What scripts are to be specified in the affidavit and what scripts are to be annexed to the affidavit.

Every script which has at any time been made by or under the direction of the testator, whether a will, codicil, draft of a will or codicil, or written instructions (*d*) for the same, of which the deponent has any knowledge, is to be specified in his affidavit of scripts; and every script in the custody or under the control of the party making the affidavit is to be annexed thereto, and deposited therewith at the registry (Rule 31, C. B.).

Affidavit to be filed though party has no scripts to disclose.

Note that the affidavit of scripts is to be filed even though the party filing it alleges that he has no script in his possession, and that a script is to be specified in the affidavit even though not in the possession of the party filing the affidavit, if it has come to his knowledge in any way.

Pencil writing on scripts.

When any pencil writing appears on a will, script, or other document filed in the registry, a facsimile copy of the document or of the pages containing the pencil writing must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by the examiner in the registry. (See Rule 75, C. B.)

(*c*) The time for delivery of the affidavits of scripts is by the present practice fixed by the registrar on the summons for directions.

(*d*) As to the necessity of specifying these, see *Foxwell* v. *Poole,* (1862) 3 S. & T. 5.

Affidavit of plight and condition.

If any script brought in is torn, or has alterations or obliterations upon it, the affidavit should state its plight and condition when it came into the possession of the party who produces it (see App. VII., Form 11).

Compelling production of scripts.

The method by which persons are compelled to bring into the registry testamentary papers within their control, or are ordered to attend to be examined as to their possession of testamentary papers, has been discussed in an earlier chapter (*e*).

Time for filing affidavit after appearance.

The registrar gives directions as to the time of filing the affidavit of scripts on the summons for directions.

Where no appearance entered.

Where no appearance is entered by any defendant, the affidavit should be filed before the action is entered for trial.

Practice.

Practice.—The form of an affidavit of scripts will be found in the Appendix (*f*). *Each script should be identified by reference to a distinguishing letter marked upon it, thus: A, B, C, etc.* (*g*).

Scripts to be marked.

Will already lodged in district registry.

If a will, referred to in the affidavit, has already been lodged in a district registry, the district registrar should be notified and requested to forward it to the principal registry for the purposes of the action.

Scripts not annexed to be described in detail.

Scripts which are not in the possession of the party who makes the affidavit, but have been in his possession or have come to his knowledge, should be described in sufficient detail to identify them, and the affidavit should state where the papers then are, or what has become of them, if these facts are known to the deponent.

Inspection of scripts.

Scripts may be inspected at the Contentious Department of the registry. No party to the cause, nor his proctor, solicitor, or attorney, shall be at liberty, except by leave of the judge or one of the registrars of the principal registry, to inspect the affidavit as to scripts, or the scripts annexed thereto, filed by any other party to the cause, unless his own affidavit as to scripts shall have been filed (Rule 32, C. B.).

Who may make the affidavit.

The affidavit of scripts should be sworn by the plaintiff or

(*e*) *Ante*, pp. 512—514.

(*f*) App. VII., Form 57.

(*g*) This direction has been put in italics as it is sometimes neglected, and its neglect leads to endless trouble and confusion at a later stage.

defendant. Under special circumstances the Court may allow their solicitor to make the affidavit on their behalf (*h*).

Further affidavit of scripts.

A further affidavit of scripts may be ordered if necessary (*i*).

SUB-SECTION 2.—*Pleadings.*

Questions as to pleadings dealt with under the summons for directions.

Upon the summons for directions the registrar determines whether the indorsement on the writ shall stand for the statement of claim, and fixes the time for the delivery of the statement of claim, defence, and reply.

No reply without leave.

No reply is to be delivered unless ordered (Order XXIII., r. 1). Leave to deliver a reply is granted under the summons for directions.

The rules as to pleadings are dealt with in detail in later chapters (*post*, Chaps. VII.—X.).

SUB-SECTION 3.—*Admissions.*

Admissions. Order XXXII., R. S. C.

Any party to a cause may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party (Order XXXII., r. 1).

Notice of admission. Notice to admit documents. Notice to admit facts.

Either party may by notice call upon the other party to admit any document (Order XXXII., rr. 2 and 3); and any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call upon any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice (Order XXXII., r. 4).

For forms of notice see Appendix VII. (Forms 147, 150), and generally as to admissions see Order XXXII. and the notes thereto in the Annual Practice.

SUB-SECTION 4.—*Discovery and Inspection.*

Discovery and inspection. Order XXXI., R. S. C.

Applications for discovery of documents are dealt with at the hearing of the summons for directions, and applications for leave to administer interrogatories are made on notice under the summons for directions.

In probate actions more ample discovery is at

It is said (*k*) that in probate actions more ample discovery is at times sought and obtained than in other actions; and it

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(*h*) See *Walsh* v. *Tallon*, (1893) L. R. Ir. 31 Ch. 393.

(*i*) *Peacock* v. *Lowe*, (1867) 1 P. & D. 478, n.

(*k*) Tristram & Coote, pp. 442, 443; Dixon on Probate, 2nd ed., p. 412.

times sought and obtained than in other actions.

is evident that in cases where issues of undue influence, fraud, or want of testamentary capacity are raised, the Court will hesitate to regard as immaterial and irrelevant any facts or documents which bear upon the testator's mode of life and his surroundings, particularly in view of the impossibility of determining beforehand what evidence relating to any particular period in the testator's life may or may not prove material at the trial. The same observation applies, though with less force, to an issue of want of knowledge and approval.

Discovery will be ordered of all facts and documents which throw light on the history of the deceased,

For these reasons, discovery will be ordered in a probate action of all facts and documents which, throwing light upon the history of the deceased, may possibly become material to the issues raised on the pleadings.

particularly of documents and papers belonging to him.

Further, discovery and inspection, unless some special reason be given to the contrary, will be ordered in most cases of all documents and papers belonging to the deceased, relating to his property and his will. After the death of a testator his papers fall into the hands sometimes of an executor, sometimes of the next of kin or other relative. These papers may be of the highest importance to both sides, and it would be both inconvenient and unjust to allow the persons who happen to have possession of them at the time of the death, to keep possession of them until the trial, and to avail themselves of them for their own purposes without giving the other side an opportunity of examining them (*l*).

Power of the Ecclesiastical Courts to order discovery,

The only power of enforcing discovery of documents possessed by the Ecclesiastical Courts in testamentary causes, appears to have been the power of ordering an affidavit of scripts (*m*). For other discovery, the parties were obliged to file a bill for discovery in a Court of equity (*n*).

of the Court of Probate,

In *Hunt* v. *Anderson* (*o*) it was held that the Court of Probate, by virtue of sect. 36 of the Court of Probate Act, 1857, had powers as extensive as the Court of Chancery to compel a discovery, and now by the Judicature Act, 1873, ss. 16

(*l*) *Hunt* v. *Anderson*, (1868) 1 P. & D. at p. 480.

(*m*) *Peacock* v. *Lowe*, (1867) 1 P. & D. 478, n.

(*n*) *Ibid.*; *Fuller* v. *Ingram*, (1859) 5 Jur. (N. S.) 510.

(*o*) (1868) 1 P. & D. 476.

and 23, the Probate Division has all the powers of enforcing a discovery possessed by all the Courts which were absorbed into the High Court of Justice (*p*).

and of the Probate Division.

Under the Judicature Acts the right to discovery is regulated by the rules previously existing in the Court of Chancery (*q*).

Discovery and Inspection of Documents.

Discovery of documents :

When discovery of documents or their production and inspection is desired in a probate action, the method of procedure varies according to the nature of the document.

(a) of scripts in the possession of the parties ;

If the document is a script—*i.e.*, a testamentary paper of the deceased, or a draft of or instructions for a will or codicil—in the possession or power of a party to the action, it is annexed to his affidavit of scripts, which is filed in the registry and is open to inspection by his opponents as soon as, but not as a rule before, their affidavit of scripts has been filed (*r*).

(b) of scripts in the possession of third persons ;

If the document is a script in the possession of a person not a party to the action, its production may be secured by process under sect. 26 of the Court of Probate Act, 1857 (*s*).

(c) of documents other than scripts.

Order XXXI., R. S. C.

Applications for discovery, production, and inspection of documents *other than scripts* are made under Order XXXI. of the Rules of the Supreme Court.

The practitioner who desires to obtain discovery and inspection of documents other than scripts has three courses open to him (*t*):—

Rule 15.

Notice to produce documents referred to in the pleadings or affidavits.

(1) Where the document has been referred to in his opponent's pleadings or affidavits, he should give notice under Order XXXI., r. 15, to his opponent to produce the document for inspection. As to the procedure under this rule, Order XXXI., rr. 16—18, and the notes thereto in the Annual Practice should be consulted.

(*p*) See *Harvey* v. *Lovekin,* (1884) 10 P. D. 122 ; *Euston* v. *Smith,* (1884) 9 P. D. 57.

(*q*) *Anderson* v. *Bank of British Columbia,* (1876) 2 Ch. D. 644.

(*r*) *Vide ante,* pp. 612—614.

(*s*) *Vide ante,* pp. 512—514.

(*t*) See, on this subject, Odgers on Procedure, Chap. XVI.

Order XXXI., Rule 19A. Order to account for specific documents.

(2) Where he knows that certain specific documents are in his opponent's possession, and desires inspection of them, his right course is to proceed under Order XXXI., r. 19A.

Rule 12. General discovery of documents.

(3) But where, as is generally the case, he has no clear idea as to the documents in his opponent's possession, but wishes to obtain general discovery of all documents relating to the matters in question in the action, he may apply under Order XXXI., r. 12, for an order directing his opponent to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the cause.

By whom obtainable.

This order may be obtained by any party to the action against any other party (see Order XXXI., r. 12), and it has been held that one defendant can obtain discovery from his co-defendant, if there is some right to be adjusted between them in the action (*u*).

Affidavit of documents, what it should contain.

Affidavit of Documents.—The party against whom the order is made, files an affidavit (App. VII., Form 58) specifying the documents material to the issues in the action which are or have been in his possession, and also which, if any, of the documents therein mentioned he objects to produce (Order XXXI., r. 13) and the grounds of his objection. Documents which he is prepared to swear are irrelevant to the issues in the action are omitted from the affidavit, and his oath is as a general rule conclusive on this point until the trial (*v*).

Irrelevant documents omitted.

Irrelevant parts of a relevant document sealed up.

Where the plaintiff in a probate action had been ordered to produce for inspection documents in her possession relating to the matters in question in the action, and produced the passbooks of her banking account, sealing up parts of them which were, as she deposed, irrelevant to the matters in issue, it was held that an application by the opposite parties for inspection of the bankers' books containing the plaintiff's banking account could not be granted, as such an order would in effect deprive the plaintiff of the right to seal up until the trial such part of the books as she swore to be irrelevant (*x*).

(*u*) *Shaw* v. *Smith*, (1886) 18 Q. B. D. 193; *Alcoy* v. *Greenhill*, (1896) 74 L. T. 345.

(*v*) See notes to Order XXXI. in the Annual Practice.

(*x*) *Parnell* v. *Wood*, [1892] P. 137.

Where privilege claimed, or document omitted as irrelevant, Court may inspect the document.

Order XXXI., r. 19A, provides that when, on an application for an order for inspection, privilege is claimed for any document, the Court or a judge may inspect the document for the purpose of deciding as to the validity of the claim. This power has been held to extend to cases where a document is alleged to be irrelevant (*y*).

Grounds upon which privilege may be claimed.

Claim of Privilege.—The following is a summary of the grounds on which production of a document may be refused. For further details, and for the authorities (other than probate cases, which alone are cited below), the practitioner is referred to the notes to Order XXXI. in the Annual Practice by the learned author of Bray on Discovery, and to Chap. XVI. of Mr. Blake Odgers's book on the Principles of Procedure, upon which the following abstract is based.

Production may lawfully be refused on seven grounds:—

(1) Document of title.

(1) That the document relates solely to the deponent's own title (*z*);

(2) Deponent's own case.

(2) That the document relates solely to the deponent's own case, and contains nothing to assist his opponent's case or to impeach his own;

(3) Communications between solicitor and client.

(3) That the document was prepared for the purpose of submitting it to counsel or to a solicitor for advice on the facts stated therein; but this privilege does not extend to communications made between a client and a solicitor relating to a crime or fraud, or its subject-matter, if such crime or fraud is in issue in the action (*a*);

(4) Documents prepared with a view to litigation.

(4) That the document was prepared solely for the purpose of assisting the deponent or his legal advisers in some actual or anticipated litigation (*b*);

(5) Incriminating documents.

(5) That the document, if produced, would tend to criminate the deponent or subject him to a forfeiture;

(6) Documents which are the property of a third person.

(6) That the document is the property of a third person who objects to its production;

(*y*) *Ehrmann* v. *Ehrmann*, [1896] 2 Ch. 826.

(*z*) See *Egremont Burial Board* v. *Egremont Iron Ore Co.*, (1880) 14 Ch. D. 158.

(*a*) *Reynell* v. *Sprye*, (1846) 10 Beav. 51; *R.* v. *Cox*, (1884) 14 Q. B. D. 153; *Williams* v. *Quebrada*, [1895] 2 Ch. 751; *Bullivant* v. *Att.-Gen. for Victoria*, [1901] A. C. 196.

(*b*) See *Young* v. *Holloway*, (1887) 12 P. D. 167.

Thus where the defendants, in an action in which the plaintiff propounded a will, had applied for inspection of documents, and it appeared that the solicitor for the plaintiff had for many years acted as solicitor for the testatrix whose will was in dispute, and had in his possession diaries, cash ledgers, bankers' cash books, and other memoranda relating to the testatrix and her affairs, it was held that these papers were the private property of the solicitor, and that the plaintiff could not be compelled to produce them for inspection, and an order directing the administrator *pendente lite* to inspect the papers and to take copies of them for the defendants was refused (*c*).

Private letters written to deponent by strangers to the suit.

No privilege can be claimed for private letters written to the deponent by strangers to the suit, even though expressed to be written in confidence, and though the writer forbids their production (*d*). Thus in *Young* v. *Holloway* (*e*), where, during the progress of an action for the revocation of probate, four anonymous letters were received relating to the matters in dispute, two by the plaintiff, one by the plaintiff's solicitor, and another by her counsel, it was held that the letters to the plaintiff must be produced, but that the letters to the solicitor and counsel were privileged, for they must be taken to have been sent to them for the purposes of the action, and by reason of their being the plaintiff's legal advisers in the action.

(7) State documents.

(7) That the document is a State document.

Order for production.

Production and Inspection of Documents.—The registrar has power to order the production by a party to the suit of documents in his possession or power which relate to any matter in question in the cause (Order XXXI., r. 14). In a proper case the party in possession of a document may be ordered to permit a facsimile or photographic copy of it to be taken by his opponent (*f*).

Facsimile copy.

Order for inspection.

Similarly, the registrar may make an order for inspection in such place and in such manner as he may think fit (Order XXXI., r. 18). And if privilege from inspection is claimed, he

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(*c*) *O'Shea* v. *Wood*, [1891] P. 237; *ibid.* at p. 286, C. A.

(*d*) *Hopkinson* v. *Lord Burghley*, (1867) 36 L. J. Ch. 504.

(*e*) (1887) 12 P. D. 167.

(*f*) *Davey* v. *Pemberton*, (1862) 11 C. B. (N. S.) 628; *Lewis* v. *Earl of Londesborough*, [1893] 2 Q. B. 191.

may himself inspect the document (*g*) (Order XXXI., r. 19A (2); see also Order XXXVII., r. 7, and generally the notes to Order XXXI. in the Annual Practice).

Practice. Order for discovery.

Practice.—An order for discovery is made on the summons for directions. No affidavit in support is required (Order XXXI., r. 12). The party seeking discovery may be, but by the recent practice seldom is (*h*), ordered to pay £5 into court to the "Security for Costs Account" to abide further order. A copy of the receipt for such payment (if ordered) must be served with the order for discovery, and the time for making discovery commences from the date of such service (Order XXXI., r. 26). The time for filing the affidavit of documents is fixed by the registrar.

Inspection and production.

When an application for inspection or for production of documents is necessary it is made under the summons for directions.

Under Order XXXI., r. 18 (2), an application to inspect documents, other than those referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, is to be founded on an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

Further and better affidavit.

A further and better affidavit of documents is applied for on notice under the summons for directions, but the applicant must be able to show *from the affidavit of documents itself, or from the documents disclosed in it* (or from some admission on the pleadings), that the deponent has in his possession other material documents which he has not disclosed (*i*).

Interrogatories (*j*).

Interrogatories in probate actions;

Interrogatories are allowed in probate actions as in any other action in the High Court of Justice, the only distinction being that in probate actions interrogatories as to the mode of

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(*g*) See *Ehrmann* v. *Ehrmann,* [1896] 2 Ch. 826; *ante,* p. 619.

(*h*) See the note to Order XXXI., r. 26, in the Yearly Practice.

(*i*) *Jones* v. *Montevideo Co.*, (1880) 5 Q. B. D. at p. 558; *Compagnie Financière* v. *Peruvian Co.*, (1882) 11 Q. B. D. at p. 63; *Hall* v. *Truman,* (1885) 29 Ch. D. at p. 319; *Lyell* v. *Kennedy,* (1884) 27 Ch. D. at p. 19.

(*j*) See App. VII., Form 129; App. VIII., Precedent 39. Form of answers to interrogatories: App. VII., Form 129A. Form of order, App. VII., Form 290.

life and past history of the testator, and his relations with the parties to the suit even at times remote from the period when the will was executed, are sometimes allowed when the issues justify them, and the answers may have a possible bearing on the questions raised (*ante*, p. 616).

in actions where an undue influence is raised.

Thus in *Young* v. *Holloway* (*k*), which was an action to revoke probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, the plaintiffs delivered interrogatories for the examination of the defendants, asking what sums the defendants had received from the testator by way of payment for services, of loan, or of gift, and whether the universal legatee (one of the defendants) had made over any and what part of the property, since the testator's death, to the other defendants.

Interrogatories as to the sums of money received from the testator by the persons against whom undue influence is alleged may be relevant.

The first interrogatory was allowed, on the ground that if the defendants had received large sums from the testator during the last years of his life, that might be material with reference to the rest of the evidence on the question of undue influence, by showing the control the parties had over him. The period to which the interrogatory applied was, however, limited to three years.

The second interrogatory was also allowed, on the ground that, if two of the defendants (who took no interest under the will) had received a large sum of money from the legatee soon after the testator's death, that would displace the argument that these gentlemen could have no possible reason for exercising the alleged undue influence.

Cotton, L.J., said (*l*): "We know nothing about the evidence, but in determining whether answers to interrogatories should be given, we must consider whether the answers given to the plaintiff seeking discovery may not be relevant and assist the plaintiff in completing her evidence."

Rules.

The rules as to interrogatories are Order XXXI., rr. 1—11, and to these, and the notes thereto in the Annual Practice, the practitioner is referred.

Practice.

Practice.—Leave to deliver interrogatories is obtained from

(*k*) (1887) 12 P. D. 167.

(*l*) At p. 175.

the registrar by notice under the summons for directions. The particular interrogatories proposed to be delivered must be submitted to the registrar (Order XXXI., r. 2). A copy of the proposed interrogatories should be delivered to the other side with the notice. In deciding upon the application the registrar will allow only such of the interrogatories submitted to him as he considers necessary either for disposing fairly of the issue or for saving costs (Order XXXI., r. 2).

Security for costs.

A party interrogating may be ordered to pay into the "Security for Costs Account" the sum of £5 to abide further order, and in such a case must, with his interrogatories, serve a copy of the receipt for such payment (*m*) (Order XXXI., r. 26).

Striking out interrogatories.

As to setting aside and striking out interrogatories, see Order XXXI., r. 7.

Answer to interrogatories.

Interrogatories are to be answered by affidavit to be filed within ten days or within such other time as is ordered (Order XXXI., r. 8).

Interrogatories before defence.

Leave to deliver interrogatories will not, as a general rule, be given to the defendant before his defence is delivered (*n*).

Sub-section 5.—*Particulars and Further Substance of the Case.*

Particulars not frequently applied for in probate actions,

Applications for particulars are not common in probate actions. But if occasion should arise for such an application it should be made to a registrar by notice under the summons for directions.

the usual course where greater particularity is desired being to apply for further substance of the case.

Order XIX., r. 25A, provides: "In probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely." If the plaintiff considers that the "substance of the case" delivered by the defendant is incomplete, or not sufficiently detailed, he may apply to the registrar on notice under the summons for directions for further substance of the case.

What degree of particularity can be insisted on.

But he can obtain no more than a statement in general terms of the case which is to be relied upon by his opponent. He is not entitled to *particulars* in the usual sense of the term, save that where it is pleaded that the testator was not of sound

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(*m*) *Vide ante*, p. 621.

(*n*) See note to Order XXXI., r. 1, in the Annual Practice.

mind, particulars of any specific instances of delusion must be delivered before the case is set down for trial (Order XIX., r. 25A).

The Court will not order particulars of incapacity other than specific instances of delusion.

In *Hankinson* v. *Barningham* (*o*) it was held that in an action for probate the Court will not order particulars of incapacity to be given. "A plea which depends upon the whole life and conduct of a man," said Sir J. Hannen, "cannot be made the subject of particulars." Even since Order XIX., r. 25A, came into operation, a defendant who pleads incapacity, although he may be compelled to give a general statement of the substance of his case, and to deliver particulars of any specific instances of delusion, would not be ordered to deliver particulars of incapacity which involved the setting out of facts extending over many years. As Esher, M.R., said in *Cave* v. *Torre* (*p*), "there are two facts to be proved: first, that the plaintiff was a lunatic. . . . It is said the defendant must give particulars. What particulars can he give of that? There are no particulars to give. There is *evidence* to give. How is it proved that a man is a lunatic? The evidence may be of some one act, or may also consist of a great many different facts, but there is no law which requires you to give particulars of the evidence which you are going to adduce to prove a particular fact."

The names of the persons against whom undue influence is alleged may be ordered to be given, but not particulars of the acts of undue influence.

In *Salisbury* v. *Nugent* (*q*) it was held that the defendants in a probate action might be ordered to give the names of the persons against whom undue influence was charged, but could not be ordered to give particulars of the acts of undue influence alleged, and the times when and places where each of the acts was alleged to have taken place. The Court of Appeal based its decision on the long-established practice of the Probate Court, but, as Lindley, L.J., said, a case of undue influence may depend on a multitude of circumstances of which it is impossible to give particulars. And by the present practice, although under Order XIX., r. 25A, the substance of the case of undue influence must be delivered, particulars of the kind

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(*o*) (1883) 9 P. D. 62.
(*p*) (1886) 54 L. T. at p. 518.
(*q*) (1883) 9 P. D. 23.

asked for in *Salisbury* v. *Nugent* would not, it is submitted, be ordered.

Fraud, etc., must be pleaded with particularity.

With this reservation as to undue influence, Order XIX., r. 6, applies to probate actions. That rule provides: "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, . . . particulars (with dates and items if necessary) shall be stated in the pleading."

Time for pleading after delivery of particulars.

By Order XIX., r. 8, the party at whose instance particulars have been delivered shall, unless otherwise ordered, have the same length of time for pleading after the delivery of particulars that he had at the return of the summons.

SUB-SECTION 6.—*Place of Trial.*

Place of trial fixed by the registrar.

The place of trial in probate actions is fixed by the registrar at the hearing of the summons for directions.

The registrar has power to order the action to be tried in Middlesex—*i.e.*, in the Probate Division of the High Court of Justice—or at assizes, or in the County Court.

If any other venue than Middlesex is desired, the question is usually ordered to stand over for affidavits to be filed.

(1) *Middlesex.*

A probate action will be tried in the Probate Division, unless for good cause shown.

The Probate Division of the High Court of Justice is the Court in which a probate action will be tried, unless good cause to the contrary is shown (*r*). Before the Judicature Acts came into operation it was decided that there was no similarity between the position of a plaintiff in a probate action and the situation of a plaintiff at common law, who had then the right to lay the venue where he pleased. A testamentary suit properly belongs to the Court of Probate, and should, unless for special reasons, be tried there (*s*).

(2) *Assizes.*

Power of the Court of Probate to order an issue to be tried at assizes.

The Court of Probate Act, 1857, s. 35, provided: "It shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceeding to be tried by means of an

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(*r*) *Brandreth* v. *Brandreth*, (1862) 2 S. & T. 446.

(*s*) *Cooper* v. *Moss*, (1858) 1 S. & T. 143.

issue to be directed to any of the superior Courts of common law, in the same manner as an issue may now be directed by the Court of Chancery." And, by sect. 38, "where the Court of Probate directs an issue, it shall be lawful for such Court to direct such issue to be tried either before a judge of assize in any county, or at the sittings for the trial of causes in London and Middlesex, and either by a special or common jury (*t*), in like manner as is now done by the Court of Chancery."

Power of registrar.

The registrar has power to order trial of a probate action at assizes (*u*).

Application for trial at assizes to be supported by affidavit.

The application must be supported by an affidavit stating the grounds of the application (*x*). The consent of the parties is not in itself sufficient (*y*).

Grounds on which trial at assizes is directed.

The only ground on which trial at the assizes is directed is the consideration that the parties are thereby saved the expense of bringing the witnesses to London. Where, therefore, the person who opposes an application for trial at the assizes is willing to give an undertaking to pay, in any event, the extra expense to his opponent of bringing witnesses to London, he is entitled to have the action tried in the Probate Court (*z*).

Grounds for refusing application for trial at assizes.

Applications for trial at assizes have been refused on the ground that such a course would involve unreasonable delay (*a*); that the cause has been the occasion of much discussion and feeling at the place where the assize is to be holden (*b*); that the questions to be decided are peculiar or intricate: *e.g.*, a question whether the testator destroyed his

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(*t*) It has been held under this section that the Court of Probate has no power to order an issue in a testamentary cause to be tried by a judge of assize without a jury: *Bushell* v. *Blenkhorn*, (1866) 1 P. & D. 89.

(*u*) *King* v. *Brontoft* (20th March, 1899), not reported, cited in Tristram & Coote at p. 455, where the contrary decision of Butt, J., in *Lancaster* v. *Brook*, (1889) 14 P. D. 80, was overruled by Sir F. H. Jeune as having been made *per incuriam*.

(*x*) *Brandreth* v. *Brandreth*, (1862) 2 S. & T. 446.

(*y*) *Dunn* v. *Dunn*, (1860) 1 S. & T. 521; *Bull* v. *Bull*, (1860) 30 L. J. P. 40, n.

(*z*) See Dixon on Probate, 2nd ed., p. 425; Tristram & Coote, 456; note to Order XXXVI., r. 1A, in the Annual Practice; and see *Ridgway* v. *Abington*, (1863) 11 W. R. 500.

(*a*) *Ingram* v. *Fuller*, not reported, cited Tristram & Coote, 456, Annual Practice, note to Order XXXV., r. 1A; and see *Esling* v. *Dixon*, not reported, *ibid.*

(*b*) *Cooper* v. *Moss*, (1858) 1 S. & T. 143.

will—which was not forthcoming at his death—with the intention of revoking it has been held to be a proper case to be tried before the Court of Probate itself (*c*).

Mode of trial.

The Court has power only to direct an issue to be tried at assizes before a judge of assize with a jury; application for trial before the judge of assize without a jury may be made, by consent of both parties, to the judge of assize (*d*).

Practice when trial at assizes is ordered.

Practice.—When trial at assizes is ordered notice should be given to the Contentious Department of the principal registry for transmission of the scripts and necessary papers to the district probate registry nearest to the assize town, and arrangements should be made with the district registrar for their production at the trial (*e*). The associate's certificate, which in testamentary causes must show that one or more witnesses have been orally examined, must be obtained at the conclusion of the trial, and filed at the principal registry, together with a copy of the pleadings, in order that judgment may be entered there. Forms of decree are given in App. VII. (Forms 125, 126.) The fee of £1 is payable at the principal registry, in addition to the fee appearing on the certificate.

(3) *County Courts.*

Probate jurisdiction of County Courts in contentious business.

County Courts have jurisdiction in probate actions in cases where the value of the personal estate of the deceased does not exceed £200, and of his real estate £300, at the time of his death.

Court of Probate Act, 1858, s. 10. Where personalty is under £200 County Court to have jurisdiction.

Sect. 10 of the Court of Probate Act, 1858, provides: "Where it appears by affidavit to the satisfaction of a registrar of the principal registry that the testator or intestate in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for had at the time of his death his fixed place of abode in one of the districts specified in Schedule A to the [Court of Probate Act, 1857 (*f*)], and that the personal estate in respect of which such probate or letters of administration are to be or have

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(*c*) *Beech* v. *Rathbone*, (1865) 35 L. J. P. 26. And see *Ridgway* v. *Abington*, (1863) 32 L. J. P. 107; 11 W. R. 500.

(*d*) *Bushell* v. *Blenkhorn*, (1866) 1 P. & D. 89.

(*e*) Tristram & Coote, 457.

(*f*) *I.e.*, in the district of a *district* registry. These words appear to been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of £200, and the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of £300 (*g*) or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto." Provisions are contained in the Court of Probate Act, 1857, for the transmission by the registrar of the County Court of the certificate of decree for grant or revocation of probate to the district registrar (*h*), as to the power of the County Court judge to decide causes and enforce judgments (*i*), and that the affidavit of the facts giving the County Court jurisdiction is to be conclusive, unless disproved while the matter is pending (*k*).

Registrar of County Court to transmit certificate of decree.

Power of judge of County Court.

Affidavit of facts giving County Court jurisdiction to be conclusive.

Not obligatory to apply for probate, etc., to County Court.

By the Court of Probate Act, 1857, s. 59, as amended by the Court of Probate Act, 1858, s. 12, it is not obligatory on any person to apply for probate or administration or for the revocation of a grant of probate or administration through any County Court; but in every case such application may be made through the principal registry of the Court of Probate; but "where in any contentious matter arising out of any such application it is shown to the Court of Probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, the Court of Probate may send the cause to such County

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exclude the jurisdiction of the County Courts where the deceased's abode at the time of his death was within the jurisdiction of the principal registry.

(*g*) The value here mentioned is the actual value of the property free from all questions as to mortgages or other charges: *Davies* v. *Brecknell*, (1879) 2 P. & D. 177. And see *Thomas* v. *Nurse*, (1870) 39 L. J. P. 80.

(*h*) Court of Probate Act, 1857, s. 55.

(*i*) *Ibid.*, s. 56.

(*k*) *Ibid.*, s. 57.

Court; and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his Court in the first instance" (*l*).

After transfer to County Court the judge of the Probate Division has no power to give directions.

After transfer to a County Court, the action becomes for all purposes a County Court case; the judge of the Probate Division cannot therefore give directions as to the mode of trial (*m*), or direct a new trial (*n*), or make any order as to costs, whether incurred before or after the transfer (*o*). Nor can any other order be made in the cause by a judge of the Probate Division, unless the case is brought before that Court by way of appeal from the determination of the judge of the County Court (*p*).

Appeal from County Courts.

Appeals from County Courts are discussed in a later chapter (*q*).

Practice.

Applications for trial at County Court.

Practice.—Applications for trial at a County Court under sect. 10 of the Court of Probate Act, 1858, are made to a registrar of the principal probate registry, and must be supported by an affidavit showing that the County Court has jurisdiction under that section. The registrar will sign the minute founding the jurisdiction of the Court (App. VII., Form 132).

Applications to transmit action to County Court.

Applications to transmit an action to the County Court after writ has issued are made to the registrar under the summons for directions, supported by a similar affidavit.

Transmission of documents.

The principal registry should be notified to transmit the necessary documents to the nearest district registry for production at the trial.

Minute to be lodged.

Before the entry of any plaint the plaintiff must lodge with the registrar of the County Court an office copy of the minute

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(*l*) Where proceedings have been commenced in the Court of Probate, the Court will receive evidence from both sides as to the state of the property and the place of abode of the deceased before it determines whether it will or will not send the cause to the proper County Court: *Slater* v. *Alvey*, (1870) 2 P. & D. 154. When the County Court has jurisdiction, the Court of Probate may, though application be made on behalf of all the parties to the cause for it to be tried at assizes, still, in its discretion, direct it to be tried in the County Court: *Dunn* v. *Dunn*, (1860) 1 S. & T. 521.

(*m*) *Norris* v. *Allen*, (1862) 2 S. & T. 601.

(*n*) *Zealley* v. *Veryard*, (1866) 1 P. & D. 195.

(*o*) *Macleur* v. *Macleur*, (1868) 1 P. & D. 604.

(*p*) *Zealley* v. *Veryard*, (1866) 1 P. & D. 195.

(*q*) *Vide post*, pp. 682, 684.

signed by the probate registrar authorising the commencement of proceedings (*r*).

County Court Rules, Order XLIX.

Rules of practice have been framed for proceedings in the County Courts, and to these the practitioner is referred (*s*).

Copy of decree to be filed in registry.

When judgment has been pronounced a certified copy of the decree of the County Court judge should be filed in the principal registry with the papers to lead the grant, or, in cases of revocation, should be lodged in the Notation Department.

SUB-SECTION 7.—*Mode of Trial.*

Registrar determines mode of trial on summons for directions.

The registrar, on the summons for directions, orders the cause to be tried before the Court itself or by a common or special jury.

Trial without a jury.

Order XXXVI., r. 4, provides: "The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the principal Act could, without any consent of parties, have been tried without a jury."

Who are entitled to require trial with jury.

It has been held the effect of this rule, read in conjunction with Order XXXVI., rr. 2, 3, 5—7, is as follows: Every party who before November, 1883, was entitled to a trial by jury, is so entitled still; and no party who before November, 1883, was not entitled to a trial by jury, is so entitled now (*t*). That being the case, it follows that—

An heir-at-law if party to a suit may insist on trial by jury.

(1) An heir-at-law, who has been cited or otherwise made a party to the suit, retains his right to have any question of fact arising in the suit tried by a jury (*u*).

In all other cases the question

(2) In all other cases (including the case where an heir-at-law has been cited or otherwise made a party to the suit, but

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(*r*) County Court Rules, Order XLIX., r. 4.

(*s*) County Court Rules, Order XLIX. And see the Annual County Courts Practice, Vol. II., pp. 45—52.

(*t*) *Per* Lindley, L.J., in *Timson* v. *Wilson*, (1888) 38 Ch. D. 72.

(*u*) Court of Probate Act, 1857, s. 35, which provided: "It shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceeding under this Act to be tried by a special or common jury before the Court itself, . . . and such question shall be so tried by a jury in any case where an heir-at-law, cited or otherwise made a party to the suit or proceeding, makes application to the Court of Probate for that purpose."

does not insist upon his right to a jury (x)), the question whether a cause shall be tried before the Court itself or by a jury is in the discretion of the Court (y). The refusal of the Court to order trial by a jury is, with the leave of the Court, subject to an appeal (z), but the Court of Appeal will not interfere unless it is clear that the discretion has been wrongly exercised (a).

whether a cause should be tried by a jury is in the discretion of the Court.

Appeal from refusal of the Court to order trial by a jury.

It is stated (b) that where the issues raised in a testamentary suit are testamentary capacity, undue influence, or fraud, the practice of the Court is to grant a jury on the application of either party (c).

In certain cases trial by a jury is usually ordered, and in others usually refused.

Trial by jury will not be ordered when the only issue raised is as to the due execution of a will. And generally when the issues raised are such that they can more satisfactorily and conveniently (d) be disposed of by the Court itself, the cause will be heard by the Court without a jury on the application of one of the parties, even though the other (e) opposes the application (f).

Thus where the main question to be decided was the presumptive revocation of a will by the testator (g), or the contents of a lost will (h), the Court has directed the cause to be tried before itself without a jury, notwithstanding the opposition of one of the parties to this course.

The Court has power to order certain of the issues to be

Trial of some only of the

(x) *Burgoine* v. *Moordaff*, (1883) 8 P. D. 205. Note that Order XXXVI., r. 26, referred to in that case, is in the same terms as the present Order XXXVI., r. 4.

(y) *Quick* v. *Quick*, (1864) 3 S. & T. 460; *Burgoine* v. *Moordaff*, *supra*; Court of Probate Act, 1857, s. 35; Order XXXVI., r. 4.

(z) See Court of Probate Act, 1857, ss. 35, 39.

(a) *Burgoine* v. *Moordaff*, (1883) 8 P. D. at p. 208.

(b) Tristram & Coote, 459.

(c) See *Queen's Proctor* v. *Williams*, (1862) 31 L. J. P. 86. In this case a question of pedigree was directed to be tried before a jury under s. 35 of the Court of Probate Act, 1857.

(d) See Order XXXVI., r. 5.

(e) Not being the heir-at-law.

(f) *Quick* v. *Quick*, (1864) 3 S. & T. 460.

(g) *Smith* v. *Hoad*, (1864) 3 S. & T. 462.

(h) *Quick* v. *Quick*, (1864) 3 S. & T. 460; *James* v. *Foster*, (1867) 36 L. J. P. 46. In the latter case Sir J. P. Wilde said: "I think it would be unreasonable to ask twelve men to agree as to the details of the contents of a will which is not forthcoming."

issues by a jury.

tried before itself by a jury, reserving others of them for itself alone (*i*).

Action tried in first instance by a jury, on rehearing before the Court alone.

Notwithstanding that an action has in the first instance been tried by a jury, the Court has power to order that a second trial, occasioned by the disagreement of the jury in the first instance, should be tried by a judge without a jury (*k*).

Application for special jury.

Special Jury.—Either party may apply on the summons for directions, or by notice thereunder when a direction for trial by a common jury has been made, for a special jury.

And by Order XXXVI., r. 7, the plaintiff or defendant in any cause or matter in which he is entitled to a jury may have the issues tried by a special jury upon giving notice in writing to that effect to his opponent. Such notice must be given by the plaintiff to the defendant at the time when he gives notice of trial, by the defendant to the plaintiff at any time after the close of pleadings or settlement of the issues and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given.

The judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just (Order XXXVI., r. 7).

SUB-SECTION 8.—*Examination of Witnesses before Trial.*

Witnesses are required to be examined *vivâ voce* and in open court at trial.

As a general rule, witnesses at the trial of any action are to be examined *vivâ voce* and in open court (*l*).

The judge may order that a particular fact or facts may be proved by affidavit,

The Court or a judge may, however, at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as may be reasonable, but where it appears that the other party *bonâ fide* desires the production of a witness for cross-examination, and

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(*i*) *Crispin* v. *Doglioni,* (1861) 2 S. & T. 493; *James* v. *Foster,* (1867) 36 L. J. P. 46. And see, as to the power of the Court to sever the issues, Order XXXVI., r. 8.

(*k*) *Burgoine* v. *Moordaff,* (1883) 8 P. D. 205.

(*l*) Order XXXVII., r. 1; *Warner* v. *Mosses,* (1880) 16 Ch. D. at p. 101. And see Court of Probate Act, 1857, s. 31.

that such witness can be produced, such an order will not be made (*m*).

or that the affidavit of a witness may be read at the trial.

Where all parties agree, all the evidence at the hearing of an action may be taken by affidavit (*n*), but such agreement must be in writing between the solicitors of all the parties (*o*).

Application, how made.

Applications for leave to take the evidence of witnesses by affidavit are made to the judge on summons.

Affidavit sworn by witness on proving will in common form allowed to be read.

In a suit for revocation of probate on the grounds of undue execution and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses, but without success, the Court, with doubt and hesitation, allowed an affidavit made by him eight years before, at the time the will was proved in common form, to be admitted as evidence of execution and capacity (*p*).

Proof of will in solemn form by affidavit.

In *Cook* v. *Tomlinson* (*q*) proof of a will in solemn form by affidavit was not permitted, though none of the parties cited appeared, on the ground that their non-appearance might be through reliance on the examination of the attesting witnesses in open court. But in *Hayes* v. *Willis* (*r*), where a suit for probate in solemn form was undefended, and neither of the witnesses who attested the execution of the will could be found, an affidavit previously sworn by one of them in support of an application for probate in common form was admitted as evidence of due execution.

Power of Court to order examination of witnesses before trial.

Order XXXVII., r. 5, provides as follows: "The Court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such

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(*m*) See Order XXXVII., r. 1.

(*n*) *Ibid.*, and notes thereto in the Annual Practice.

(*o*) *Ibid.*; *New Westminster Brewery Co.* v. *Hannah*, (1875) 1 Ch. D. 278.

(*p*) *Gornall* v. *Mason*, (1887) 12 P. D. 142.

(*q*) (1876) 24 W. R. 851. See also *Brown* v. *White*, (1876) 24 W. R. 456; *Re Woolley's Trusts*, (1876) 24 W. R. 783.

(*r*) (1906) 75 L. J. P. 86.

cause or matter to give such deposition in evidence on such terms, if any, as the Court or a judge may direct."

Orders are made under this rule—

In what cases such orders are made.

(1) Where a material witness resident within the jurisdiction of the Court is about to go abroad, or is from age, illness, or infirmity, or some other like cause, unlikely to be able to attend at the trial (*s*);

(2) Where a material witness is resident outside the jurisdiction of the Court.

Mode of examination. Putting in deposition at trial.

Order XXXVII., rr. 10—17, contains provisions as to the mode in which the examination is to be taken, and by Order XXXVII., r. 18, depositions are not to be given in evidence at the hearing or trial, unless the Court is satisfied that the deponent is dead, or without the jurisdiction, or unable from sickness or other infirmity to attend the trial.

Examination of Witnesses within the Jurisdiction.

Order for immediate examination of a witness within the jurisdiction. Practice.

Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court—*i.e.*, in England or Wales—is made to the registrar by notice under the summons for directions, and should be supported by an affidavit, sworn by the applicant's solicitor, stating (1) the name of the witness to be examined; (2) that he is a material and necessary witness, without whose evidence the applicant cannot safely proceed to trial; and (3) that he is about to go abroad, or that from age, illness, infirmity, or some other cause he is unlikely to be able to attend at the trial. If the cause be the illness or infirmity of the witness, an affidavit by his doctor is required.

The witness is examined *vivâ voce* before a person agreed upon between the parties or nominated by the registrar. A form of order will be found in App. VII. (Form 291).

Examination of witness out of the jurisdiction. On commission.

Examination of Witnesses out of the Jurisdiction.

On Commission (*t*).—When the witness to be examined is resident abroad—*i.e.*, in Scotland, Ireland, India, the colonies,

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(*s*) Annual Practice, note to Order XXXVII., r. 5; *Warner* v. *Mosses*, (1880) 16 Ch. D. 100.

(*t*) Forms of commission: App. VII., Forms 115, 116; minute on opening: App. VII., Form 133; form of order: App. VII., Form 292.

or a foreign country—the registrar will issue a commission for his examination, except in certain cases, below mentioned, where the appropriate process is by letters of request.

Practice.

The application should be supported by an affidavit showing (1) that the application is made *bonâ fide*, (2) that the witnesses can give evidence material to the issue, and (3) that there is some good reason why they cannot be examined in England. The affidavit should state the name of at least one witness whom it is desired to examine. It is not necessary that the names of all the witnesses should be mentioned in the commission (*v*).

Where the witness is resident in Scotland or Ireland (*x*), the affidavit should disclose special circumstances such as would justify the examination of the witness before trial if he were resident in England (*y*).

Letters of request.

Letters of Request.—If in any case the Court or judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission (Order XXXVII., r. 6A).

To what countries commissions may issue and in what cases requisitions are required.

Inquiries have recently been instituted with the object of ascertaining in what countries there is no objection to evidence being taken on commission before a consular officer or other duly appointed examiner, provided such evidence is given voluntarily, (1) from the subjects or citizens of that State, or (2) from British subjects within that State, or (3) from subjects or citizens of other States within that State. The inquiries are not as yet complete, but the following information has been elicited:—

1. *Countries where requisitions are required.*—Austria and Hungary, Germany (*z*), Grand Duchy of Luxemburg, Roumania, Russia, and Switzerland.

2. *Countries where commissions are allowed.*—In the following tabular statement a list is given of the countries in which a

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(*v*) *Nadin* v. *Basset*, (1883) 25 Ch. D. 21.

(*x*) As to compelling attendance of witnesses in such cases, see 6 & 7 Vict. c. 82, ss. 5—7; 22 Vict. c. 20; 48 & 49 Vict. c. 74; *Campbell* v. *Att.-Gen.*, (1867) L. R. 2 Ch. App. 571.

(*y*) *Vide ante*, p. 634.

(*z*) A commission will not, since May, 1910, issue to Germany, even for the examination of British subjects there.

British consular officer is allowed to take evidence on commission. The second heading states whether or not a duly appointed commissioner other than a British consular officer is allowed to take evidence on commission, but the information at present available on this point is very incomplete. It is assumed that in all cases, except where stated to the contrary, subjects of the State in question, British subjects, and subjects of other States residing in the State in question may be examined on commission. In all cases stress is laid on the fact that attendance and giving evidence by the witnesses must be voluntary.

Name of Country.	Whether British consular officer allowed to take evidence on commission.	Whether other duly appointed commissioner allowed to take evidence.
Argentine (Buenos Ayres)	Yes.	Yes.
Belgium (*z*)	Yes (*z*).	Yes (*z*).
Bolivia	Yes.	Yes.
Chile (Santiago)	Yes.	No information.
Columbia	Yes.	No.
Cuba	Yes.	Yes.
Denmark (Copenhagen)	Yes.	Yes.
Ecuador (Lima)	Yes.	Yes.
France	Yes.	? Yes.
Guatemala	Yes.	No information.
Honduras	Yes.	No information.
Italy	Yes.	No information.
Mexico	Yes.	Probably.
Netherlands	Yes.	Yes.
Portugal (*a*)	Yes (*a*).	Yes (*a*).
Salvador	Yes.	No information.
Servia (*b*) (Belgrade)	Yes (*b*).	No information.
Spain (*c*) (Madrid)	Yes (*c*).	Yes (*c*).
Sweden	Yes.	No.
United States of America	Yes.	Yes.
Uruguay	Yes.	Yes.
Venezuela (*a*)	Yes (*a*).	Yes (*a*).

Practice as to commissions and requisitions.

The draft commission is settled by the registrar, and after engrossment brought into the registry to be signed and sealed.

(*z*) It appears that, though in theory the Belgian Government is opposed to commissions, it does not interfere with them in practice.

(*a*) The Government takes up the same attitude as Belgium.

(*b*) N.B.—Only British subjects can be examined in Servia.

(*c*) Spanish subjects can certainly be examined, and probably British subjects and subjects of third States also.

As to the practice in issuing letters of request, see note to Order XXXVII., r. 6A, in the Annual Practice. The requisition, when sealed, is handed with all necessary papers to the senior registrar, for transmission to the Secretary of State for Foreign Affairs.

Special examiner.

Special Examiner.—A special examiner may be appointed under Order XXXVII., r. 5, for the examination or cross-examination of witnesses abroad (see App. VII., Form 293), but no orders for special examiners are now made for any European country or any of the South American republics, though a special examiner may be appointed to act in the United States of America. It is usual where the examination is to be *vivâ voce* to have a special examiner, and where it is on interrogatories to have a commissioner (*d*).

Mandamus.

Mandamus.—The Court has power under 13 Geo. III., c. 63, ss. 40, 44, and 45, and 1 Will. IV., c. 22, ss. 1 and 2, to order a mandamus to issue to an Indian or colonial Court to summon before it and examine a material witness resident within the jurisdiction of such Court. See also 48 & 49 Vict. c. 74.

Application for a mandamus is made to the judge on motion (*e*).

(*d*) Ency. of Laws, tit. Commission, p. 211.
(*e*) *Ibid.*

CHAPTER VII.

PLEADINGS IN PROBATE ACTIONS.

Section 1.

DISTINCTIVE FEATURES.

Distinctive features of pleadings in probate actions.

Pleadings in probate actions are now subject to the provisions of Order XIX. of the Rules of the Supreme Court, and differ little in practice from pleadings in any other division of the High Court. There are, however, some distinctive features which it may be well to summarise at the outset.

Indorsement of writ to stand for statement of claim.

(1) In actions for probate in solemn form the registrar very frequently orders that the indorsement on the writ shall stand for the statement of claim (*a*).

Substance of case necessary with a defence.

(2) The forms of defence in probate actions are fixed and stereotyped to a great extent, and it is necessary with regard to each of them to state the substance of the case on which it is intended to rely (*b*).

In revocation actions statement of claim regarded as, and subject to same rules as, a defence.

(3) In actions for the revocation of probate the statement of claim, showing cause why the probate should be revoked, is practically a defence, and is governed by the same rule as regards the "substance of the case" (*c*).

Denial of defendant's interest must be specifically alleged.

(4) In probate suits, where the plaintiff denies the interest of the defendant (*e.g.*, that he is next of kin, heir-at-law, or holds the status with reference to the deceased which he claims to occupy) he must allege in his statement of claim that he denies the defendant's interest (*d*).

In interest causes pleadings must show that no person exists having a prior interest.

(5) In interest causes the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant (*e*).

(*a*) *Vide post,* p. 644.

(*b*) *Vide post,* pp. 651, 652.

(*c*) *Vide post,* p. 648.

(*d*) Order XX., r. 9; see *post,* p. 648.

(*e*) Rule 62, C. B. *Vide post,* p. 648.

Section 2.

PLEADINGS GENERALLY.

Pleadings, how headed and endorsed;

Pleadings in probate actions are headed and endorsed thus:—

"In the High Court of Justice, Probate, Divorce, and Admiralty Division (Probate).

"In the estate of A. B., deceased.

"Between C. D., Plaintiff,
and
D. F., Defendant."

Before the title of the action in a statement of claim, should be placed the date of issue of the writ.

A pleading should be marked on the face thereof with the date on which it is delivered, and with the letter and number of the writ. A pleading should be endorsed with a description of the pleading, and with the name and place of business of the solicitor and agent, if any, who delivers it (*f*). If it contains more than ten folios of seventy-two words, it must be printed (*g*).

how drawn.

The pleading should be divided into paragraphs numbered consecutively, dates and numbers being expressed in figures. If the pleading is settled by counsel, he must sign his name at the end; if not so settled, it is signed by the solicitor, or by the party himself, if he is not represented by a solicitor.

Unnecessary prolixity.

Unnecessary prolixity may involve the pleader in costs (Order XIX., r. 2), and although no technical objection can now be raised to any pleading on the ground of informality (Order XIX., r. 26), unnecessary, scandalous, or embarrassing matter may be struck out or ordered to be amended (Order XIX., r. 27) (*h*).

Scandalous matter.

Delivery of pleading.

A copy of the pleading is to be delivered at the address for service before 6 p.m. on any weekday, save Saturday, when delivery must be made before 2 p.m. Pleadings are not filed,

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(*f*) *Order* XIX., r. 11.

(*g*) *Ibid.*, r. 9.

(*h*) Further, on the subject of pleadings generally, see R. S. C., Order XIX., and Blake Odgers on Procedure, pp. 77, 78.

but two copies of the pleadings must be left at the registry when the cause is entered for trial.

Time for delivery extended.

The time for the delivery of pleadings may be extended by consent, or by order of the registrar under the summons for directions.

Particulars.

Pleadings are directed to be delivered "with particulars." The degree of particularity required in pleadings will be dealt with under the heading of "Defence" (*i*). Orders for further and better particulars and for further substance of the case have been dealt with in the preceding chapter (*k*).

SUB-SECTION 1.—*Amendment of Pleadings.*

Amendment of pleadings.

The Court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just (Order XXVIII., r. 1).

(1) Amendment before trial at instance of party pleading without leave.

Whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ (Order XX., r. 4).

Claim on writ. Statement of claim.

"The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared, or where defence is delivered, but no order for reply is made, within ten days from delivery of the defence or the last of the defences" (Order XXVIII., r. 2).

Counterclaim.

A defendant, similarly, may amend his counterclaim or set-off (*not* his defence) without leave, provided he does so before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at

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(*i*) *Post,* pp. 650—659.

(*k*) *Ante,* pp. 623—625. The following cases may be referred to as illustrating the degree of particularity required in pleadings in probate actions: *Glen* v. *Burgess,* (1863) 3 S. & T. 43 (destroyed will); *Leake* v. *Hurst,* (1860) 30 L. J. P. 39 (date of will omitted); *Queen's Proctor* v. *Williams,* (1861) 31 L. J. P. 90, *Queen's Proctor* v. *Wallis,* (1862) 31 L. J. P. 97 (particularity in setting out relationship to deceased); *Middlehurst* v. *Johnson,* (1860) 30 L. J. P. 14.

any time before the expiration of twenty-eight days from defence (Order XXVIII., r. 3).

Disallowance of amendments.

Applications to disallow amendments made without leave are made to the registrar under the summons for directions (Order XXVIII., r. 4).

(2) Amendment before trial at instance of party pleading with leave.

In all other cases, application for leave to amend pleadings before trial must be made to the registrar under the summons for directions (*l*) (Order XXVIII., r. 6).

(3) Amendment at the trial.

Leave is sometimes given to amend during the hearing of the action. Thus in *Riding* v. *Hawkins* (*m*), a probate suit in which the burden of proof lay on the defendant, application was made by the plaintiff, after the defendant had been cross-examined and his case had been closed, for leave to amend the pleadings by adding a defence that the codicil in dispute had been obtained by the defendant's fraudulent misrepresentation, the evidence in support of such defence to be confined to matters arising out of the defendant's cross-examination. It was held that the amendment might be allowed. An adjournment was offered to the defendant, but was refused. The Divisional Court held that the learned judge was justified in allowing the amendment under the circumstances, but granted a new trial on the ground of surprise (*n*).

SUB-SECTION 2.—*Striking out Pleadings and Stay of Proceedings.*

Order XIX., r. 27.

Unnecessary and scandalous matter may be struck out.

By Order XIX., r. 27, the Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action (*o*).

(*l*) See *Ridgway* v. *Abington*, (1862) 3 S. & T. 3; *Coke* v. *French*, (1897) 76 L. T. 163. For examples of amendments allowed after issue joined, but before trial, see *Ware* v. *Claxton*, (1858) 1 S. & T. 251; *Twells* v. *Clarke*, (1864) 3 S. & T. 280.

(*m*) (1889) 14 P. D. 56.

(*n*) See also *Betts* v. *Doughty*, (1879) 5 P. D. 26. And further, as to amendments during trial, see note to Order XXVIII., r. 1, in the Annual Practice, and Order XXVIII., r. 6.

(*o*) If irrelevant matter is pleaded it will be struck out: see *Farlar* v. *Farlar*, (1858) 1 S. & T. 124. And see *Rosbotham* v. *Rosbotham*, (1860) 2 S. & T. 121; *Powell* v. *Powell*, (1865) 1 P. & D. 6; but see *Rigg* v.

Order XXV., r. 4.

Pleadings struck out if no cause of action disclosed, or where claim or defence is frivolous or vexatious.

Order XXV., r. 4, provides: "The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Application, to whom made.

Applications under these rules are made in the first instance to the registrar under the summons for directions.

Inherent power of the Court to stay frivolous or vexatious proceedings.

The Court acts under Order XXV., r. 4, only if *on the face of the pleadings* it is of opinion that an action is frivolous and vexatious. But the Court has jurisdiction to dismiss an action when, on facts proved to the satisfaction of the Court, it appears that the action is frivolous and vexatious, and an abuse of the process of the Court (*p*). This jurisdiction is based, not upon the rules in question, but upon the inherent power which every Court has to prevent the abuse of legal machinery which would occur if, for no possible benefit, defendants were dragged through long and expensive litigation (*q*).

Thus where, in 1886, an action was brought to obtain revocation of letters of administration granted in 1798, the plaintiff claiming to represent the next of kin of the intestate, and the defendants being the representatives of the deceased administrator, it was held that, having regard to the lapse of time, to the fact that no possible advantage could be obtained by the plaintiff in the event of his success, and all the circumstances of the case, the action must be dismissed as frivolous and vexatious (*r*).

Hughes, (1884) 9 P. D. 68, where Fry, L.J., held that a plaintiff is entitled to plead, "If the will propounded by the defendants was validly made, which I do not admit, it was validly revoked by a later will."

(*p*) *Willis* v. *Earl Beauchamp,* (1886) 11 P. D. 59, at p. 60.

(*q*) *Ibid.* at p. 63.

(*r*) *Willis* v. *Earl Beauchamp,* (1886) 11 P. D. 59. And see further, as to staying proceedings as frivolous and vexatious, *Peters* v. *Tilley,* (1886) 11 P. D. 145; *Young* v. *Holloway,* [1895] P. 87, where applications to dismiss actions upon these grounds were refused; *Mohan* v. *Broughton,* [1899] P. 211, [1900] P. 56, C. A., *Mahon* v. *Quinn,* [1904] 2 Ir. R. 267, where suits were dismissed on the ground that the plaintiff was debarred by her laches and acquiescence from prosecuting her claim. And see *Birch* v. *Birch,* [1902] P. 130, where it was held that an action might be brought

The Court is not compelled to stay as frivolous and vexatious an action brought to set aside, on the ground of fraud, a judgment establishing a will and granting probate of it, but the plaintiff must adduce evidence of facts discovered since the judgment which raise a reasonable probability of the success of the action (*s*).

SUB-SECTION 3.—*Points of Law, how raised.*

Points of law raised on the pleadings may be disposed of before the trial.

No demurrer is now allowed, but any party is entitled to raise by his pleading any point of law, and the point so raised may be disposed of at the trial, or, by consent or by order of the registrar under the summons for directions, may be set down for hearing and disposed of before the trial. (See Order XXV., rr. 1—3.)

Estoppel.

Questions of estoppel may be dealt with in the manner indicated by these rules (*t*); or a motion may be made to the Court to stay the action, and to dismiss the proceedings as *res judicata* (*u*).

SUB-SECTION 3.—*Default of Pleading.*

Default of pleading. Order XXVII., R. S. C.

If the plaintiff, who has been ordered to deliver a statement of claim, fails to do so within the time limited, application may be made by the defendant for dismissal of the action for want of prosecution (Order XXVII., r. 1).

In probate actions, if any defendant make default in delivering a defence, the action proceeds notwithstanding the default (*v*) (Order XXVII., r. 10).

As to close of pleadings on default of delivering a reply or subsequent pleading, see Order XXVII., r. 13.

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to set aside a decree of the Court pronouncing for a will in solemn form on the ground that the judgment had been obtained by fraud—even though none of the parties to the action had anything to do with the fraud—but that the Court ought to treat as frivolous and vexatious any such action in support of which the plaintiff does not produce evidence of facts discovered since the former judgment which raise a reasonable probability of the action succeeding. See also *Young* v. *Holloway*, [1895] P. 87.

(*s*) *Birch* v. *Birch*, [1902] P. 62; *ibid.*, p. 130, C. A.

(*t*) See *Priestman* v. *Thomas*, (1884) 9 P. D. 70, 210.

(*u*) This course was adopted in *Birch* v. *Birch*, [1902] P. 62.

(*v*) *Vide ante*, p. 609, *post*, p. 670.

CHAPTER VIII.

STATEMENT OF CLAIM.

Section 1.

GENERAL RULES.

Statement of claim, time for delivering.

ORDER XX., r. 2, provides: "In probate actions the plaintiff shall, unless otherwise ordered by the Court or a judge, deliver his statement of claim within six weeks from the entry of appearance by the defendant, or from the time limited for his appearance, in case he has made default; but where the defendant has appeared the plaintiff shall not be compelled to deliver it until the expiration of eight days after the defendant has filed his affidavit of scripts." This rule is, of course, subject to any order made on the summons for directions.

In probate actions, not delivered as of course.

Indorsement of writ often ordered to stand for statement of claim.

Statements of claim in probate actions are not delivered as a matter of course. Upon the hearing of the summons for directions, the registrar determines the necessity for a statement of claim and settles the time for its delivery. As the indorsement of the writ must show the capacity in which the plaintiff claims, and set out particulars of the death of the deceased and of the testamentary documents propounded, it is frequently ordered to stand for the statement of claim. And it may be stated as a general rule that, unless the circumstances of the case are such as to render necessary a statement by the plaintiff of facts that cannot possibly or conveniently be set out in the indorsement of the writ, a statement of claim will not be ordered.

Therefore, before drafting a statement of claim, the pleader should be careful to ascertain that it has been ordered on the summons for directions.

Claim on indorsement of writ extended or altered.

Whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ (Order XX., r. 4).

Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative (Order XX., r. 6).

Relief claimed to be stated.

In probate actions, where the plaintiff disputes the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest (Order XX., r. 9).

Denial of interest.

This rule applies when the plaintiff disputes the defendant's interest as next of kin, heir-at-law, etc. In an action which arises from the entry of a caveat, the defendant's interest is disclosed in his appearance to the warning; in actions for revocation, it appears upon the grant.

Order XIX., r. 10, provides that if no appearance has been entered for any party, every pleading required to be delivered to a party shall be delivered by being filed with the proper officer—*i.e.*, in probate actions at the Contentious Department of the probate registry. It is stated that this rule is not enforced, but that it is sufficient if two copies of the pleadings are filed when the action is entered for trial (*a*).

Statement of claim where there is no appearance.

It is no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it.

Statement of claim should not anticipate the defence.

Section 2.

STATEMENTS OF CLAIM IN PARTICULAR ACTIONS.

SUB-SECTION 1.—*In Actions for Probate in Solemn Form.*

The following is a form of statement of claim (see App. VII., Form 308) in an action for probate in solemn form:—

Form of statement of claim where ordered in a simple action for probate in solemn form.

"STATEMENT OF CLAIM.

"1. The plaintiff is the executor named in the will of Charles Williams, late of The Towers, Richmond, in the county of Surrey, gentleman, who died on the 1st day of April, 1909, the said will bearing date the 14th day of July, 1904, and a codicil thereto the 17th day of January, 1906.

"The plaintiff claims that the Court shall decree probate of the said will and codicil in solemn form of law."

(*a*) Tristram & Coote, 371.

Additional averments :

Additional averments are required in certain cases, the more important of which are the following :—

foreign will ;

Foreign Will.—Where the will propounded depends for its validity upon its due execution according to the law of the place abroad where the testator was domiciled at the time of his death, the statement of claim should name that place, and should state that the testator died domiciled there, and that the will in question was duly executed in accordance with the formalities required to be observed in the making of a valid will of personal estate by the law of that place (*b*).

An averment that the will was admitted to probate by a competent Court of the place of the alleged domicil was held insufficient (*c*). But, in view of the authorities cited in an earlier chapter, there can be no doubt that such a plea would be held good at the present day (*d*).

will of British subject ;

Will of British Subject.—Where the will propounded depends for its validity upon its due execution according to the provisions of Lord Kingsdown's Act, 1861, the statement of claim should contain an averment that the deceased was a British subject, and that the will was duly executed in accordance with the statute 24 & 25 Vict. c. 114 (*e*).

lost will.

Lost Will (*f*).—When the action is for probate of the contents of a will which has been lost or destroyed, the statement of claim should contain the following averments :—

(1) When a draft or copy of the will is propounded, the draft or copy annexed to the affidavit of scripts should be referred to in the statement of claim as containing the contents of the will executed by the testator.

(2) Where no copy or draft exists the statement of claim should contain an averment " that the contents of the said will were in substance or to the effect as follows," and the contents should be set out so far as they can be proved (*g*);

(3) If the will has been lost, the following averment : " That the said will never was revoked or destroyed by the testator

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(*b*) See App. VIII., Precedent 15A.

(*c*) *Isherwood* v. *Cheetham,* (1862) 2 S. & T. 607.

(*d*) *Vide ante*, pp. 25, 26. See App. VIII., Precedent 37.

(*e*) See App. VIII., Precedents 15B, 29, 37.

(*f*) See App. VIII., Precedents, 15, 3, 27, 34.

(*g*) See *Sugden* v. *Lord St. Leonards,* (1876) 1 P. D. 154—158.

or by any person in his presence and by his direction with the intention of revoking the same, and the same was at the time of his death a valid and subsisting will, but the same cannot now be found";

(4) If the will was destroyed by the testator while of unsound mind, "That the said will was destroyed by the said deceased on the 1*st day of June*, 1908, at a time when he was of unsound mind, memory, and understanding" (*h*).

In other cases of destruction *sine animo revocandi* the statement of claim should state the circumstances under which the will was destroyed—*e.g.*, by mistake, with the intention of substituting therefor some other testamentary document (*i*), and so forth, as the case may be.

Incorporation of documents.

Incorporation of Documents.—When documents are propounded as incorporated by reference in a will or codicil, the statement of claim should refer specifically to the words of reference in the incorporating instrument, and should identify by reference to its script letter the document alleged to be incorporated (*j*).

Obliterations and alterations.

Obliterations and Alterations.—Where obliterations or alterations appear on the face of the will or codicil, the statement of claim should contain a specific reference to them, and the claim should be for probate of the will in its original form or in its altered state, as the case may be (*k*).

SUB-SECTION 2.—*In Interest Suits* (*l*).

Statements of claim in interest suits.

It has already been stated that administration actions are in practice now rarely brought unless the plaintiff's right to a grant of letters of administration is disputed on the ground of the plaintiff's want of interest—*i.e.*, that he has not been lawfully married to the deceased, or is not related to the deceased as he claims to be. Suits of this description are known as interest causes.

Rule 61, C. B., provides: "In interest causes, as heretofore,

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(*h*) See App. VIII., Precedent 19.
(*i*) See App. VIII., Precedent 34.
(*j*) See App. VIII., Precedent 14.
(*k*) See App. VIII., Precedents 13, 5, 7.
(*l*) See App. VIII., Precedents 23, 12, 32.

each party shall be at liberty to deny the interest of the other; and in such cases both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial of their interests respectively."

In interest causes the pleading of each party must show on the face of it that no other person exists having a prior interest to the claimant (Rule 62, C. B.).

In probate actions, where the plaintiff denies the interest of the defendant, he shall allege in his statement of claim that he denies the defendant's interest (Order XX., r. 9).

A precedent of a statement of claim in an interest suit will be found in the Appendix (*m*).

SUB-SECTION 3.—*In Actions for the Revocation of Grants.*

Statement of claim in action to revoke probate.

Precedents of statements of claim in actions of this description will be found in the Appendix (*n*).

In actions for the revocation of a grant of probate in common form, the grounds upon which revocation of the grant is sought should be stated in the statement of claim. Thus the plaintiff must, in his statement of claim, attack the will and plead against it as if he were defendant in an ordinary action for proof in solemn form. He must, with each such plea, state the substance of the case on which he intends to rely (*o*), and in other respects also this part of the statement of claim should be in the form of a defence.

Form of claim.

Where the plaintiff himself relies upon a will which he alleges to be the true last will of the deceased, he should propound it in his statement of claim (*p*), otherwise his claim should be that the Court should pronounce against the pretended will, and revoke the grant of probate in common form made to the defendants, and declare that the deceased has died intestate (*q*).

(*m*) App. VIII., Precedent 23.

(*n*) App. VIII., Precedents 20, 21.

(*o*) See *post*, p. 652. Order XIX., r. 25A, though in terms applicable only to defences, extends, it is submitted, to this case. At all events, in practice it is usual to state the substance of the case.

(*p*) See App. VIII., Precedents 21, 22.

(*q*) See App. VIII., Precedent 20. The Court will not declare anything of the sort, for it is obviously impossible for it to say that no

Statement of claim in actions for the revocation of administration.

In actions for the revocation of grants of administration, also, the ground on which revocation of the grant is claimed should be stated in the statement of claim, and if the plaintiff relies upon a will, he should propound that document and claim revocation of the grant of administration and probate of the will in solemn form of law (*r*).

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other will exists. Nor would any useful purpose be served by such a declaration, if made. But for some unknown reason, this relief is persistently claimed.

(*r*) See App. VIII., Precedent 22. As to statements of claim in actions for revocation of probate in solemn form, see *Priestman* v. *Thomas,* (1884) 9 P. D. at p. 71; *Birch* v. *Birch,* [1902] P. at p. 131.

CHAPTER IX.

DEFENCE AND COUNTERCLAIM.

Section 1.

General Rules.

Time for delivering defence.

The time for delivery of defence is fixed by the registrar on the summons for directions. The time may be extended by consent (Order LXIV., r. 8) or by order of the registrar under the summons for directions (Order LXIV., r. 7).

Default in delivering.

In probate actions, if any defendant make default in delivering a defence, the action may proceed, notwithstanding such default (Order XXVII., r. 10).

If no defence is delivered by any defendant, and proof in solemn form is desired, application should be made to enter the action as a short cause (*a*).

Notice of intention merely to cross-examine the witnesses produced in support of will.

In probate actions the party opposing a will may, with his defence, give notice (*b*) that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side unless the judge shall be of opinion that there was no reasonable ground for opposing the will (Order XXI., r. 18).

Effect of such notice. Must be served with defence. Does not apply to revocation suits,

The effect of compliance with this rule upon the discretion of the Court as to costs is discussed in a later chapter (*b*). It is merely necessary, in this connection, to state that the notice must be served *with* the defence (*c*). A party who seeks to call in and obtain revocation of a grant of probate cannot take advantage of this rule (*d*).

(*a*) *Vide ante*, p. 609, *post*, p. 670.

(*b*) *Post*, pp. 695—698. For form of notice, see App. VII., Form 150A.

(*c*) *Bone* v. *Whittle*, (1866) 1 P. & D. 249.

(*d*) *Tomalin* v. *Smart*, [1904] P. 141.

or to cases where undue influence or fraud is pleaded.

Nor can the party who opposes the will protect himself by a notice of this description if he pleads undue influence or fraud: for to insist upon proof in solemn form is to require proof of the due execution of the will, of the testator's capacity, and of his knowledge and approval of the contents of his will; and a plea of undue influence or fraud is inconsistent with the notice (*e*).

Notice may be conditional.

The notice may, however, be conditional—*e.g.*, that, if both attesting witnesses are called, the defendants only intend to cross-examine them (*f*).

Counterclaim.

Counterclaim.—Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim (Order XXI., r. 10). Thus if a defendant propounds a will, he does so by way of counterclaim (*g*).

Title of counterclaim against persons other than the plaintiff.

Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim setting forth the names of all the persons who, if such counterclaim had been enforced by cross action, would be defendants to such cross action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff (Order XXI., r. 11). If any of such persons are not parties to the action, the defendant should cite them to see proceedings, or he may proceed under Order XXI., rr. 12 and 13. As to reply to counterclaim see Order XXI., r. 14.

Service on persons not parties.

Reply to counterclaim.

Section 2.

Particular Defences.

Forms of defence in probate actions in the Ecclesiastical Courts.

By the practice of the Ecclesiastical Courts and of the Court of Probate, the forms of defence in probate actions became fixed and stereotyped. The Court discountenanced innovations

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(*e*) *Ireland* v. *Rendall,* (1866) 1 P. & D. 194; *Cleare* v. *Cleare,* (1869) 1 P. & D. 655; *Harrington* v. *Bowyer,* (1871) 2 P. & D. 264.

(*f*) *Leeman* v. *George,* (1867) 1 P. & D. 542.

(*g*) See App. VIII., Precedents 27, 28, 30, 31.

in pleading. Thus it was for long doubted whether a plea that the testator did not know and approve of the contents of his will was good in law (*h*). A favourite plea was "That the said alleged will was not the will of the deceased," under which evidence might be given at the trial that the will was not duly executed, or that it was a mere sham will, never intended by the testator to operate, or even that the testator's signature had been forged. In fact, Dr. Wambey, in *Twells* v. *Clarke* (*i*), stated that it involved every plea that could go to the validity of a testamentary instrument; and in *Owen* v. *Davies* (*j*) this plea, after having served so long, was finally discredited.

Rule 40A, C.B. Five recognised forms of defence.

Under Rule 40A, C. B., five pleas were recognised, and no party could plead any other plea, except by leave of a judge. Those pleas were undue execution, incapacity, undue influence, fraud, and want of knowledge and approval. Only under the last of these were particulars directed to be given, and it is obvious that the plaintiff in a probate action was under a grave disadvantage in many cases, since the mere general statement of the defences above enumerated left him in ignorance of the nature of the case which he would have to meet.

Disadvantage to the plaintiff entailed by the vague nature of such defences.

Order XIX., r. 25A. Substance of the case to be stated with regard to every defence.

Accordingly in 1901 a rule was framed to mitigate this grievance; and now by Order XIX., r. 25A, "*in probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely.*"

Accordingly, although the old stereotyped pleas are still used, the defence must state, in respect of each of them, the "substance of the case."

What is meant by the substance of the case.

In complying with this rule, the pleader is not obliged to set out his evidence, or to give elaborate particulars of his defence. It is sufficient, and it is essential, that the plaintiff should be given enough information to enable him to ascertain with certainty the nature of the case on which the defendant relies (*k*).

It is proposed to discuss the various forms of defence in probate actions in some detail.

(*h*) See *Hastilow* v. *Stobie*, (1865) 1 P. & D. 64.

(*i*) 3 S. & T. 281.

(*j*) (1864) 3 S. & T. 588.

(*k*) *Vide ante*, pp. 623—625.

SUB-SECTION 1.—*Undue Execution* (*l*).

That the said will was not duly executed according to the provisions of the statute 1 *Vict. c.* 26.

Defence that the will was not duly executed.

It is usual to insert this plea in all defences. Even if the due execution of the will is not seriously disputed, it is advisable to put the plaintiff to the proof that the requirements of the Wills Act have been complied with.

Issues raised by plea.

The plea puts in issue the execution of the will, and under it may be raised the following defences :—

(a) That the signature of the testator is not so placed at the foot or end of the will as to satisfy the requirements of sect. 9 of the Wills Act, 1837, and sect. 1 of the Wills Act Amendment Act, 1852. If the defendant relies upon this defence, the plea should be thus framed: "That the said will was not duly executed in accordance with the statutes 1 Vict. c. 26 and 15 & 16 Vict. c. 24."

(b) That the will was never signed by the testator—*i.e.*, that in fact no signature of the testator appears on the will or that the signature appearing on the will is a forgery. But where forgery is alleged, it should be expressly averred in the substance of the case.

(c) That the signature of the testator was not placed upon the will by some other person in his presence and by his direction—*i.e.*, that the person who signed for the testator did so without his authority, or in his absence, or both.

(d) That the two witnesses were not present at the same time when the signature was made or acknowledged.

(e) That, though both witnesses were present when the testator acknowledged his signature, there was no valid acknowledgment.

(f) That the witnesses did not subscribe the will in the presence of the testator.

Substance of the case.

But in each instance the defendant must state the substance of the case.

If he merely puts the plaintiff to proof of due execution, the following substance of the case will suffice :—

"Under the above paragraph the defendant puts the plaintiff

(*l*) See App. VIII., Precedents 24—30.

to proof that the requirements of the statute 1 Vict. c. 26 were complied with."

If, on the other hand, he desires to raise one or more of the specific defences mentioned above, he should state in his substance of the case the specific informality which he alleges, *e.g.*,—

"Under the above paragraph the defendant alleges that the said will was not signed by the deceased in the presence of two witnesses present at the same time, nor did such witnesses attest and subscribe the said will in the presence of the deceased."

If, however, the defendant intends to allege that the signature of the deceased was a forgery, the defence should contain a specific allegation to that effect, *e.g.*,—

"Under the above paragraph the defendant alleges that the said will was never signed by the deceased or by any other person in his presence or by his direction, but that the signature purporting to be that of the testator appearing upon the said will is a forgery."

Difficulty of upsetting a will on the ground of undue execution.

In connection with this plea, it should be borne in mind that it is not an easy matter to set aside a will on the ground of undue execution.

The evidence of non-compliance with the requirements of the statute must be clear and cogent, before the Court will set aside the document which the testator intended to be his last will, on the ground of some alleged informality in its execution. Particularly is this the case when the will was witnessed by or in the presence of a solicitor, or some person who well knew the formalities prescribed by statute. Moreover, the existence of discrepancies in the statements of the attesting witnesses, or an allegation of informality in the execution of the will by one, or even by both of them, is not in itself sufficient to establish a plea of this description (*l*). This fact should be borne in mind by the pleader, if undue execution is the only ground of defence upon which he relies.

(*l*) *Vide ante*, pp. 149—158.

SUB-SECTION 2.—*Unsoundness of Mind* (*m*).

That at the time when the said will purports to have been executed the deceased was not of sound mind, memory, and understanding.

Defence that testator was not of sound mind.

This plea raises the issue of testamentary capacity. It is usually accompanied by a plea of want of knowledge and approval.

Issues raised.

The pleader should state shortly the nature of the case he intends to prove. If he alleges that the testator was a lunatic or hopeless imbecile, he will say so; if, on the other hand, his case is that the testator's mind was impaired by illness or age, so that he was unable to form a rational opinion as to the extent of his property or the claims of others upon his bounty, this should be stated in the Substance of the Case. A reference to the precedents in the Appendix will illustrate how much detail is required in the statement (*m*).

Substance of the case.

Where it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion must be delivered before the case is set down for trial, and, except by leave of the Court or a judge, no evidence shall be given of any other instances at the trial (Order XIX., r. 25A).

Notice of specific delusions.

A precedent of such notice will be found in the Appendix (*n*).

SUB-SECTION 3.—*Want of Knowledge and Approval* (*o*).

That at the time when the said will purports to have been executed the deceased did not know and approve of the contents thereof (or *of the residuary clause in the said will*, as the case may be).

Defence of want of knowledge and approval.

This plea puts in issue the knowledge and approval by the testator of the contents of his will at the time of its execution. Strictly it is only appropriate when the capacity of the testator is not disputed, but it is alleged that the contents of the will were never properly brought to his notice. It is,

Issues raised.

(*m*) See App. VIII., Precedents 24, 26, 27.

(*n*) App. VIII., Precedent 38.

(*o*) See App. VIII., Precedents 25, 26, 27, 30, 17.

however, not unusual to plead want of knowledge and approval when testamentary incapacity is also alleged.

Substance of the case.

Even before Order XIX., r. 25A, came into operation, it was necessary with a plea of want of knowledge and approval to give particulars stating shortly the substance of the case intended to be set up under the plea, and it was provided that no defence shall be available under this plea which might have been raised under any other plea (*e.g.*, undue influence, fraud, testamentary incapacity) unless such other plea be pleaded therewith (Rule 40A, C. B.).

The substance of the case should state (if the facts are so) that the deceased gave no instructions for the said will, that it was not read over to him or explained to him, nor did he himself read over the same. If fraud is alleged, it should be separately pleaded; if the defendant's case is that, although the will was read over to or by the deceased, the latter was incapable of appreciating its effect, testamentary incapacity should also be pleaded. It is sometimes convenient to plead both testamentary incapacity and want of knowledge and approval, and to frame a common substance of the case to cover both pleas (*p*).

SUB-SECTION 4.—*Undue Influence* (*q*).

Defence of undue influence.

That the execution of the said will was obtained by the undue influence of the plaintiff (and others acting with him whose names are at present unknown to the defendant).

Issues raised.

This plea raises the issue that the will was obtained by coercion, or something which the law treats as equivalent to coercion on the part of the plaintiff. It does not raise an issue of fraud, which must, if alleged, be expressly pleaded (*ante*, p. 74).

Particulars.

The plaintiff is entitled to particulars setting out the names of the persons against whom the charge of undue influence is preferred (*r*).

Substance of the case.

The defendant must state the nature of the conduct which, he alleges, constitutes undue influence on the part of the

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(*p*) See App. VIII., Precedents 25—27.

(*q*) See App. VIII., Precedent 25.

(*r*) *Salisbury* v. *Nugent*, (1883) 9 P. D. 23.

plaintiff, *e.g.*, actual physical coercion, such as by force or fear, or importunity upon weakness, or whatever his case may be (*s*).

Caution to be exercised before placing a plea of undue influence on the record.

The issue of undue influence ought not to be raised except on very good grounds. Like a plea of justification in libel, it is a plea which must be strictly proved, and failure to establish the charge will almost inevitably involve the defendant's condemnation in costs (*t*). The cautious pleader will make very sure of his evidence and the strength of his case before he places this plea upon the record.

SUB-SECTION 5.—*Fraud.*

Defence of fraud.

That the execution of the said will was obtained by the fraud of the plaintiff (*u*).

Substance of the case.

The plaintiff is entitled to particulars, with dates and items if necessary, of the fraud alleged. (See Order XIX., r. 6; *ante*, p. 625.) These particulars should be set out in the substance of the case.

SUB-SECTION 6.—*Not a Testamentary Instrument* (*v*).

Defence that instrument not testamentary.

That the paper writing propounded by the plaintiff is not a testamentary instrument.

Issues raised.

This plea raises the issue that the document in question was executed by the deceased without any intention that it should operate as a disposition of his property to take effect upon his death—*i.e.*, that it was a mere sham will, or was intended as a present gift to take effect during his lifetime.

Substance of the case.

It would not be sufficient to state that the document was not executed by the testator as his will, for a deed or other instrument containing dispositions of property to take effect upon the death of the testator, may be admitted to probate, if duly executed in accordance with the provisions of the Wills Act (*w*). The substance of the case should contain averments either that the will was executed as a jest (*x*), or as a sham will (*y*), and never intended by the testator to have any force

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(*s*) See App. VIII., Precedent 25.

(*t*) *Vide post*, pp. 688—692.

(*u*) *Vide ante*, p. 74.

(*v*) See App. VIII., Precedent 30.

(*w*) See *ante*, p. 145.

(*x*) *Nichols* v. *Nichols*, (1814) 2 Phill. 180.

(*y*) *Lister* v. *Smith*, (1863) 3 S. & T. 282. And see further *ante*, p. 148.

or effect as a disposition of his property, or that it was intended to operate as a present disposition of his property to take effect during his lifetime, and not after his death (*z*).

SUB-SECTION 7.—*Revocation.*

The defence of revocation may take three forms :—

Defence of revocation by marriage.

(a) *That after the execution of the said will the deceased contracted a valid marriage.*

Substance of the case.

Set out the date of the marriage and the place where the marriage was celebrated.

By subsequent will or codicil.

(b) *That the will dated the* 1*st day of April,* 1906, *was revoked by a will dated the* 2*nd day of March,* 1907, *duly executed by the deceased* (*a*).

Substance of the case.

The subsequent will should be propounded by way of counterclaim. The substance of the case will then state: "The substance of the defence is contained in the counterclaim."

By burning, tearing, etc.

(c) *That the said will was revoked by the same having been burnt, torn, or otherwise destroyed by the testator or by some person in his presence and by his direction, with the intention of revoking the same* (*b*).

Substance of the case.

State when, where, and by whom the will was destroyed, and the circumstances under which it was destroyed. If the defendant relies upon the presumption, he should state that he alleges "that the said will was last known to be in the possession of the deceased and was not found at his death, and the defendant relies upon the presumption of law that the said will was destroyed by the deceased *animo revocandi*" (*b*).

SUB-SECTION 8.—*Miscellaneous Defences.*

Deceased prevented by threats from altering will.

A plea "that after making the said alleged will of May, 1853, the deceased was prevented by the force and threats of the plaintiff from executing a further will, prepared by and under his instructions, whereby the plaintiff would have been deprived of his interest under the said alleged will," was allowed in *Betts* v. *Doughty* (*c*).

(*z*) *Vide ante,* p. 147 ; see App. VIII., Precedent 30.

(*a*) See App. VIII., Precedents 35, 31.

(*b*) See App. VIII., Precedent 28.

(*c*) (1879) 5 P. D. 26 ; *vide ante,* p. 91.

Infancy.

Or the defence may be "That at the time when the said will was executed the deceased was under the age of twenty-one years." (See the Wills Act, 1837, s. 7.)

Estoppel.

Another defence, which may arise in an action for revocation of probate, is estoppel (*d*).

Defence in an interest suit.

The foregoing defences are common to actions for probate in solemn form and actions for the revocation of probate. In the latter case they would be raised in the statement of claim. A form of defence in an interest suit will be found in the Appendix (*e*).

(*d*) See *Priestman* v. *Thomas*, (1884) 9 P. D. at p. 72; and *vide ante*, p. 643.

(*e*) App. VIII., Precedent 32.

CHAPTER X.

REPLY, DEFENCE TO COUNTERCLAIM, AND SUBSEQUENT PLEADINGS.

Reply.

No reply to be delivered without leave.

Reply (*a*).—No reply shall be delivered unless the same be ordered (Order XXIII., r. 1). A plaintiff shall deliver his reply, if ordered, within the time specified in the order, or if no time is so specified, within ten days after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a judge (Order XXIII., r. 2).

The registrar, under the summons for directions, decides whether a reply is necessary, and the time for its delivery.

No reply can be delivered by a plaintiff, whether it contains a defence to a counterclaim or not, except by leave of the registrar.

In what cases leave to deliver a reply will be granted.

If the plaintiff's only object in delivering a reply is to deny what the defendant has stated in his defence, the registrar will not, as a rule, give leave, for, if no reply be delivered, all material statements of fact in the defence are "deemed to have been denied and put in issue" (Order XXVII., r. 13). But if a counterclaim has been delivered with the defence, the registrar will generally give leave for a reply, as the plaintiff must deal specifically with every allegation of fact in the counterclaim which he does not admit to be true (Order XIX., r. 17) (*b*).

Also it may be necessary for the plaintiff to raise in his reply some plea in confession and avoidance of the allegations contained in the defence. If the defendant has pleaded revocation, the plaintiff may wish to raise a plea of revival; if the defendant has pleaded that the will is not duly executed in

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(*a*) See App. VIII., Precedents 33—37.

(*b*) See note to Order XXIII., r. 2, in the Annual Practice.

accordance with the law of the foreign country where the testator died domiciled, the plaintiff may wish to reply that, even so, it is executed in accordance with the provisions of the Wills Act, and is therefore a valid exercise of an English power of appointment (*c*) or a valid will of English real estate. It would have been improper for the plaintiff to raise these issues in his statement of claim, for it is no part of the statement of claim to anticipate the defence and to state what the plaintiff would have to say in answer to it (*d*). And in such a case leave to deliver a reply would be granted.

Defence to counterclaim.

Defence to Counterclaim (*e*).—When a counterclaim is pleaded, a reply thereto is subject to the rules applicable to statements of defence. A third person brought into the action for the first time by the counterclaim, may deliver his defence to counterclaim without leave within the time within which he might deliver a defence if it were a statement of claim. (Order XXI., r. 14) (*f*).

The most usual defence to counterclaim is a plea that, if for any reason the will propounded by the plaintiff is invalid, a former will is entitled to probate (*e*).

Subsequent pleadings.

Subsequent Pleadings.—Pleadings subsequent to reply—*i.e.*, rejoinder, surrejoinder, rebutter, and surrebutter—may only be delivered by leave of the registrar, to be applied for by notice under the summons for directions; the time for their delivery is fixed by the registrar. In default of order, the time is within four days after the delivery of the previous pleading (Order XXIII., r. 3).

(*c*) See App. VIII., Precedent 37.

(*d*) *Per* James, L.J., in *Hall* v. *Eve,* (1876) 4 Ch. D. at p. 345.

(*e*) See App. VIII., Precedents 33—35.

(*f*) *I.e.*, within ten days from delivery of the counterclaim, or such time as is ordered by the registrar: Order XXI., r. 8.

CHAPTER XI.

PRESERVATION OF PROPERTY PENDING SUIT.

Section 1.

APPOINTMENT OF ADMINISTRATOR AND RECEIVER *PENDENTE LITE.*

Applications for appointment of administrator and receiver *pendente lite*, made on motion.

Affidavits in support.

Appointment.—Applications for the appointment of an administrator *pendente lite* of the personal estate of the deceased, or a receiver of his real estate, are made to the Court on motion (*z*), supported by affidavits showing the nature and value of the estate and any other incidental circumstances relating to the property, real or personal, which render the appointment necessary and convenient. For, while it has been laid down that an administrator *pendente lite* may be appointed irrespective of the condition of the estate (*a*), it is still customary to show in the affidavits that the appointment is required in order that the administrator may discharge certain necessary functions which there is nobody else to discharge, *e.g.*, the receipt and investment of rents, the payment of debts and interest on mortgages, etc.

The principles upon which the Court acts in granting or refusing applications of this description are dealt with in an earlier chapter (*b*).

Notice of motion.

Notice of motion must be served on all parties to the action, and, if a receiver of real estate is applied for, upon the heir-at-law, even though he is not a party to the suit (*c*).

Time of application.

The appointment cannot be made before the issue of the writ, for a suit must be pending to justify the appointment (*d*), but application may be made for the appointment of a receiver or administrator *pendente lite* before the summons for directions. (See Order XXX., r. 1.)

Leave to serve notice

Leave may be obtained from the judge to serve the notice

(*z*) For precedent of case on motion see App. VIII., Precedent 42.

(*a*) *Bellew* v. *Bellew*, 4 S. & T. 58; *vide ante*, p. 382.

(*b*) *Ante*, pp. 381—388.

(*c*) *Wiggins* v. *Hudson*, (1899) 80 L. T. 296.

(*d*) *Salter* v. *Salter*, [1896] P. 291.

of motion with writ.

of motion simultaneously with the writ, and, in such a case, the case on motion should contain a statement that such leave has been granted (*e*).

Who is appointed.

If the parties agree as to the person to be appointed, the judge will appoint the person nominated, otherwise the matter is referred to the registrar to make the appointment.

Practice.

The practice on extracting a grant by an administrator *pendente lite*, has been dealt with in an earlier chapter (*ante*, p. 480). The appointment of a receiver (if not the same person as the administrator) is drawn by the registrar's clerk (see App. VII., Form 63); and the receiver executes a special bond (App. VII., Form 74).

Powers of administrator and receiver *pendente lite.*

An administrator *pendente lite* has "all the rights and powers of a general administrator other than the right of distributing the residue of the personal estate," and every such administrator is subject to the immediate control of the Court and acts under its direction (*f*).

Direction of the Court.

A receiver of the real estate *pendente lite* has "such power to receive all rents and profits of the real estate and such powers of letting and managing such real estate as the Court may direct" (*g*).

The direction of the Court, where necessary, is obtained on summons before a registrar, or, in important matters, before the judge.

Accounts of administrator and receiver *pendente lite.*

Duty at the termination of his office to pay over and account.

Accounts.—An administrator *pendente lite* is merely an officer of the Court, and holds the property only till the suit terminates (*h*). As soon as it is concluded, he must pay over all that he has received, in his character of administrator, to the persons pronounced by the Court to be entitled (*hh*). His other functions are then completely at an end, and the Court is bound to take care that he discharges the duty committed to him, as far as the delivery over of everything to the proper party is concerned (*i*).

(*e*) Tristram & Coote, 343.

(*f*) Court of Probate Act, 1857, s. 70.

(*g*) *Ibid.*, s. 71.

(*h*) *Vide ante*, p. 388, for commencement and termination of office of administrator *pendente lite*.

(*hh*) If he makes default, application should be made for the assignment of the bond.

(*i*) *Graves*, (1828) 1 Hagg. at p. 315.

Inventory and account to be rendered, and accounts referred to registrar for investigation and report.

By Rule 96, C. B.: "every administrator *pendente lite* and receiver of real estate shall exhibit an inventory and render an account of the property of the deceased which comes to his hands, and the accounts of every such administrator and receiver shall be referred to the registrars of the principal registry for investigation and report, before the same are allowed by the Court, unless the judge shall otherwise direct; and the foregoing rules and orders respecting the taxation of costs shall, so far as the same are applicable, be observed with respect to the investigation of such accounts, and any other accounts referred to the registrars for examination."

Practice in vouching the account.

The account, together with the solicitor's bill of costs in respect of the appointment of the administrator and receiver, is filed in the Contentious Department. The registrar will fix a day for taxing the bill and vouching the accounts, and notice thereof will be sent by post to the applicant, who must, in his turn, give at least one clear day's notice of the appointment to the other parties interested. All persons interested in the estate (or in the residue, if there is a will) should be represented before the registrar.

The account is verified by affidavit (for form see App. VII., Form 59), and vouchers and receipts for all payments made must be produced. On the day appointed, the bill of costs is taxed and the accounts vouched and allowed by the registrar, and the amount due to the estate in the hands of the administrator and receiver is certified. The bond may be vacated on the same appointment, or, if there is no estate, and therefore no account to verify, a separate summons, returnable before a registrar, may be taken out for this purpose.

Remuneration of administrators and receivers *pendente lite.*

Remuneration.—By sect. 72 of the Court of Probate Act, 1857, the Court "may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court shall think fit."

The amount of the remuneration to be allowed is fixed by the registrar on the appointment at which the accounts are investigated and vouched.

Section 2.

INJUNCTIONS AND ORDERS FOR THE PRESERVATION OF PROPERTY.

Power of the Court to grant mandamus or injunction.

The Judicature Act, 1873, s. 25, sub-s. 8, provides: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after, the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable."

Order for sale of perishable goods, etc.

Order L., r. 2, provides: "It shall be lawful for the Court or a judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

Detention, preservation, or inspection of property, the subject of an action.

And by Order L., r. 3, "it shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

Applications for injunctions, etc., how made.

An application for an order under the Judicature Act, 1873, s. 25, sub-s. 8, or under R. S. C., Order L., rr. 2 and 3, "may be made to the Court or a judge by any party. If the application be by the plaintiff under the said sub-section 8, it may be made either *ex parte* or with notice, and if for an order under rules 2 or 3 of this Order, it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff and at any time after appearance by the party making the application" (Order L., r. 6) (*k*). In the Probate Division such applications are made to the Court on motion (*l*). Applications for the appointment of a receiver by way of equitable execution, and for injunctions so far as they are ancillary or incidental to equitable execution are made on summons to a registrar (*m*).

Injunction against intermeddling executor.

Where an executor had, before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the Court gave leave to the co-executor to issue a writ (*n*) against him claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver (*o*).

Order prohibiting dealing with share of a ship.

In *Nicholas* v. *Dracachis* (*p*) it was held that the Court of Probate may under 17 & 18 Vict. c. 104, s. 65, direct an order to issue prohibiting the dealing in any share of a ship, for a time and on conditions to be named in the order.

(*k*) See further the notes in the Annual Practice to Order L. of the Rules of the Supreme Court.

(*l*) There have been cases in which injunctions have been granted by a judge in chambers, but a motion appears to be the appropriate process. For form of order for an interim injunction, see App. VII., Form 295.

(*m*) *Vide ante*, pp. 546, 552.

(*n*) Writs of injunction are now abolished: Ord. L., r. 11.

(*o*) *Moore*, (1888) 13 P. D. 36.

(*p*) (1875) 1 P. D. 72.

CHAPTER XII.

TRIAL.

Section 1.

PRELIMINARIES.

THE rules as to the place and mode of trial are dealt with in an earlier chapter (*ante*, pp. 625—632).

Notice of trial by plaintiff.

Notice of Trial.—The plaintiff, or the party in the position of plaintiff (*z*), may give notice of trial (App. VII., Form 145) with the reply, if any, or, where no reply has been ordered, on the expiration of four days after the defence, or the last of the defences has been delivered; or at any time after the issues of fact are ready for trial (Order XXXVI., r. 11).

Length of notice of trial.

Ten days' notice of trial must be given, unless the defendant has consented or been ordered to accept short notice of trial, usually four days (Order XXXVI., r. 14). Notice of trial must be given to all parties who have entered an appearance, including parties cited and interveners.

Notice of trial by defendant.

If the plaintiff does not give notice of trial within six weeks after he first becomes entitled to do so, the defendant may give notice of trial himself, or apply to the registrar to dismiss the action for want of prosecution (Order XXXVI., r. 12).

Entry of trial.

Entry of Trial.—In London and Middlesex, unless the trial is entered within six days after notice of trial, the notice is no longer in force (Order XXXVI., r. 16).

Where entered.

In the Probate Division trial in London is entered in the Contentious Department at the registry. Two copies of the pleadings must be left (see Order XXXVI., r. 30), and one of these must be endorsed with a copy of the notice of trial.

Entry for trial at assizes or County Court.

As to entry for trial at assizes, see Order XXXVI., r. 22B; and as to entry for trial in the County Court, see County Court Rules, 1903, Order XLIX.

(*z*) In spite of these words, it is *not* the practice for the defendant in a revocation suit to give notice of trial.

Postponement or adjournment of trial.

Postponement.—Under Order XXXVI., r. 34, the judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit.

Applications for postponement, how made.

Applications under this rule may be made at any time after notice of trial has been given; they are usually made to the judge by counsel at the rising of the Court. If the postponement is not consented to by the other side, the application should be supported by affidavit setting out the grounds upon which the postponement is asked, and notice should be given to the other side.

Subpœnas. Order XXXVII., R. S. C.

Subpœnas.—Subpœnas *ad testificandum* and *ad duces tecum* (App. VII., Forms 331, 332) are issued in accordance with Order XXXVII., rr. 26—34. The *præcipe* (App. VII., Form 316) is filed in the Contentious Department of the registry, where the subpœna is issued. In the Probate Division a subpœna remains in force until the disposal of the case, irrespective of the sittings (Rule 132, C. B.).

The practice as to subpœnas to bring in scripts has already been discussed (*a*).

Section 2.

Proceedings at the Trial.

Proceedings at the trial.

Proceedings at the trial are regulated by Order XXXVI., rr. 31—42.

Default of appearance.

If a will is propounded, and none of the parties who oppose the will appear when the trial is called on, the party propounding the will may proceed to prove it in solemn form.

But a judgment by default may, on application to the judge who heard the cause, within six days after the trial, be set aside on terms (Order XXXVI., r. 33) (*b*). It has been held that, notwithstanding this rule, the Court of Appeal has power to entertain an appeal direct from a judgment by default (*c*).

Right to begin.

Right to begin.—By the practice of the Court, the party propounding the last will is entitled to begin, for otherwise the Court might be engaged in investigating the validity of a

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(*a*) *Ante*, p. 512.

(*b*) See *Cudworth* v. *Hayward*, (1896) 75 L. T. 456.

(*c*) *Armour* v. *Bate*, [1891] 2 Q. B. 233.

series of wills, all of which would be of no importance if the last will were established to be the true will (*d*).

The burden of proving the due execution of the will, the testamentary capacity of the testator, and his knowledge and approval of its contents, is upon the party who propounds the will, and if any of these issues are raised upon the pleadings, he is entitled to begin.

If none of these issues are raised on the pleadings, then it lies upon the party who pleads the affirmative issues impeaching the will (*e.g.*, undue influence, fraud, etc.) to begin, for though there will be some proof of the will necessary beyond that raised by the issues, yet the parties have not by the pleadings required that proof, and it is only needed by the Court (*e*).

Duty of party propounding will to call attesting witnesses.

The party propounding the will is bound to call at least one of the attesting witnesses, if he can be produced, to prove due execution (*f*); and if that witness satisfies the Court that the will was duly executed, it is not necessary to call the other attesting witness (*g*).

But if the witness called fails to prove due execution, the party propounding the will is bound to call the other attesting witness, although he may know him to be an adverse or a hostile witness (*h*), but if such witness gives evidence against the will, the party calling him may cross-examine him, and may call evidence to disprove the facts stated by him and to prove previous inconsistent statements, although he has denied making such statements and is not a hostile witness (*i*).

Judgment.

Judgment.—The decree is drawn up and signed by the Court registrar. After two days the solicitor may order at the registry the copy necessary for obtaining the grant. The will pronounced for may be obtained from the Contentious Department.

(*d*) *Hutley* v. *Grimstone*, (1879) 5 P. D. 24; *Cross* v. *Cross*, (1864) 3 S. & T. at p. 295.

(*e*) *Hutley* v. *Grimstone*, (1879) 5 P. D. 24.

(*f*) *Coles* v. *Coles*, (1866) 1 P. & D. 70; *vide ante*, p. 302.

(*g*) *Belbin* v. *Skeats*, (1858) 1 S. & T. 148; *vide ante*, p. 302.

(*h*) *Owen* v. *Williams*, (1863) 4 S. & T. 202; *Coles* v. *Coles*, (1866) 1 P. & D. 71; *vide ante*, p. 302.

(*i*) *Coles* v. *Coles*, (1866) 1 P. & D. 71; *vide ante*, p. 302.

Section 3.

"Short Cause."

Under what circumstances an action may be set down as a "short cause."

Applications for leave to set down an action as a short cause may be made not only when no appearance has been entered by any of the defendants or parties cited (*k*), but also:

(1) When no defence has been delivered, or where the defendant withdraws his defence;

(2) When the parties have come to terms.

The practice on such applications has been detailed in an earlier chapter (*l*). It may, however, be useful here to summarise the proceedings at the trial of a short cause, or other undefended case, where a will is propounded for proof in solemn form.

Summary of proceedings.

The party propounding the will must satisfy the Court (1) of the due execution of the will, (2) of the testator's testamentary capacity at the time of its execution, and (3) of his knowledge and approval of its contents.

In a normal case the solicitor who prepared the will would be put into the box, and would state that the deceased gave him instructions for the will, which was prepared accordingly, that the will was read over to the deceased, who approved of its contents and was of sound mind.

One of the attesting witnesses would then be called, and, after identifying his signature and that of the testator, would state that the requirements of sect. 9 of the Wills Act were complied with.

If the Court is asked to pronounce *against* a will, formal evidence of undue execution or of insanity must be given.

Section 4.

Compromise.

When an action may be compromised.

The power of compromise in probate actions is frequently resorted to, and is of great importance. As soon as the writ has been issued, but not before (*m*), the parties may come to terms, and these terms may be filed and made a rule of Court, binding upon the parties to the compromise and enforceable in the same way as any other order of the Court (*n*). But if a

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(*k*) *Vide ante*, pp. 580, 609.

(*l*) *Ante*, p. 609.

(*m*) *Norman* v. *Strains*, (1880) 6 P. D. 219.

(*n*) *Harvey* v. *Allen*, (1858) 1 S. & T. 151. As to enforcing the order, Terms made a rule of Court.

compromise is to be made a rule of Court, the terms of the compromise must contain an agreement to that effect (*o*).

Upon what terms an action may be compromised.

There is practically no limit to the terms upon which parties may agree to compromise; they may in effect make a new will for the testator. Thus an executor may agree that the will he propounds shall be admitted to probate, but that he will administer the estate in accordance with the provisions of a revoked will; or where a will has been invalidly executed, the persons interested on an intestacy may agree that the will shall be pronounced against, but that they will administer the estate in accordance with its provisions; and, *provided all parties interested are of full age and are parties to the compromise*, such terms would be made a rule of Court.

But if it is part of the terms of the compromise that a will shall be pronounced for or pronounced against, the Court must be satisfied by evidence that the will was duly executed, or is invalid, before it will pronounce its decree.

Compromise only binds parties thereto.

But a compromise is binding only upon persons who are parties to the compromise; a bargain only binds those by whom it is made. In this respect an action which terminates in a compromise differs in its effect from one in which the decree of the Court is pronounced on the merits of the case. In the former case only the actual parties to the compromise are bound; in the latter not only the parties to the action and persons cited to see proceedings, but all persons who were in fact cognizant of the suit and had an opportunity of intervening, are bound by the result (*p*).

Whenever a compromise is arrived at, therefore, the parties to the action should make sure that every person whose interest might be affected by the compromise should sign the terms. If this precaution is omitted, the compromise may be set aside at a later date.

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see Order XLII., rr. 24, 25. The decision in *Carritt* v. *Christian,* (1870) 2 P. & D. 181, that it is not the practice to embody terms of compromise in an order of the Court, has not been followed.

(*o*) *Graves* v. *Graves,* (1893) 69 L. T. 420; see *Howard* v. *Howard,* (1897) 77 L. T. 140. A registrar may order terms to be filed, but he has no power to make them a rule of Court; see *Smythe* v. *Smythe,* (1887) 56 L. T. 197.

(*p*) *Wytcherley* v. *Andrews,* (1871) 2 P. & D. 327; *Ritchie* v. *Malcolm,* [1902] 2 Ir. R. 403; *vide ante,* p. 278.

Procedure where minors or infants are necessary parties to a compromise.

And it is important to note that, where it is sought to make minors or infants parties to a compromise, the Court will only approve of the compromise on their behalf if satisfied that it is for their benefit. The procedure to be followed is that prescribed by the Chancery Division in similar cases. The minors or infants must be represented by an independent solicitor, who may also be instructed to represent children unborn. This solicitor must lay a case before counsel, setting out the terms of the proposed compromise and the circumstances of the case, and obtain counsel's opinion that the compromise is beneficial to the minors or infants.

The compromise is then submitted for the approval of the Court, supported by the case laid before counsel and his opinion thereon, and affidavits by the guardian of the minors or infants and their solicitor, stating that the case laid before counsel contains a true and accurate statement of the facts, and that, in their belief, the compromise is beneficial to the minors or infants.

It is usual to instruct the counsel who gave the opinion to be present when the proposed compromise is considered by the Court, in order that he may support his opinion. If the opinion given is that of a junior counsel, and there is a leader, the leader may be asked whether he agrees with the junior's opinion (*q*).

Applications to obtain the judge's sanction to the terms of a compromise are made on summons.

Importance of machinery of compromise where charitable institutions are concerned.

It may not be out of place, in this connection, to refer to the usefulness of the machinery of compromise in cases where charitable institutions are interested under a will. Cases frequently arise in which the testator leaves the whole of his estate to some charitable institution, leaving his own family unprovided for. Under all the circumstances, the charitable institution may not be unwilling to forego some part of the benefit conferred on it, in favour of the wife or children of the testator, but difficulties arise owing to the fact that the trustees are not empowered by the terms of their trust to relinquish any part of a legacy or devise to which they may legally be entitled. In such a case the

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(*q*) *Wilson* v. *Birchall,* (1880) 16 Ch. D. at p. 43.

charitable institution should issue a writ propounding the will, and a defence should be put in by the wife or children. There is then a *lis pendens*, and during the pendency of the action there is no will. The trustees are therefore perfectly entitled to compromise the action on such terms as they consider just and proper, having regard to the interests of the charity which they represent and all the circumstances of the case.

Where unascertained charities affected, Attorney-General must be a party to the compromise.

Where unascertained charities are or may be affected by the terms of the compromise, the Attorney-General must be made a party to the action, and must consent to the compromise on their behalf (*r*).

(*r*) *Boughey* v. *Minor*, [1893] P. 181.

CHAPTER XIII.

APPEALS AND NEW TRIAL.

Section 1.

APPEALS FROM THE REGISTRAR.

Appeals from the registrar are regulated by Order LIV., rr. 20—22 (*a*). These rules provide :—

Reference by registrar to judge.

"If any matter appears to the master (*b*) proper for the decision of a judge, the master (*b*) may refer the same to a judge, and the judge may either dispose of the matter or refer the same back to the master (*b*) with such directions as he may think fit" (Order LIV., r. 20).

Appeal from registrar.

"Any person affected by any order or decision of a master (*b*) may appeal therefrom to a judge at chambers. Such appeal shall be by way of indorsement on the summons by the master (*b*) at the request of any party (*d*), or by notice in writing (*e*) to attend before the judge without a fresh summons, within five days after the decision complained of, or such further time as may be allowed by a judge or master (*f*). Unless otherwise ordered, there shall be at least one clear day between service of the notice of appeal and the day of hearing" (Order LIV., r. 21).

No stay of proceedings.

"An appeal from a master's decision shall be no stay of proceeding unless so ordered by a judge or master" (Order LIV., r. 22).

(*a*) *Patrick*, (1889) 14 P. D. 42, C. A.

(*b*) Read "registrar."

(*d*) This procedure is practically obsolete.

(*e*) In practice this "notice in writing" takes the form of a summons by way of appeal, for which no fee is chargeable.

(*f*) The time may be enlarged by the judge on the hearing of the appeal, without a summons being taken out at chambers for that purpose : Annual Practice, note to Order LIV., r. 21.

The appeal may be as to costs only, notwithstanding the provisions of sect. 49 of the Judicature Act, 1873 (*g*).

Appeal as to costs.

For further information as to appeals of this description, the practitioner is referred to the note to Order LIV., r. 21, in the Annual Practice.

An appeal from an order of a registrar on motion, heard by him in the vacation, lies direct to the Court of Appeal, as in the case of a similar order by a judge.

Order of registrar on motion in vacation.

Section 2.

APPEALS FROM THE JUDGE IN CHAMBERS.

Section 49 of the Judicature Act, 1873, provides: "No order made by the High Court or any judge thereof, by consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order."

Judicature Act, 1873, s. 49. No appeal from consent order, or as to costs only, except by leave.

The provisions of sect. 50 of the Act which regulate appeals from the judge in chambers in the Probate Division (*h*), are as follows: "Every order made by a judge of the High Court in chambers, except orders made in the exercise of such discretion as aforesaid, may be set aside or discharged upon notice . . . by the judge sitting in court; . . . and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal."

S. 50. As to discharge of orders made in chambers.

No appeal from order, unless motion to discharge has been made, except by special leave.

The party dissatisfied with the order of a judge in chambers may—

(1) Apply to the judge in court to set aside or discharge the order—

(a) By asking the judge who hears the application in chambers to adjourn the matter into court, and to fix a day for the rehearing, when the matter may be reargued before him;

(1) Application to judge to set aside or discharge the order.

(a) Adjournment into court.

(*g*) *Foster* v. *Edwards*, (1879) 48 L. J. Q. B. 767; *Bryant* v. *Reading*, (1886) 17 Q. B. D. at p. 131.

(*h*) See *Rigg* v. *Hughes*, (1884) 9 P. D. 68.

(b) Motion to discharge.

(b) By motion to the judge in court to discharge the order. Such a motion is a rehearing, not an appeal. The motion must be made within fourteen days, whether the order be interlocutory or final, unless the judge relaxes this rule on ground shown (*i*).

(2) Appeal direct to the Court of Appeal.

(2) Appeal direct to the Court of Appeal.

Certificate as to further argument.

But appeals from orders made in chambers are subject to the same rules in the Probate Division as in the Chancery Division, and will not be entertained unless the judge gives leave to appeal direct, or certifies that he does not require to hear further argument (*j*). When an appeal lies to the Court of Appeal direct it is subject to the rules which govern appeals from the judge in court, discussed below.

Section 3.

APPEALS FROM THE JUDGE IN COURT.

Final and interlocutory orders.

Final and Interlocutory Orders.—The rules presently to be set out refer to two classes of orders: final orders, which determine the rights of the parties, and interlocutory orders, which do not determine their rights.

Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal (*l*).

From what orders an appeal lies.

From what Orders Appeals lie.—The Judicature Act, 1873, s. 19, gives a right of appeal to the Court of Appeal from every judgment or order of the High Court or any judge thereof.

From a refusal to grant letters of administration on motion.

Under this section it has been held that an appeal lies to the Court of Appeal from a refusal of a judge of the Probate

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(*i*) See notes to Judicature Act, 1873, s. 50, in the Annual Practice, Vol. II., and cases cited. The procedure in the Probate Division is the same as that followed in the Chancery Division: *Rigg* v. *Hughes,* (1884) 9 P. D. 68. When the matter has been fully argued before the judge in chambers he will not usually require it to be reargued before him in court, but will give a certificate to that effect, and the parties can then go direct to the Court of Appeal. If the judge refuses to give such a certificate a motion must be made to him in court to discharge the order, or for leave to appeal direct to the Court of Appeal.

(*j*) *Rigg* v. *Hughes,* (1884) 9 P. D. 68. And see the preceding note.

(*l*) Judicature Act, 1875, s. 12. As to what orders are final and what interlocutory, see notes to Order LVIII., r. 15, and the table prepared by Edward Manson, Esq., both in the Annual Practice.

Division to grant letters of administration on motion to a person claiming to be a creditor of an intestate. Cotton, L.J., said: "Without giving any opinion whether this application is contentious or non-contentious business, I think that sect. 19 of the Judicature Act, 1873, covers this case, and the applicant has a right to appeal. There may be some kinds of non-contentious business with respect to which it would not be right to allow an appeal" (*m*).

Limitations are imposed by statute or by practice on the right of appeal in particular cases. Of those which may affect appeals from a judge of the Probate Division, the following are of importance:—

No appeal from interlocutory orders without leave.

(1) No appeal lies without the leave of the judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge (*n*).

Exceptions.

There are five exceptions to this rule, only two of which can affect probate practice. An appeal lies without leave where the liberty of the subject or the custody of infants is concerned, and in cases of granting or refusing an injunction or appointing a receiver (*o*).

No appeal from consent order, or as to costs only, without leave.

(2) No appeal lies, except by leave of the judge making the order, from an order made by the consent of parties, or as to costs only, which by law are left to the discretion of the Court (*p*).

No appeal as to order allowing extension of time for appealing.

(3) No appeal lies from an order allowing an extension of time for appealing from a judgment or order (*q*).

Orders in the discretion of the judge.

(4) Although discretionary orders are appealable, the Court of Appeal will not, unless in exceptional cases, allow an appeal where the determination complained of was merely the exercise of the discretion of the judge (*r*).

Leave to appeal.

Leave to appeal.—The leave of the judge who made the order should first be asked. If leave is refused, application

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(*m*) *Clook*, (1890) 15 P. D. 132; and see Order LVIII., r. 10.

(*n*) Judicature Act, 1894, s. 1 (1).

(*o*) *Ibid.*, s. 1 (1).

(*p*) Judicature Act, 1873, s. 49. And see note to Order LVIII., r. 1, in the Annual Practice.

(*q*) Judicature Act, 1894, s. 1 (1).

(*r*) See note to Order LVIII., r. 1, in the Annual Practice, and cases there cited.

for leave to appeal may be made to the Court of Appeal (*s*). But if the appeal be from a consent order, or from an order as to costs, only the judge who made the order can give leave (*t*).

SUB-SECTION 1.—*Appeals to the Court of Appeal* (Order LVIII., R. S. C.).

Appeal to be by re-hearing on motion.

Notice of Motion.—All appeals to the Court of Appeal shall be by way of re-hearing, and shall be brought by notice of motion in a summary way; and no petition, case, or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part (Order LVIII., r. 1).

Service and amendment of notice of appeal.

Service and amendment of notice of appeal are regulated by Order LVIII., r. 2.

Length of notice.

Notice of appeal from any judgment, whether final or interlocutory, or from a final order, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice (Order LVIII., r. 3).

A judgment means a decision obtained in an action; every other decision is an order (*u*).

The fourteen days' notice *includes* Sunday, Christmas Day, and Good Friday, unless the time expires on such day (*v*) (Order LXIV., rr. 2 and 3). In the four days' notice these days are excluded (Order LXIV., r. 2).

Notice of appeal by respondent.

As to notice of appeal by respondent see Order LVIII., rr. 6 and 7.

Time for appealing from refusal of *ex parte* application.

Time for appealing.—Where an *ex parte* application has been refused by the Court below, an application for a similar

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(*s*) Order LVIII., r. 17.

(*t*) Judicature Act, 1873, s. 49; *Adlington* v. *Conyngham*, [1898] 2 Q. B. 492.

(*u*) *Onslow* v. *Commissioners, etc.*, (1890) 25 Q. B. D. at p. 466. As to final and interlocutory orders *vide ante*, p. 676.

(*v*) For circumstances in which Sunday, if it is the last day, is not excluded, see note to Order LXIV., r. 1, in the Annual Practice.

purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the Court below or of the Court of Appeal may allow (Order LVIII., r. 10).

An appeal lies from the refusal of an unopposed application for a grant of administration (*x*).

Time for appealing from interlocutory and final order.

No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall (except by special leave of the Court of Appeal) be brought after the expiration of *fourteen days*, and no other appeal shall (except by such leave) be brought after the expiration of *three months*. The said respective periods shall be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal (Order LVIII., r. 15).

Security for costs.

The distinction between a judgment and an order and between a final order and an interlocutory order has already been discussed (*y*).

Stay of proceedings on appeal.

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct (Order LVIII., r. 16).

Power of Court of Appeal to admit further evidence, etc.

The power of the Court of Appeal to amend, to admit further evidence, to draw inferences of fact, and to make orders as to costs of appeal, is dealt with in Order LVIII., r. 4.

Power to order new trial.

If upon hearing of an appeal, it shall appear to the Court of

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(*x*) *Clook*, (1890) 15 P. D. 132.

(*y*) *Ante*, pp. 676, 678; and see notes to Order LVIII., r. 15, in the Annual Practice.

Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had (Order LVIII., r. 5).

Setting down appeal.

The party appealing from a judgment or order shall produce to the proper officer of the Court of Appeal the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed (Order LVIII., r. 8).

Practice.

In appeals from the Probate Division, the solicitor for the appellant must leave in the Contentious Department of the registry two copies of the notice of appeal and one copy of the judgment or order appealed from. The following papers for the use of the judges must be left in the Lords Justices' Clerk's room at the Central Office at least one week before the appeal is likely to appear in the paper: three copies in sets respectively of the notice of appeal, the order or judgment appealed from, and of the pleadings or other documents showing the nature of the appeal.

Evidence on appeal as to question of fact.

As to evidence on appeal as to questions of fact see Order LVIII., rr. 11 and 12.

SUB-SECTION 2.—*Appeals from a Judge with Jury—Motions for New Trial* (Order XXXIX., R. S. C.).

Court to which motion for new trial, etc., shall be made, where no jury.

Every motion for a new trial or to set aside a verdict, finding, or judgment, shall be made, where there has been a trial without a jury, by appeal to the Court of Appeal (Order XXXIX., r. 1).

Motion for new trial after trial with a jury.

Every motion for a new trial, or to set aside a verdict, finding, or judgment where there has been a trial thereof, or of any issue therein with a jury, shall be entered in the Court of Appeal in the same way as motions by way of appeal to the Court of Appeal are now entered where there has been a trial without a jury. Such first-mentioned motions shall be subject to the provisions of Order XXXIX., r. 4, and shall be brought before the Court of Appeal in like manner as an appeal (Order XXXIX., r. 1A).

Mode of application for new trial.

Every application for a new trial shall be by notice of motion. The notice shall state the grounds of the application and whether all or part only of the verdict or findings is complained of (Order XXXIX., r. 3) (*z*).

Time for service of notice of motion: cases tried with a jury;

The notice of motion shall be fourteen days' notice, and shall be served within ten days after the trial, or, where further consideration has been adjourned, within ten days after judgment has been given on such further consideration. The time of the vacations shall not be reckoned in the computation of the time for serving the notice of motion (Order XXXIX., r. 4, as amended R. S. C., May, 1909).

cases tried without a jury.

In practice this rule is applied only to motions for a new trial in cases tried with a jury. Motions for a new trial when the case was tried by a judge without a jury, are treated as governed by Order LVIII., r. 15 (*a*).

Amendment of notice of motion.

As to amendment of notice of motion see Order XXXIX., r. 5.

Ground for granting new trial.

A new trial shall not be granted on the ground of misdirection (*z*) or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties (Order XXXIX., r. 6).

New trial ordered on any one question.

A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question (Order XXXIX., r. 7).

(*z*) For the grounds on which a new trial may be asked, see note to Order XXXIX., r. 6, in the Annual Practice. Particulars of misdirection must be stated: *Murfett* v. *Smith*, (1887) 12 P. D. 116.

(*a*) *Vide ante*, p. 679.

Section 4.

APPEALS FROM COUNTY COURTS.

Appeals from County Courts.

Appeals from decisions of County Courts in probate actions, lie to a Divisional Court of the Probate, Divorce, and Admiralty Division (Order LIX., r. 4). The practice is regulated by Order LIX. of the Rules of the Supreme Court.

Section 5.

APPEALS TO THE HOUSE OF LORDS.

Appeal to the House of Lords.

From the Court of Appeal there is an appeal to the House of Lords. The practice on such appeal is regulated by the Appellate Jurisdiction Acts, 1876 and 1887, and the Appeal (Formâ Pauperis) Act, 1893, and by certain standing orders and directions to be found in Vol. II., Part VII., of the Annual Practice.

Section 6.

SUMMARY AS TO APPEALS (*b*).

(1) **Appeal from Registrar** (Order LIV., rr. 20—22, *ante*, p. 674).

To what Court .	Judge in chambers.
Time for . .	Within *five days* (*Patrick*, 14 P. D. 42).
Mode of . .	(a) Filing fresh summons by way of appeal in Contentious Department; (b) Indorsement of summons by registrar at request of any party, of which notice is given in Contentious Department.
Observation .	No stay of proceedings (Order LIV., r. 22).

(2) **Appeal from Judge in Chambers** (Order LVIII., *ante*, p. 675).

To what Court	(a) To judge in court (*Rigg* v. *Hughes*, 9 P. D. 68); (b) To Court of Appeal, if judge in chambers gives leave to appeal direct or certifies that he requires no further argument.

(*b*) This summary is based upon the appeal table compiled by Mr. Manson for the Annual Practice and the adaptation of that summary to probate practice contained in Tristram & Coote's Probate Practice, p. 475.

Time for . .	(a) Within *fourteen days* of order pronounced, whether order interlocutory or final; (b) *Fourteen days* if interlocutory order, *three months* if final order.
Mode of . .	(a) Notice of motion or adjournment; (b) Notice of motion.
Where set down	(a) Contentious Department; (b) Contentious Department and Central Office.

(3) **Appeal from Judge in Court** (Order LVIII., *ante*, p. 678).

To what Court .	Court of Appeal (Judicature Act, 1873, ss. 18 (5), 19).
Time for . .	Within *three months* from perfecting of order, in cases of final orders or judgment in an action; *Fourteen days* in case of interlocutory orders or final orders not in an action (Order LVIII., r. 15); *Four days* in case of *ex parte* applications (Order LVIII., r. 10).
Mode of . . .	Notice of motion (Order LVIII., r. 1); *Fourteen days*' notice in case of judgment or final order (Order LVIII., r. 3); *Four days*' notice in case of interlocutory order; *Eight days*' and *two days*' notice respectively in cross appeals (Order LVIII., r. 7).
Where set down	In Contentious Department and Central Office.

(4) **Appeal from Judge with Jury—Motion for New Trial** (Order XXXIX., *ante*, p. 680).

Note . . .	A motion for a new trial of an action tried without a jury is for the purposes of time a motion of appeal within Order LVIII.,

	r. 15 (*vide supra*, "Appeal from Judge in Court").
To what Court .	Court of Appeal.
Time for . .	Within *ten days* after trial or, where further consideration has been adjourned, within ten days after judgment has been given on such further consideration (Order XXXIX., r. 4, as amended May, 1909).
Mode of . .	Notice of motion. *Fourteen days*' notice (Order XXXIX., r. 4).
Where set down	Contentious Department and Central Office.

(5) Appeal from County Court (Order LIX., *ante*, p. 682).

To what Court .	Divisional Court of Probate, Divorce, and Admiralty Division (Order LIX., r. 4).
Time for . .	Within *twenty-one days* (Order LIX., r. 12).
Mode of . .	Notice of motion. *Eight days*' notice (Order LIX., r. 10).
Where set down	Contentious Department.

(6) Appeal from Court of Appeal (*ante*, p. 682).

To what Court .	House of Lords (Appellate Jurisdiction Acts, 1876, 1887).
Time for . .	Within *one year* from date of order or judgment.
Mode of . .	By petition.

CHAPTER XIV.

COSTS.

Section 1.

GENERAL RULES.

Questions of costs in the discretion of the judge.

In the Probate Division, as in the Court of Probate and in the Prerogative Court, its predecessors, the question of costs is in the discretion of the judge.

Judicature Act, 1890, s. 5.

Sect. 5 of the Judicature Act, 1890, provides: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

Order LXV., r. 1.

And by Order LXV., r. 1, "subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

General rules for the exercise of the Court's discretion as to costs.

In the exercise of its discretion as to costs, the Court has laid down for its guidance certain general principles, which may be summarised in the form of the three following rules (*a*) :

First, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate.

Secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

Thirdly, unless the circumstances of the case are such as to bring it within one of the foregoing exceptions, the general rule that costs should follow the event ought to prevail.

"It is hardly in the nature of discretion," said Sir J. P. Wilde in *Mitchell* v. *Gard* (*b*), "that its exercise should be adjusted by exact rule. But by acknowledged method and general classification, the suitor may in some measure be enabled to estimate the prospect before him, and to foresee the penalties under which he launches into litigation." His Lordship proceeded to lay down the rules above set forth for the future guidance of the Court, deducing for the first time from the decisions of the Prerogative Court and of the Judicial Committee a general classification or rule, which has been affirmed and acted upon by subsequent judges (*c*).

For convenience of treatment, the three rules in question may be amplified in the form of six propositions, each of which demands separate consideration.

(*a*) Sir J. P. Wilde in *Mitchell* v. *Gard*, (1863) 3 S. & T. at p. 278. And see these rules reaffirmed by Gorell Barnes, J., in *Twist* v. *Tye*, [1902] P. at p. 94 ; *Spiers* v. *English*, [1907] P. at p. 123.

(*b*) (1863) 3 S. & T. at p. 277.

(*c*) *E.g.*, Sir Gorell Barnes in *Twist* v. *Tye*, [1902] P. at p. 94 ; *Spiers* v. *English*, [1907] P. at p. 123. Decisions as to costs before 1863 which conflict with the rule in *Mitchell* v. *Gard* ought not to be relied on. Cases as to costs in the Court of Probate decided before 1863 will be found collected in a note to *Summerell* v. *Clements*, (1862) 32 L. J. P. 33.

SUB-SECTION 1.—*Where the Litigation has been caused by the Conduct of the Testator.*

Where the litigation has been brought about through the conduct of the testator, the costs of ascertaining his will should be defrayed by his estate (*d*).

Where litigation brought about by conduct of the testator, costs should be defrayed by his estate,

If the litigation is justified by the state in which the testator left his testamentary papers, the costs of both parties should be paid out of the estate (*e*), on the ground that the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact (*f*).

as where the testamentary papers are surrounded with confusion or uncertainty.

Thus where, from the state in which the deceased left his papers, it was doubtful whether he intended altogether to revoke an earlier will (*g*), or whether the document signed by him and attested by two witnesses was intended to be testamentary (*h*), the Court ordered the costs of both parties to be paid out of the estate.

The rule is not confined to cases where the testator has left his papers in confusion, but extends to all cases where the testator, by reason of his conduct, can fairly be considered the cause of the reasonable litigation which has occurred after his death as to the validity of his will (*i*).

The rule extends to all cases where the testator can fairly be considered the cause of the litigation,

Thus where the testator by his own conduct, habits and mode of life has given the opponents of the will reasonable ground for questioning his testamentary capacity, the costs of their unsuccessful opposition must be paid out of the estate (*k*).

as where testator's conduct has given reasonable ground for questioning his testamentary capacity,

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(*d*) *Mitchell* v. *Gard,* (1863) 3 S. & T. at p. 277 ; *Davies* v. *Gregory,* (1873) 3 P. & D. at p. 31 ; *Spiers* v. *English,* [1907] P. at p. 123.

(*e*) *Lemage* v. *Goodban,* (1865) 1 P. & D. at p. 63 ; *Hillam* v. *Walker,* (1828) 1 Hagg. at p. 75 ; *Thorncroft* v. *Lashmar,* (1862) 2 S. & T. at p. 484 ; *Davies* v. *Gregory,* (1873) 3 P. & D. at p. 35.

(*f*) *Mitchell* v. *Gard,* (1863) 3 S. & T. at p. 277.

(*g*) *Jenner* v. *Ffinch,* (1879) 5 P. D. 106 ; *Lemage* v. *Goodban,* (1865) 1 P. & D. 57.

(*h*) *Thorncroft* v. *Lashmar,* (1862) 2 S. & T. 479.

(*i*) *Davies* v. *Gregory,* (1873) 3 P. & D. at p. 31. The reasoning of Sir J. Hannen in this case, and the cases cited in his judgment, must not be taken to mean that the Court will regard the litigation as arising from the conduct of the testator in *every* case where the losing parties had reasonable grounds for contesting the will. The tendency of recent cases is rather to restrict than to enlarge the operation of this rule : see *post,* pp. 690, 692.

(*k*) *Davies* v. *Gregory,* (*supra*) ; *Roe* v. *Nix,* [1893] P. 55.

Conversely, if an executor is led into litigation by the fact that the testator seemed to all outward appearance to be capable of managing his affairs, he is entitled to his costs out of the estate, even if the will is pronounced against on the ground of the testator's incapacity (*l*).

or for pleading undue influence.

Again, where the testator's own statements to the unsuccessful litigants had induced them to plead undue influence, it was held that their costs should be paid out of the estate (*m*).

SUB-SECTION 2.—*Where Litigation caused by Conduct of Residuary Legatee.*

If the residuary legatee by his improper conduct has induced the litigation, the estate must bear the costs,

If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he, by his improper conduct, has induced a litigation which the Court considers reasonable, it is not unjust that the estate should bear the costs of the litigation which his conduct has caused (*n*).

as where he delays to produce the will.

Thus where a residuary legatee did not produce the will until after administration had been taken out by the next of kin, although several times called upon to do so if it existed, and no explanation of the delay was given, the Court pronounced for the will, but allowed the costs of the next of kin in obtaining administration, and in putting the residuary legatee to proof in solemn form, out of the estate (*o*).

And where the residuary legatee has himself procured the execution of a will in his favour, the Court may allow the costs of persons who unsuccessfully

Under this rule the Court will allow the costs of a party, who unsuccessfully contests a will on the ground of undue influence or fraud, to be paid out of the estate, after a full indemnity has been given to the successful party for his costs (*p*), if, in the opinion of the Court, the conduct of the

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(*l*) *Boughton* v. *Knight,* (1873) 3 P. & D. at p. 79.

(*m*) *Cousins* v. *Tubb,* (1892) 65 L. T. 716. And see *Williams* v. *Coker,* (1893) 67 L. T. 626; *Shortman* v. *Shortman,* (1893) 67 L. T. 717.

(*n*) *Mitchell* v. *Gard,* (1863) 3 S. & T. at p. 277.

(*o*) *Smith* v. *Smith,* (1865) 4 S. & T. 3.

(*p*) The costs of a defendant who unsuccessfully pleaded undue influence and fraud were allowed out of the estate:—

Where the widow of the deceased, who was a beneficiary under the will which she propounded, had sought to obtain from the deceased, at a time when he was admittedly insane, a deed vesting all his property in her: *Williams* v. *Henery,* (1864) 3 S. & T. 471.

Where the principal beneficiary, a stranger in blood, had taken instrucpersons beneficially interested under the will has reasonably excited doubt and suspicion, and justified those pleas (*q*).

contest the will on the ground of undue influence or fraud to be paid out of the estate,

Wilson v. *Bassil* (*r*) was a case in which the principal beneficiary under the will had called in the solicitor who drew up the will on the instructions of the deceased. Circumstances were proved which, in the opinion of Walton, J., were such as to bring the case within the principles laid down in *Fulton* v. *Andrew* (*s*), to excite the vigilance and suspicion of the Court, and to cast upon the person propounding the will the duty of proving the righteousness of the transaction. Under these circumstances, the learned judge held that the defendant was justified in pleading undue influence and fraud, and, notwithstanding that the plaintiff succeeded in establishing the will, ordered the defendant's costs to be paid out of the estate, after the plaintiff should have first taken her costs as between solicitor and client.

but only if satisfied that the persons contesting the will had reasonable grounds for bringing forward these pleas.

But there may be cases which fall within the rule laid down in *Fulton* v. *Andrew* (*s*), in which the circumstances are such as to make it unreasonable for the party disputing the will to plead undue influence and fraud (*t*). Thus in *Spiers* v. *English* (*u*) the defendant, the person who obtained the will and who was mainly interested under it, was a relieving officer. His character could not be impeached, and he was under the impression at the time the will was made that the testatrix possessed only a few pounds to pay for her burial. Sir Gorell Barnes, P., held that the plaintiff, who had unsuccessfully contested the will on the ground of undue

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tions for the will when no one else was present, and the will was not read over or explained to the testatrix (in this case undue influence or fraud was not pleaded) : *Goodacre* v. *Smith,* (1867) 1 P. & D. 359.

Where the principal beneficiary (a stranger) had obtained a will in her favour, and never mentioned that fact to members of the deceased's family, and had got a neighbour to write the testator's signature to two cheques. The state of the deceased's signature to the will excited suspicion (undue influence pleaded) : *Orton* v. *Smith,* (1873) 3 P. & D. 23. And see *Shortman* v. *Shortman,* (1893) 67 L. T. 717.

(*q*) *Orton* v. *Smith,* (1873) 3 P. & D. 23 ; *Wilson* v. *Bassil,* [1903] P. 239.

(*r*) [1903] P. 239.

(*s*) (1875) L. R. 7 H. L. 448. *Vide ante,* p. 84.

(*t*) *Per* Walton, J., in *Wilson* v. *Bassil,* [1903] P. at p. 242.

(*u*) [1907] P. 122.

influence and fraud, had shown no ground on which the Court ought to order his costs to be paid out of the estate, or to interfere with the ordinary rule that costs follow the event. "The plea of undue influence," said the learned judge (*x*), "ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it" (*y*).

SUB-SECTION 3.—*Where the unsuccessful Litigant had Reasonable Ground for opposing Probate.*

Unsuccessful litigant not condemned in costs if he had reasonable ground for questioning execution of will or capacity of testator.

If there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, the losing party may properly be relieved from the costs of his successful opponent (*z*).

"It is the function of this Court," said Sir J. P. Wilde in *Mitchell* v. *Gard* (*a*), "to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial inquiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this inquiry are not wholly in the wrong, even if they do not succeed; and so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt."

It is of high public importance that doubtful wills should not pass easily into proof by reason of the costs of opposing them. It is of equal importance that parties should not be tempted into a fruitless litigation by the knowledge that their costs will be defrayed by others, or that they will escape

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(*x*) *Spiers* v. *English*, [1907] P. at p. 124; and see *Levy* v. *Leo*, (1909) 25 T. L. R. 717; *Oldcorn* v. *Tenniswood*, (1909) 25 T. L. R. 825.

(*y*) See also *Browning* v. *Mostyn*, (1897) 66 L. J. P. 37.

(*z*) *Mitchell* v. *Gard*, (1863) 3 S. & T. at p. 278; *Davies* v. *Gregory*, (1873) 3 P. & D. at p. 33; *Twist* v. *Tye*, [1902] P. at p. 94; *Spiers* v. *English*, [1907] P. at p. 123.

(*a*) (1863) 3 S. & T. at p. 277.

condemnation in costs. It is the desire of the Court to keep both these considerations in view, while yielding to neither, and it is in this spirit that the above rules have recommended themselves for adoption (*b*).

Example.

Thus the Court refused to condemn in costs a next of kin who had unsuccessfully opposed a will, pleading undue execution and incapacity, upon information given to him by one of the attesting witnesses, to the effect that when the will was read over, the testator signified his approval by gesture only, and that the witness could not swear that the testator was of sound mind (*c*).

SUB-SECTION 4.—*Where Unsuccessful Litigant pleads Fraud or Undue Influence.*

Where a person unsuccessfully pleads fraud or undue influence, he will be condemned in costs unless the Court is satisfied that there was reasonable and sufficient ground to justify charges of that character.

Where the opposing party takes upon himself to question the conduct or good faith of others, and to place upon the record pleas of undue influence or fraud which he fails to substantiate, the Court will not relieve him from the costs of his successful opponent unless satisfied that there was reasonable and sufficient ground to justify charges of that character (*d*).

A plea of undue influence or fraud ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it (*e*), and failure to establish such pleas will, as a general rule, be followed by condemnation in costs (*f*).

But in this case, as in the last, the losing party may be relieved from the costs of his successful opponent if there be sufficient and reasonable ground for contesting the case upon

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(*b*) See *Mitchell* v. *Gard*, (1863) 3 S. & T. at p. 279.

(*c*) *Tippett* v. *Tippett*, (1865) 1 P. & D. 54. And see *Aylwin* v. *Aylwin*, [1902] P. 203, where no order was made as to costs (this case would seem to have come within the second proposition, *ante*, p. 689; and costs might have been ordered out of the estate); *Bramley* v. *Bramley*, (1864) 3 S. & T. 430.

(*d*) *Mitchell* v. *Gard*, (1863) 3 S. & T. at pp. 278, 279; *Summerell* v. *Clements*, (1862) 3 S. & T. 35; *Spiers* v. *English*, [1907] P. at p. 123; *Orton* v. *Smith*, (1873) 3 P. & D. at p. 25; *Levy* v. *Leo*, (1909) 25 T. L. R. 717; *Oldcorn* v. *Tenniswood*, (1909) 25 T. L. R. 825.

(*e*) *Mitchell* v. *Gard*, (1863) 3 S. & T. at p. 278; *Spiers* v. *English*, [1907] P. at p. 124.

(*f*) *Summerell* v. *Clements*, (1862) 3 S. & T. 35.

these issues (*g*). The question whether such pleas are justifiable must be judged upon its merits in each case that comes before the Court (*h*).

Cases in which parties, who have unsuccessfully pleaded undue influence and fraud, have been allowed their costs out of the estate, are dealt with in the second sub-section of this section (*i*).

SUB-SECTION 5.—*In the Absence of Special Circumstances, Costs follow the Event.*

Costs follow the event.

Unless the circumstances are such as to bring the case within one of the foregoing rules, the Court will not interfere with the general rule that costs should follow the event (*k*).

"I should like to call attention," said Sir Gorell Barnes, J., in *Page* v. *Williamson* (*l*), "to an erroneous idea which seems to exist in the minds of litigants in this Court. They appear to have an expectation of getting their costs out of the estate in almost every case. That is not so. The rule is that costs follow the event, and there is no departure from it in this Court any more than in any other Court, unless under rare and exceptional circumstances."

SUB-SECTION 6.—*Costs of Interest Suits.*

Costs in interest suits.

It was not the practice for the Ecclesiastical Courts to deal with the next of kin in interest suits in the same way as they did when the contention had reference to a will. In interest suits, unless some special circumstances appeared (*m*), the party who failed to prove his case was condemned in costs (*n*). This practice is followed in the Probate Division (*o*).

(*g*) *Mitchell* v. *Gard*, (1863) 3 S. & T. at p. 278; *Summerell* v. *Clements*, (1862) 3 S. & T. 35; *Bramley* v. *Bramley*, (1864) 3 S. & T. 430; *Smith* v. *Smith*, (1866) 1 P. & D. 239.

(*h*) *Orton* v. *Smith*, (1873) 3 P. & D. at p. 25.

(*i*) *Ante*, p. 688.

(*k*) *Twist* v. *Tye*, [1902] P. at p. 93; *Spiers* v. *English*, [1907] P. at p. 123.

(*l*) (1902) 87 L. T. at p. 147.

(*m*) *Wiseman* v. *Wiseman*, (1867) 1 P. & D. 351.

(*n*) See *Northey* v. *Cock*, (1824) 2 Add. 294; *Sullivan* v. *Haydon*, (1752) 1 Lee, 12; *Tucker* v. *Westgarth*, (1824) 2 Add. 352.

(*o*) *Wiseman* v. *Wiseman*, (1867) 1 P. & D. 351.

Section 2.

COSTS OF PARTICULAR PARTIES.

It is now necessary to discuss the position, with reference to costs, of particular parties to an action.

Sub-section 1.—*Executor who propounds Will.*

Costs of executor who proves will in solemn form.

An executor who proves a will in solemn form is, as a general rule, entitled to his costs out of the estate (*p*). Indeed, apart from an order of the Court, he has a right to take them out of the estate as costs of obtaining probate. But where, through the negligence of the executrix, the original will was lost, and the substance of the will was propounded and in most particulars established, the Court condemned the executrix in the costs of the defendants, and allowed her only such costs as she would have incurred in proving the will in solemn form (*q*).

Where will lost through negligence of executrix.

Costs on re-trial.

Where a verdict establishing a will was set aside and a new trial granted, the executors were allowed to take their costs out of the estate up to the time of the rule for a new trial being made absolute (*r*).

Executor unsuccessfully propounding will condemned in costs.

An executor is *primâ facie* justified in propounding a will (*s*), but he is not bound to do so unless he chooses (*t*), and if it is made to appear that an executor, when propounding a will, must have known that he was attempting to obtain the sanction of the Court to a document which could not be supported, he ought to be condemned in costs (*u*).

(*p*) *Headington* v. *Holloway,* (1830) 3 Hagg. at p. 282.

(*q*) *Burls* v. *Burls,* (1868) 1 P. & D. 472. And see *Smith* v. *Atkins,* (1870) 2 P. & D. 169.

(*r*) *Boulton* v. *Boulton,* (1867) 1 P. & D. 456.

(*s*) *Boughton* v. *Knight,* (1873) 3 P. & D. at p. 77.

(*t*) *Rennie* v. *Massie,* (1866) 1 P. & D. at p. 119.

(*u*) *Boughton* v. *Knight,* (1873) 3 P. & D. at p. 77. See *Dodge* v. *Meech,* (1828) 1 Hagg. 612; *Clarkson* v. *Waterhouse,* (1860) 2 S. & T. 378; *Richards* v. *Humphreys,* (1860) 29 L. J. P. 137; *Rennie* v. *Massie,* (1866) 1 P. & D. 118 (a bare executor condemned in costs); *Smith* v. *Atkins,* (1870) 2 P. & D. 169 (executrix propounding will which was pronounced for, except residuary clause in her favour, which was excluded from probate on the ground of undue influence, condemned in costs, except costs of proving will in solemn form); *Cottrell* v. *Cottrell,* (1872) 2 P. & D. 397

Thus in *Page* v. *Williamson* (*x*) it was held that, where executors have an ample opportunity of examining into the state of mind of a testator, and of getting a clear knowledge of the whole state of affairs, and yet take upon themselves the responsibility of propounding a will, they do so at their own risk, and, if they are defeated on the trial of the action, the Court will not, except under special circumstances (*y*), interfere with the general rule that costs should follow the event.

SUB-SECTION 2.—*Legatee who propounds Will.*

A legatee or devisee who successfully propounds will *loco executoris* entitled to his costs.

Where a legatee or devisee propounds a paper and establishes it, thereby fulfilling the duty of the executor, he is entitled to have his expenses paid out of the estate of the deceased (*z*). If the legatee who establishes the will obtains a grant of administration *cum testamento annexo*, he is entitled to recoup himself out of the estate for these expenses without an order of the Court. But where the legatee is not primarily entitled to a grant of administration with the will annexed, and so might never be in a position to repay himself the expenses of the suit, he should obtain an order that his costs be paid out of the estate (*a*).

So is a legatee who successfully propounds a codicil,

Where the executor of the testator's will proved the will only, a legatee who successfully propounded a codicil was held to be entitled, not only to his party and party costs against the executor, but also to such further sum *nomine expensarum* as would cover the additional expenses, to be paid out of the estate of the deceased (*b*).

unless guilty of laches.

Where a legatee who successfully propounded a codicil had been guilty of unwise delay in producing the paper, and had

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(executor who could have no *bonâ fide* motive in provoking litigation condemned in costs); *Rogers* v. *Lecocq*, (1896) 65 L. J. P. 68; *Twist* v. *Tye*, [1902] P. 92.

(*x*) (1902) 87 L. T. 146.

(*y*) See *Boughton* v. *Knight*, (1873) 3 P. & D. 64.

(*z*) *Sutton* v. *Drax*, (1815) 2 Phill. 323; *Williams* v. *Goude*, (1828) 1 Hagg. at p. 610; *Thorne* v. *Rooke*, (1841) 2 Curt. at p. 830.

(*a*) *Bewsher* v. *Williams*, (1861) 3 S. & T. 62; see *post*, p. 705.

(*b*) *Bremer* v. *Freeman*, (1856) Dea. & Sw. at p. 258; *Wilkinson* v. *Corfield*, (1881) 6 P. D. 27.

thus occasioned the suit, the Court refused to allow him his costs out of the estate (*c*).

SUB-SECTION 3.—*Persons who successfully oppose Probate.*

Persons who successfully oppose probate entitled to their costs.

A will may be successfully opposed either by the next of kin of the deceased, who establish an intestacy, or by the executor or beneficiaries under an earlier or later will which is, in the event, established.

In either case the successful litigant, on becoming the legal personal representative of the deceased, is entitled to recoup himself out of the estate for his expenses, and also to proceed against his unsuccessful opponent, provided the latter has been condemned in costs.

Where a will is set aside at the instance of a person who has no title to be constituted the legal personal representative of the deceased, a distinction appears to exist between cases in which the unsuccessful litigant has, and has not, been condemned in costs. In the latter case the successful litigant may be allowed his costs out of the estate (*d*); in the former he must rely on the party who has been condemned in costs for payment (*e*).

SUB-SECTION 4.—*Next of Kin and others who put the Executor of a Will to Proof in Solemn Form.*

By the practice of the Prerogative Court next of kin, etc., were entitled to

"By the practice of the Prerogative Court, the next of kin (*f*), a creditor who had obtained a grant of administration (*g*), or an executor under a former will (*h*), had a right to call upon the executor to prove the will in solemn form, without being

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(*c*) *Headington* v. *Holloway*, (1830) 3 Hagg. 280.

(*d*) *Critchell* v. *Critchell*, (1863) 3 S. & T. 41; *Bewsher* v. *Williams*, (1861) 3 S. & T. 62; and see *Dyke* v. *Williams*, (1871) 2 P. & D. 239.

(*e*) *Nash* v. *Yelloly*, (1862) 3 S. & T. 59. But see *Cross* v. *Cross*, (1864) 3 S. & T. at p. 300.

(*f*) Wms. on Exors., p. 290, citing 1 Oughton, tit. 6, s. 7; *Reeves* v. *Freeling*, (1812) 2 Phill. 56; *Urquhart* v. *Fricker*, (1826) 3 Add. at p. 57.

(*g*) *Ibid.*, citing *Dabbs* v. *Chisman*, (1810) 1 Phill. at pp. 159, 160. *Secus* a creditor who has not obtained administration: he may not deny an interest or oppose a will: *vide ante*, p. 334.

(*h*) *Mansfield* v. *Shaw*, (1818) 3 Phill. 22; *Boston* v. *Fox*, (1860) 4 S. & T. 199; *Seaton* v. *Sturch*, (1860) 29 L. J. P. 195.

call upon the executor to prove in solemn form without being liable for costs.

liable for costs, provided they did not do so vexatiously (*i*). If they exercised this right vexatiously, or pleaded or attempted to set up a case of fraud which they were not justified by the evidence in doing, they were liable to be condemned in costs (*k*).

This right did not extend to a legatee under a former will,

"This right, however, did not extend to a legatee under a former will" (*l*).

nor to actions to revoke probate.

Again, if these persons put the executor on proof *after* he had taken probate in common form, they did so at the risk of being condemned in costs (*m*).

Practice of the Prerogative Court continued in Court of Probate.

This practice was continued in the Court of Probate by Rule 5, C. B., which provides that "next of kin and others who previously to the passing of the said Act" (*i.e.*, the Court of Probate Act, 1857) "had a right to put executors or parties entitled to administration with the will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore."

Rule 41, C. B. Notice of intention merely to cross-examine witnesses produced in support of will.

Rule 41, C. B., provided: "In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court."

Re-enacted by Order XXI., r. 18, R. S. C.

This rule was re-enacted, with some immaterial alterations, by Order XXI., r. 18, R. S. C. 1883; and under these rules it was held that the Court had no jurisdiction to condemn in costs a party who opposed probate of a will, and had given notice of his intention merely to cross-examine the witnesses

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(*i*) Wms. on Exors., p. 290, citing *Urquhart* v. *Fricker,* (1826) 3 Add. at p. 57; *Bell* v. *Armstrong,* (1822) 1 Add. at p. 375; *Wagner* v. *Mears,* (1829) 2 Hagg. 524.

(*k*) See *Constable* v. *Tufnell,* (1833) 4 Hagg. at p. 508.

(*l*) Wms. on Exors., p. 290; *Urquhart* v. *Fricker,* cited *supra; Hockley* v. *Wyatt,* (1882) 7 P. D. 239.

(*m*) Wms. on Exors., p. 290; *Bell* v. *Armstrong,* (1822) 1 Add. at p. 375.

called in support of the will, even though he had no reasonable ground for his opposition (*n*).

In the year 1898, Order XXI., r. 18, amended.

But the discretion of the Court as to costs, when a notice of this character has been delivered, was restored in 1898, when Order XXI., r. 18, was amended. The rule now reads as follows :—

"In probate actions the party opposing a will may, with his defence, give notice (App. VII., Form 150A) to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side, *unless the judge shall be of opinion that there was no reasonable ground for opposing the will.*"

Effect of amended rule.

Under the rule as amended the question is whether the defendants have reasonable grounds for opposing the will. If they have not, they will be condemned in costs (*o*).

Notice under Order XXI., r. 18, cannot be given by a person who asks for revocation of probate,

The rule must be construed in accordance with the principles which guided the old Ecclesiastical Courts and afterwards the Probate Court (*p*). Accordingly it has been held that the rule applies only to the case of a party opposing a will which another party is seeking to prove in solemn form; it does not apply to the case of a party who asks for revocation of probate (*q*).

or by a legatee under an earlier will,

Nor can a legatee under an earlier will avail himself of the protection afforded by this rule, for, by the practice of the Prerogative Court, the privilege of putting an executor to proof in solemn form without liability as to costs did not extend to a legatee under a previous will (*r*).

or by a defendant who pleads undue influence or fraud.

A defendant may plead undue execution, incapacity, and want of knowledge and approval, and still avail himself of the

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(*n*) *Leigh* v. *Green*, [1892] P. 17; *Tappenden* v. *Lucas*, (1892) 65 L. T. 684.

(*o*) *Spicer* v. *Spicer*, [1899] P. 38; *Perry* v. *Dixon*, (1899) 80 L. T. 297; even though the defendant is a trustee and is protecting the interests of the *cestuis que trustent* : *ibid.* But see, as to the position of the Official Solicitor, *post*, p. 701.

(*p*) *Tomalin* v. *Smart*, [1904] P. 141.

(*q*) *Ibid.* See *Beale* v. *Beale*, (1874) 3 P. & D. 179; *Leigh* v. *Green*, [1892] P. 17.

(*r*) *Hockley* v. *Wyatt*, (1882) 7 P. D. 239.

protection of this rule, for the burden of proving the affirmative of these issues is upon the person who propounds the will, and to question these is still merely to require proof in solemn form (*s*). It is open to question whether the rule applies to any case in which matters are pleaded, the burden of proof whereof lies upon the party who opposes the will (*t*); and it has been held that the rule affords no protection to a party who pleads undue influence or fraud (*u*).

Order XXI., r. 18, applies to trials by jury.

The rule applies whether there be a jury or not, and whatever be the verdict of the jury (*x*).

Notice under the rule must be delivered with the defence, and may be conditional.

The notice under the rule must be delivered with the defence (*y*); a conditional notice, that, if both the attesting witnesses are produced, the parties opposing the will intend only to cross-examine them, has been held sufficient (*z*).

In what cases next of kin, etc., who unsuccessfully oppose probate, will be allowed costs out of the estate.

Next of kin, executors of a former will, and creditors who have obtained a grant of administration, who unsuccessfully oppose probate, will, it should seem, be allowed their costs out of the estate only in cases which fall within the first or second of the propositions previously adverted to (*a*).

SUB-SECTION 5.—*Interveners and Parties cited.*

Costs of interveners and parties cited.

Only one set of costs allowed unless there was sufficient divergence of interest to

It is the practice of the Court to allow only one set of costs (*b*). Where, therefore, a party cited enters an appearance and pleads in a suit, he will not, as a general rule, be allowed his costs even if successful (*c*), unless there is such a divergence between his interests and those of the original defendants or plaintiffs as to justify his delivering a separate

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(*s*) *Cleare* v. *Cleare*, (1869) 1 P. & D. 655.

(*t*) *Ibid.* at p. 658.

(*u*) *Ireland* v. *Rendall*, (1866) 1 P. & D. 194; *Harrington* v. *Bowyer*, (1871) 2 P. & D. 264.

(*x*) *Davies* v. *Jones*, [1899] P. at p. 164.

(*y*) *Bone* v. *Whittle*, (1866) 1 P. & D. 249.

(*z*) *Leeman* v. *George*, (1868) 1 P. & D. 542.

(*a*) *Ante*, pp. 687—690. The tendency of modern decisions seems to be to place such persons, originally the favourites of the Court, in no better position as regards costs than any other litigant: see *Davies* v. *Jones*, [1899] P. at p. 163.

(*b*) *Tennant* v. *Cross*, (1886) 12 P. D. 4; *Bagshaw* v. *Pimm*, [1900] P. 148.

(*c*) *Twist* v. *Tye*, [1902] P. at p. 98; *Shawe* v. *Marshall*, (1858) 1 S. & T. 129.

defence or statement of claim, and being separately represented at the hearing (*d*). If the interests of a party cited are already represented in the suit, his reasonable course is to support the side which represents his interests, so that the case may be fought as a whole (*e*).

justify parties being separately represented.

The same rules apply with even greater force to a person who intervenes in a suit on his own initiative.

Intervener charged with undue influence.

Where an intervener had been cited to appear by the defendants, the unsuccessful parties, and had been charged by them with procuring the will by undue influence, the Court, in pronouncing for the will, condemned the defendants in the costs of the intervener as well as those of the executors (*f*).

Party cited who does not appear may be condemned in costs.

The Court has power to condemn a party who has been cited, but who has not appeared, in the costs of a testamentary suit (*g*).

SUB-SECTION 6.—*Heir-at-law.*

Position of the heir-at-law as to costs before the Land Transfer Act, 1897;

Before the Land Transfer Act, 1897, the heir-at-law was not bound by the result of a probate action unless cited to see proceedings under sect. 61 of the Court of Probate Act, 1857. If he was not cited, he was not bound to appear, and might stand aside; and, after the parties interested in the personalty had completed their litigation, he might have the whole matter tried over again. It was therefore held that the heir-at-law who intervened in a suit, although not cited, was entitled to his costs if successful, for had he stood by and afterwards taken other proceedings, he would have obtained an order for costs (*h*).

But an heir-at-law who had been cited to see proceedings was so much in the same position as the next of kin, that, in deciding the question of costs, the Court applied the same

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(*d*) *Bagshaw* v. *Pimm*, [1900] P. 148; *e.g.*, where an intervener is interested under alterations appearing upon the will, which are propounded by neither of the original parties: *Burgoyne* v. *Showler*, (1844) 1 Rob. at p. 13; or where he alone propounds a will or codicil: *Cross* v. *Cross*, (1864) 3 S. & T. 292; *Jenner* v. *Ffinch*, (1879) 5 P. D. 106.

(*e*) *Twist* v. *Tye*, [1902] P. at p. 98; *Colvin* v. *Fraser*, (1829) 2 Hagg. at p. 368.

(*f*) *Tennant* v. *Cross*, (1886) 12 P. D. 4.

(*g*) *Foster* v. *Foster*, (1823) 1 Add. 462; *King* v. *Gillard*, (1867) 1 P. & D. 539.

(*h*) *Rayson* v. *Parton*, (1869) 2 P. & D. 38.

principles in both cases, holding that an heir-at-law was liable to costs to the same extent as were the next of kin, according to the practice of the Prerogative Court (*i*).

since the Land Transfer Act, 1897.

A considerable change was effected in the position of the heir-at-law by the Land Transfer Act, 1897. His position is now practically that of the next of kin; and if he intervenes in a suit, pleads, and is separately represented, he will be allowed a separate set of costs, if successful, only in cases where his interests are so divergent from those of the original defendants that he could not have joined in supporting the latter, and so fought the case as a whole (*k*).

SUB-SECTION 7.—*Married Woman.*

Security for costs.

Since the Married Women's Property Act, 1882, married women suing as plaintiffs without their husbands being joined are not liable to give security for costs (*l*).

Married woman having general separate estate.

The Probate Division has a discretionary power to condemn in costs a married woman having general separate estate (*m*).

If a married woman "institutes" proceedings, costs may be ordered to be paid out of property subject to a restraint on anticipation.

The Married Women's Property Act, 1893, s. 2, enacts: "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

What amounts to the "institution" of proceedings.

A summons by a married woman for leave to intervene in a pending probate action, for the purpose of asserting her independent interest in the subject-matter, is a "proceeding instituted" by her within this section, and therefore the Court has jurisdiction to order the costs of the action, as from the

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(*i*) *Fyson* v. *Westrope,* (1859) 1 S. & T. at p. 282.

(*k*) *Twist* v. *Tye,* [1902] P. at p. 98.

(*l*) *Threlfall* v. *Wilson,* (1883) 8 P. D. 18.

(*m*) *Morris* v. *Freeman,* (1878) 3 P. D. 65; see *Clarkson* v. *Waterhouse,* (1860) 2 S. & T. 378; *Thomas* v. *Crowther,* (1861) 2 S. & T. 501; *Parker* v. *Hick,* (1864) 3 S. & T. 436.

date of the summons to intervene, to be paid out of her separate property, including property subject to a restraint on anticipation (*n*). But a married woman who enters a caveat in respect of a will, and enters an appearance in answer to the warning, and is subsequently made defendant to the action by a writ of summons issued by the plaintiff propounding the will, does not "institute proceedings" within the meaning of this section. Proceedings in a probate action are "instituted," within the meaning of the Act of 1893, by the issue of the writ by the plaintiff, and not by the entry of the caveat or the appearance of the caveator in answer to the warning (*o*).

SUB-SECTION 8.—*Other Persons.*

Pauper who omits to proceed to trial.

Paupers.—Rule 25, C. B., provides that where a pauper omits to proceed to trial, pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid.

Pauper may be condemned in costs.

The Court has power to condemn a person suing *in formâ pauperis* in the costs of the suit, but may, in its discretion, direct the taxation to be suspended, and allow the decree to be enforced only if the pauper subsequently succeeds to property (*p*).

King's Proctor.

King's Proctor.—It has been held that the Court has no authority to condemn the King's Proctor, who unsuccessfully contests a will on behalf of the Crown, in the costs of the litigation (*q*).

Official solicitor.

Official Solicitor.—The position as to costs of the official solicitor who has been appointed guardian *ad litem* is regulated by Order LXV., r. 13 (*r*).

(*n*) *Crickitt* v. *Crickitt,* [1902] P. 177.

(*o*) *Moran* v. *Place,* [1896] P. 214, C. A.

(*p*) *Filewood* v. *Cousens,* (1822) 1 Add. 286; *Lemann* v. *Bonsall,* (1823) 1 Add. at p. 399; *Wagner* v. *Mears,* (1829) 2 Hagg. at p. 531; *Rind* v. *Davies,* (1833) 4 Hagg. 394; *Carless* v. *Thompson,* (1858) 1 S. & T. 21.

(*q*) *Atkinson* v. *H. M. Proctor,* (1871) 2 P. & D. 255.

(*r*) See *White* v. *Duvernay,* [1891] P. 290; *Gill* v. *Gill,* [1909] P. at p. 163.

Section 3.

APPORTIONMENT OF COSTS.

Costs in probate actions directed to be paid out of particular part of estate.

Order LXV., r. 14D, provides: "In any probate action in which it is ordered that any costs shall be paid out of the estate, the judge making such order may direct out of what portion or portions of the estate such costs shall be paid, and such costs shall be paid accordingly."

Under this rule the Court ordered the costs of both plaintiff and defendant to be charged on and paid out of the corpus of certain real estate, devised by the will to successive life tenants (*s*); and, in another case, to be paid out of the residuary shares of four defendants, there being six in all interested under the will in the residuary estate of the testator, these four defendants being held to have caused the litigation (*t*).

Costs to be paid out of real estate.

It was at one time held that the Court had no jurisdiction to order costs to be paid out of real estate (*u*); but it has been held that the Probate Division has acquired jurisdiction over real estate by virtue of Part I. of the Land Transfer Act, 1897: it is therefore open to the Court, under Order LXV., r. 14D, to distinguish between various portions of the estate—*e.g.*, between realty and personalty—and to impose costs accordingly (*x*). If the Court makes no such distinction, but merely orders costs out of the estate, the costs are payable out of the entirety of the estate in due order of administration; and if the personal estate is insufficient, the real estate of the deceased must bear the costs (*x*).

Costs where issues are found distributively.

When issues are found distributively, the Court may condemn the unsuccessful party in the costs of those issues alone upon which he failed, but only, it seems, in a case in which the exact amount of costs caused by those issues, as distin-

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(*s*) *Dean* v. *Bulmer*, [1905] P. 1.

(*t*) *Harrington* v. *Butt*, [1905] P. 3, n.

(*u*) *Young* v. *Dendy*, (1867) 1 P. & D. 344; *semble*, even if the personal estate was insufficient: *Davies* v. *Reynolds*, (1873) 3 P. & D. 90; unless by consent: *Smith* v. *Hopkinson*, (1878) 4 P. D. 84.

(*x*) *Vickerstaff* v. *Chadwick*, [1906] 1 Ch. 762; see *Brisco* v. *Baillie Hamilton*, [1902] P. at p. 238.

guished from the issues upon which he was successful, can be ascertained on taxation (*y*).

Section 4.

SECURITY FOR COSTS.

Security for costs.

The question of giving security for costs in the Probate Division is governed by the same rules as apply at common law (*z*). These rules are fully dealt with in the notes to Order LXV., rr. 6 and 6A, in the Annual Practice, and the cases there cited. It should, however, be observed that, on the question of the immunity of a *defendant* from giving security for costs, the substantial, and not the nominal position of defendant and plaintiff respectively in the suit should be considered; as in certain cases in the Probate Division the nominal position of plaintiff or defendant depends on the mode in which the cause commenced (*a*).

Amount of security.

Order LXV., r. 6, provides: "In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the Court or a judge shall direct."

Security for costs by plaintiff temporarily within jurisdiction.

By Order LXV., r. 6A, "a plaintiff ordinarily resident without the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction."

Section 5.

TAXATION OF COSTS.

Application of former practice.

Order LXV., r. 27 (37), provides: "The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the principal Act, shall, *in so far as they are not inconsistent*

(*y*) *Rayson* v. *Parton,* (1869) 2 P. & D. 38; and see *Fyson* v. *Westrope,* (1859) 1 S. & T. at p. 283; *Smith* v. *Atkins,* (1870) 2 P. & D. 169.

(*z*) Wms. on Exors., p. 289, citing *Robson* v. *Robson,* (1864) 3 S. & T. 568.

(*a*) Wms. on Exors., p. 289, citing *Robson* v. *Robson, ubi supra;* and see *Brandreth* v. *Brandreth,* (1862) 2 S. & T. 446.

with the principal Act and these rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal. But the taxing masters shall have power to revise and regulate the practice in regard to taxation of costs, and to the allowance of fees so as to assimilate the allowances for costs, and to secure uniformity upon all taxations so far as may be practicable and expedient."

Costs in contentious business regulated by Order LXV. and Appendix N to the Rules of the Supreme Court.

The taxation of costs in probate actions is therefore regulated by Order LXV., and Appendix N to the Rules of the Supreme Court, and only in particulars upon which they are silent by the table of costs to be allowed to solicitors in contentious business (*post*, pp. 989—993).

Practice on taxation.

Practice on Taxation (*b*).—The bill of costs is filed in the Contentious Department at the registry. If there are several sets of costs to be taxed relating to the same action, all should be filed at the same time, or notice given to the filing clerk that there are other costs to be filed. No order to tax need be produced, nor need any vouchers or briefs be left when the bill is filed (Rule 92, C. B.).

Notice of appointment to tax is sent from the registry to the applicant's solicitor, who must give notice forthwith to the other side, delivering at the same time a copy of the bill (Rule 93, C. B.). At least one clear day's notice must be given (Order LXV., r. 16).

Taxation.—Receipts for all payments and vouchers for counsel's fees, together with briefs and other necessary papers, should be brought.

As to the absence of some of the parties, see Rule 94, C. B.

Objections.

Objections (*c*).—Objections must be drawn in three columns: (1) the item objected to; (2) nature of the objection; (3) a blank column for the registrar's observations. The objections are filed in the Contentious Department, and the registrar will send notice of appointment, if he desires to hear the parties on the objections. Either party may take out a summons before

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(*b*) See note to Order LXV., r. 26A, in the Annual Practice.

(*c*) See Order LXV., r. 39.

the judge to review the taxation, if objection has first been made to the registrar and disallowed.

Review of taxation.

In a testamentary suit a compromise was effected, which included a fixed sum to be paid to the defendant's attorney for his agreed costs. This sum was paid to him. It was held that the Court could not afterwards allow his bill to be taxed on the application of his client (*d*).

Section 6.

MISCELLANEOUS.

Delay in applying for costs.

A claim for costs ought to be put forward at the trial. Where, after a lapse of nine years, the Court was moved to order the costs of a successful litigant to be paid out of the estate, it was held that after such a lapse of time, and having regard to the altered status of the parties, such an application ought not to be granted, although the Court would have made the order if applied to at the trial (*e*).

In *Bewsher* v. *Williams* (*f*) the Court gave judgment and pronounced for a will, and refused to make any order as to costs. Some weeks subsequently the Court was moved to direct that the costs of the legatee who propounded the will should be paid out of the estate. Sir C. Cresswell took time to consider whether he had power to vary the decree already made in the cause, but subsequently granted the motion (*g*).

Condemnation in costs includes all charges of administrator *pendente lite.*

In a testamentary suit, condemnation in costs includes all the charges of an administrator or receiver pending suit (*h*), from the date of his appointment until the dismissal of an appeal, if any (*i*).

Administration (will) not made conditional on

When administration with the will annexed was granted to the testator's next of kin, who had been condemned in the costs of his unsuccessful opposition to the will, the Court refused to

(*d*) *Holditch* v. *Carter,* (1873) 3 P. & D. 115.

(*e*) *Dyke* v. *Williams,* (1871) 2 P. & D. 239.

(*f*) (1861) 3 S. & T. 62.

(*g*) As to the power of a judge to vary an order, see Order XXVIII., r. 11; in a case of this kind a supplemental order would now probably be made.

(*h*) *Fisher* v. *Fisher,* (1879) 4 P. D. 231.

(*i*) *Taylor* v. *Taylor,* (1881) 6 P. D. 29.

payment of costs of unsuccessful opposition to the will.

make the grant conditional on the payment by him of these costs, on the ground that such an order might delay the payment of legacies to legatees who were not parties to the litigation (*k*).

Order to pay costs of fixed amount can be enforced in King's Bench Division.

An order of the Probate Division to pay costs of a fixed amount can be enforced by specially endorsed writ in the King's Bench Division (*l*), as well as by the usual modes of enforcing an order for costs (*m*).

(*k*) *Sawbridge* v. *Hill*, (1871) 2 P. & D. 219.

(*l*) *Norton* v. *Gregory*, (1895) 73 L. T. 10.

(*m*) *Vide ante*, pp. 550—552 ; and see Rules 130, 131, C. B. For form of order for payment of costs see *post*, p. 1130.

CHAPTER XV.

TIME-TABLE.

The following table, in which the various times fixed for proceedings are arranged in alphabetical order, has been adapted to the practice in the Probate Division from the table in the Diary for Lawyers (*a*). At the end of the time-table will be found a table of the time to be limited for entering appearance, after service out of the jurisdiction of a writ or notice of a writ.

Admissions of Facts.

Notice to admit. Any party may call on any other party to admit for the purposes of the cause, matter, or issue only, any specific fact or facts	at any time not later than *nine days* before the day for which notice of trial has been given (O. 32, r. 4).
Admissions to be made in pursuance of such notice	within *six days* after service thereof (*ib.*).

Affidavit of Scripts. *See* "SCRIPTS."

Amendment. *See* "PLEADINGS, AMENDMENT."

Appeals.

1. To HOUSE OF LORDS—	
From decree, order, judgment, or interlocutor	*one year* from date thereof, or, if several, from the date of the last (H. L. Standing Order as to Appeals on or after November 1st, 1876).
In case person entitled to appeal is under twenty-one years of age, or covert, or *non compos mentis*, or imprisoned, or out of the United Kingdom,	within *one year* after full age, or discoverture, or becoming of sound mind, or enlargement out of prison, or coming into Great Britain, but in no case more than five years from date of last decree, etc., appealed from (*ib.*).
2. To COURT OF APPEAL—	
(a) From refusal of *ex parte* application by the Court below	within *four days* from the date of such refusal, or within such enlarged time as a judge of the Court below or of the Court of Appeal may allow (O. 58, r. 10).
(b) From an interlocutory order, or from a final order made in a matter not being an action, or from any order made in chambers,	within *fourteen days* unless time enlarged by Court of Appeal (O. 58, r. 15; Judicature Act, 1894, s. 1, sub-s. 4).

(*a*) Published by Messrs. Sweet & Maxwell. The writer has to acknowledge the publishers' courtesy in allowing him to use the proof-sheets of this publication.

Appeals—*continued.*

The time is to be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal (O. 58, r. 15, as amended by rules of November, 1893).

(c) From final or interlocutory judgment (including motion for new trial of an action tried by a judge without a jury) or final order in an action must be brought	within *three months* unless time enlarged by Court of Appeal (O. 58, r. 15).

The time is to be calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application or dismissal at the trial, from the date of such refusal or dismissal (O. 58, r. 15; and *International, etc., Society* v. *City of Moscow Gas Co.*, 7 Ch. D. 241).

(d) Notice of appeal from interlocutory orders,	*four days*' notice (O. 58, r. 3).
(e) Notice of appeal from a final order or a final or interlocutory judgment,	*fourteen days*' notice (O. 58, r. 3).
(f) Cross appeals. Where a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, he must give notice to any party who would be affected thereby—	
(i.) In the case of an appeal from an interlocutory order	*two days*' notice (O. 58, r. 7).
(ii.) In the case of an appeal from a final judgment	*eight days*' notice (O. 58, r. 7).
(g) New trial, *see* "NEW TRIAL," *infra*, p. 714.	
3. TO DIVISIONAL COURT—	
(a) From County Courts and other inferior Courts. Such appeals are by notice of motion, to be served and the appeal entered (NOTE.—The notice of motion is an *eight days*' notice (O. 59, r. 10)).	within *twenty-one days* from the date of the judgment, order, or finding complained of, such period to be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or from the time at which the finding or any refusal is made or given (O. 59, r. 12).
4. TO JUDGE IN CHAMBERS FROM REGISTRAR.	
By indorsement of summons by the registrar at the request of any party or by notice in writing to attend before the judge (NOTE. — Between service of notice of appeal and the day of hearing there must be at least *one clear day* (O. 54, r. 21).)	within *five days* after the decision complained of (O. 54, r. 21).

Appearance.

Appearance to citation to accept or refuse a grant or to propound a will to be entered in the principal registry—	

Appearance—*continued.*

(i.) If citation served personally	within *eight days* of service, exclusive of Sunday, Christmas Day, and Good Friday (Rule 87, N.-C. B.).
(ii.) If served by advertisement	within *one month* of last advertisement
(iii.) If served abroad	within the time limited in the citation (fixed by the registrar).
Appearance to citation to see proceedings to be entered at the Central Office, Royal Courts of Justice,	at any time during the dependence of the action and before final judgment.
Appearance to warning of caveat to be entered in the registry	within *six days* of service.

Appearance to Writ of Summons.

The time limited for appearance in the writ is	*eight days* from service, inclusive of the day of such service, where defendant resides within the jurisdiction (R. S. C., App. A, Part I., No. 1; App. K, No. 1a); in the case of a writ where the defendant is not within the jurisdiction the time for appearance is fixed by the order giving leave to serve the writ.
A defendant may appear at any time	before judgment, although the time limited for appearance has expired (O. 12, r. 22).
Notice of appearance must be given by defendant	on the day on which the appearance is entered (O. 12, r. 9).

Appearance, Default of. *See* "GUARDIAN *AD LITEM*."

Attachment of Debts.

Order *nisi* must be served on the garnishee or his solicitor and, unless otherwise ordered, on the judgment debtor or his solicitor	at least *seven days* before the hearing (O. 45, r. 1, as amended by R. S. C., June, 1905).

Caveats.

A caveat shall remain in force	for the space of *six months* from the day of entry (Rule 60, N.-C. B.)
A caveat may be subducted—	(1) at any time before warning issued; (2) after warning has issued (a) at any time before service of warning (on affidavit of non-service); (b) within *six days* of entry of warning (*vide ante*, p. 517).

Change of Parties by Death, etc. *See* "PARTIES."

Charging Order.

If a judgment debtor is interested in any stock standing in the name of any company or in any stock or funds in court standing in the name of the Paymaster-General, the Court or a judge, upon the *ex parte* application of the judgment creditor, may order the judgment debtor to show cause why the	

Charging Order—*continued.*

stock or funds shall not be charged with payment of the judgment debt and interest, and upon the making of the order the stock, etc., shall stand charged: Provided that no proceedings shall be taken to have the benefit of the charge	until after the expiration of *six calendar months* from the date of such order (O. 46, r. 2; and see 1 & 2 Vict. c. 110, ss. 14 and 15; 3 & 4 Vict. c. 82, s. 1).
No transfer of any stock the subject of a charging order *nisi* shall be made	until the order is made absolute (O. 46, r. 3).

Citations. *See* "APPEARANCE."

Citation to bring in Grant.

Grant must be lodged at the Contentious Department of the registry	within *eight days* of service of citation.

Claim, Statement of. *See* "PLEADINGS."

Committal Order.

A committal order under the Debtors Act, 1869, bears date on the day on which such order was made, and continues in force	for *one year* from such date (O. 42, r. 25).

(NOTE.—A committal order may be renewed in the manner provided for writs of execution by O. 42, r. 20 (O. 42, r. 25).)

Concurrent Writ. *See* "WRIT OF SUMMONS."

Costs Taxation.

Notice of taxation to be	a *one day's* notice (O. 65, r. 16).
If any of the parties to be heard on the taxation do not attend at the time appointed, the registrar may proceed to tax the bill	after the expiration of a quarter of an hour (Rule 94, C. B.).
Review of taxation after certificate or *allocatur* signed may be obtained by application to the judge in chambers on summons	within *fourteen days* from the date of the certificate or *allocatur* (O. 65, r. 27 (41)).

Counterclaim. *See* "PLEADINGS."

Death of Party. *See* "PARTY."

Default of Appearance. *See* "GUARDIAN *AD LITEM.*"

Defence. *See* "PLEADINGS."

Directions, Summons for. *See* "SUMMONS FOR DIRECTIONS."

Discontinuance.

Summons to discontinue proceedings by consent may be taken out	at any time up to trial (see p. 542).

Discovery and Inspection.

1. DISCOVERY BY INTERROGATORIES—	
(a) Delivery. In any cause or matter interrogatories may, by leave of the Court or a judge, be delivered to the opposite party— (NOTE.—Leave to deliver interrogatories is now necessary in all cases.)	(i.) by the plaintiff at any time after delivering his statement of claim ; (ii.) by the defendant at or after the time of delivering his defence (O. 31, r. 1).
(b) Answer. Affidavit in answer to interrogatories to be filed	within *ten days*, or within such other time as a judge may allow (O. 31, r. 8).
(c) Striking out. An application to strike out interrogatories may be made	within *seven days* after service of the interrogatories (O. 31, r. 7).
2. DISCOVERY BY AFFIDAVIT OF DOCUMENTS—	*ten days* from service, after defence if any, of receipt for payment into court. This time is not fixed by rule, but is the ordinary time in practice unless otherwise ordered.

3. PRODUCTION AND INSPECTION OF DOCUMENTS—

(a) Notice to produce. Either party to a cause or matter may *at any time* give notice to any other party in whose pleadings or affidavits reference is made to any document to produce such document for inspection (O. 31, r. 15).

(*b*) Time for inspection. The party to whom such notice is given shall—	(a) if all the documents referred to in such notice have been set forth in the affidavit of documents, within *two days* from the receipt of such notice ; (b) or if any of the documents referred to in such notice have not been set forth in the affidavit of documents, then within *four days* from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which such documents as he does not object to produce may be inspected at the office of his solicitors, or in the case of bankers' books or other account books in constant use, at their usual place of custody, and stating which, if any, of the documents he objects to produce, and on what ground (O. 31, r. 17).

Distringas.

Effect of notice. Any person who claims to be interested in any stock standing in the books of a company may on affidavit filed in the Central Office give notice to the company that he is beneficially interested in such stock and the payment of dividends	until after a day specified in a notice in writing served by the company on the person so claiming to be beneficially interested (O. 46, r. 8), but the company is not authorised to refuse to permit the transfer or withhold payment of dividends for more than *eight days* after the request to

Distringas—*continued.*

thereon. The company on which such notice is served shall not permit such stock to be transferred or dividends thereon paid	transfer without order of the Court or a judge (O. 46, r. 10).

Divisional Court. *See* "APPEALS."

Documents. *See* "DISCOVERY AND INSPECTION."

Evidence.

1. BY AFFIDAVIT—

(a) Plaintiff's affidavits must be filed and a list thereof delivered to the defendant or his solicitor	within *fourteen days* after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon, or the Court or a judge may allow (O. 38, r. 25).
(b) Defendant's affidavits must be filed and a list thereof delivered to the plaintiff or his solicitor	within *fourteen days* after the delivery of plaintiff's list, or within such time as the parties may agree upon, or the Court or a judge may allow (O. 38, r. 26).
(c) Affidavits in reply must be filed by the plaintiff and a list thereof delivered to the defendant or his solicitor	within *seven days* after the expiration of the fourteen days or such other time as may be allowed to the defendant for the delivery of his list (O. 38, r. 27).
(d) Cross-examination of deponent. Notice to produce deponent for cross-examination may be served	at any time before the expiration of *fourteen days* next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a judge may specially appoint (O. 38, r. 28).

2. READING EVIDENCE TAKEN IN OTHER MATTERS—

(a) In *ex parte* applications evidence taken in another cause or matter may be read on *ex parte* applications by leave of the Court or a judge to be obtained	at the time of making any such application (O. 37, r. 3).
(b) In other cases the party desiring to use such evidence must give	*two days*' previous notice to the other parties of his intention to read such evidence (*ib.*).

3. EXAMINATIONS BEFORE EXAMINER OF THE COURT—

(a) Appointment. Upon the production of an order for an examination endorsed with his name the examiner shall give an appointment in writing	specifying the place and time (within not more than *seven days*) at which, subject to any application from the parties, the examination shall be taken (O. 37, r. 44).
(b) Notice of appointment. The party prosecuting such order shall give notice of the appointment to all parties	within *twenty-four hours*, or such shorter time (if any) as may be mentioned in the order (*ib.*).

Evidence—*continued.*

4. EVIDENCE TAKEN BEFORE ISSUE JOINED—

No affidavit or deposition filed or made before issue joined shall without special leave of the Court or a judge be received at the hearing or trial, unless notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf	within *one month* after issue joined or within such longer time as may be allowed by special leave of the Court or a judge (O. 37, r. 24).

Examiner of Court. *See* "EVIDENCE."

Execution.

A writ of execution may issue without leave	at any time within *six years* from the recovery of the judgment or the date of the order (O. 42, r. 22).
„ „ if unexecuted, shall remain in force	for *one year* from its issue (O. 42, r. 20).
„ „ if unexecuted, may be renewed	at any time before its expiration, by leave of the Court or a judge, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ (O. 42, r. 20).

Garnishee. *See* "ATTACHMENT OF DEBTS."

Guardian *ad litem.*

Appointment in default—

On default of appearance by defendant who is an infant or person of unsound mind, the plaintiff may apply for appointment of guardian *ad litem*, but no order shall be made on such an application unless notice thereof has been served on the infant or person of unsound mind in manner provided	after the expiration of time allowed for appearance, and at least *six clear days* before the day in such notice named for hearing the application (O. 13, r. 1).

Inspection. *See* "DISCOVERY AND INSPECTION."

Interrogatories. *See* "DISCOVERY AND INSPECTION."

Jurisdiction, Service of Writ out of. *See* "APPEARANCE."

Jury. *See* "NEW TRIAL" and "TRIAL."

Motions.

Between service of notice of motion and the day named in the notice for hearing the motion there must be	at least *two clear days* unless the judge give special leave to the contrary (O. 52, r. 5).
By leave of the Court or a judge, notice of motion may be served	with the writ of summons or at any time after service of the writ of summons and before the time limited for appearance (O. 52, r. 9).
All papers for motions on Mondays must be left in the Contentious Department of the registry	before 2 o'clock p.m. on the preceding Wednesday (Registrar's Direction).

Motion for New Trial. *See* "NEW TRIAL."

New Trial.

Notice of motion to Court of Appeal for new trial of an action tried *with a jury* must be served (NOTE.—A motion for new trial of an action tried *without* a jury is, for purposes of time, a motion of appeal within O. 58, r. 15. See "Appeals," 2 (c).)	within *ten days* after the trial, or where further consideration has been adjourned, within ten days after judgment has been given on such further consideration. The times of vacations do not count (O. 39, r. 4, as amended R. S. C., May, 1909). The notice of motion must be a fourteen days' notice (*ib.*).

Notice of Motion. *See* "MOTION."

Notice of Trial. *See* "TRIAL."

Notice to admit. *See* "ADMISSIONS OF FACTS."

Notice to inspect. *See* "DISCOVERY AND INSPECTION."

Notice to prove in Solemn Form.

Notice by party opposing will that he merely insists upon the will being proved in solemn form, and only intends to cross-examine the witnesses produced in support of the will, must be delivered	with the defence (O. 21, r. 18; *Bone* v. *Whittle*, 1 P. & D. 249).

Order to carry on Proceedings. *See* "PARTIES."

Particulars of Specific Instances of Delusion.

Where it is pleaded that the testator was not of sound mind, etc., particulars of any specific instances of delusion must be delivered	before the case is set down for trial (O. 19, r. 25A).

Parties.

Change of parties by death, etc.; order to carry on proceedings (O. 17, r. 4).	
An application to discharge or vary an order under O. 17, r. 4, may be made—	
(a) Where person served is under no disability other than coverture, or being under disability other than coverture, has a guardian *ad litem*,	at any time within *twelve days* from the service of the order (O. 17, r. 6).
(b) Where person served is under disability other than coverture and has no guardian *ad litem*,	at any time within *twelve days* from the appointment of a guardian *ad litem* for such party. Until such period of twelve days shall have expired the order shall have no force or effect as against the person served (O. 17, r. 7).
Appearance to be entered after service of order to carry on proceedings	within same time as after service of writ of summons (O. 17, r. 5).
Cause marked "Abated" in cause book to be struck out	after *one year*.

Pleadings, Delivery. *See also* "TIME."

1. GENERALLY—	
Time for pleading after delivery of particulars is	the same as at the return of the summons for particulars, unless the time is extended in the order for particulars (O. 19, r. 8).
Pleadings in the Long Vacation.	*See* "TIME."
2. STATEMENT OF CLAIM—	
In probate actions statements of claim, if any, must be delivered	within the time ordered in the summons for directions, or if no time is specified, within *six weeks* of appearance or of time limited for appearance (O. 20, r. 2).
3. DEFENCE AND COUNTERCLAIM—	
(a) The defendant must deliver his defence	within such time as may be fixed by the order for directions, or if no time fixed, within *ten days* from delivery of the statement of claim (O. 21, r. 8).
(b) After delivery of amended statement of claim	within original time for defence or within *eight days* from the delivery of the amendment, whichever shall be last (O. 28, r. 5), or within time fixed by order for directions, if any.
(c) After delivery of particulars	the same length of time as defendant had at the return of the summons for particulars (O. 19, r. 8).
4. REPLY AND SUBSEQUENT PLEADINGS—	
(a) Reply, if any, to defence or to defence and counterclaim must be delivered	within time specified in the order, or if no time specified, within *ten days* after the defence or the last of defences delivered (O. 23, r. 2).
(b) Reply to amended counterclaim	within the original time allowed for reply or within *eight days* from the delivery of the amendment, whichever shall be last (O. 28, r. 5).
(c) Further reply. Where any ground of reply to counterclaim arises after reply delivered or after the time limited for delivering has expired, plaintiff may deliver a further reply	within *eight days* after such ground has arisen, or at any subsequent time by leave of the Court or a judge (O. 24, r. 2, but see O. 23, r. 1).
(d) Subsequent pleadings or joinder of issue must be delivered	within the time specified in the order giving leave, or if none specified, then within *four days* after the delivery of the previous pleading (O. 23, r. 3).

Pleadings, Amendment.

1. STATEMENT OF CLAIM—	
(a) Amendment. A plaintiff may *without leave* amend his statement, whether endorsed on the writ or not,	once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared, or, where defence delivered, but no order for reply is made, within *ten days* from delivery of the defence or the last of the defences (O. 28, r. 2).

Pleadings, Amendment—*continued.*

(b) Disallowance of amendment under O. 28, r. 2. A defendant may apply to have an amendment made under O. 28, r. 2, or any part thereof, disallowed	within *eight days* after the delivery of the amended statement of claim (O. 28, r. 4).

2. COUNTERCLAIM—

(a) Amendment. A defendant who has set up a counterclaim may *without leave* amend his counterclaim	at any time before the expiration of the time allowed him for answering the reply and before such answer, or in case there be no reply, then at any time before the expiration of *twenty-eight days* from defence (O. 28, r. 3).
(b) Disallowance of amendment. The plaintiff may apply to have an amendment made under O. 28, r. 3, or any part thereof, disallowed	within *eight days* after the delivery of the amended counterclaim (O. 28, r. 3).

3. BY ORDER—

An amendment in pursuance of an order to be made	within the time limited by the order, or if no time is thereby limited, then within *fourteen days* from the date of the order. Such order to amend shall on the expiration of such limited time as aforesaid become void unless the time is extended (O. 28, r. 7).

Refresher Fees.

Refresher fees allowed according to scale	for every clear day beyond the first five hours during which the trial has lasted (O. 65, r. 27 (48)).

Renewal of Writ. *See* "WRIT OF SUMMONS."

Reply and Subsequent Pleadings. *See* "PLEADINGS."

Scripts. *See also* "SUBPŒNA."

Affidavits of scripts of all parties to be filed	within the time ordered on the summons for directions (*vide* p. 613).
Where action is undefended, plaintiff should file his affidavit of scripts	before the action is entered for trial.
Inspection of scripts by opposite party	not before the party's own affidavit of scripts has been filed (Rule 32, C. B.).

Service of Pleadings, Notices, Summons, etc. *See* "TIME."

Service of Writ. *See* "WRIT OF SUMMONS."

Specific Instances of Delusion. *See* "PARTICULARS."

Subduction of Caveat. *See* "CAVEAT."

Subpœna to bring in Scripts.

Scripts to be lodged in Record Keeper's Department in the registry	within *eight days* of service of subpœna (Rule 73, C. B., and form).

Summons.

Summons to be served	*one clear day* before the return thereof (Rule 100, C. B.; *Hopkinson* v. *Carter*, [1909] P. 118).
Summons for time only may be served	on the day previous to the return thereof (O. 54, r. 4E).
Appeal from Registrar.	*See* " APPEALS."

Summons for Directions.

(a) Plaintiff must issue a summons for directions	within *fourteen days* from entry of appearance and before taking any fresh step except application for injunction or receiver (O. 30, rr. 1, 8).
(b) If plaintiff fails to take out such summons, defendant may apply to dismiss	after the expiration of *fourteen days* from entry of appearance (O. 30, r. 8).
(c) Summons for directions is returnable	not less than *four days* after service (O. 30, r. 1A).
(d) Application subsequent to original summons by any party to be made by	*two clear days'* notice to the other party (O. 30, r. 5).

Time.

(a) Month, unless otherwise expressed, means	calendar month (O. 64, r. 1).
(b) Sunday, Christmas Day, and Good Friday not to be reckoned	in any limited time less than *six days* (O. 64, r. 2).
(c) Where time limited for proceeding expires on Sunday or other day when offices closed, such proceeding may be taken	on next day offices are open (O. 64, r. 3).
(d) In causes to be tried at autumn assizes, when commission day is prior to December 1st pleadings may be amended, delivered, or filed and summonses issued in Long Vacation	on and after October 1st (O. 64, r. 4).
(e) Long Vacation not to be reckoned (except as in (d), *supra*)	in computation of time for amending, delivering, or filing pleadings (O. 64, r. 5).
(f) Time limited for pleading not to include	day of service of order for security for costs or the time from that day until and including the day on which security is given (O. 64, r. 6).
(g) Time under these rules may be enlarged or abridged	by the Court or a judge (O. 64, r. 7).
(h) Time for amending, delivering, or filing pleadings, etc., may be enlarged	by consent in writing without order (O. 64, r. 8).
(i) Service of pleadings, notices, summonses, orders, rules, and other proceedings shall be effected	before the hour of six in the afternoon (O. 64, r. 11),
except on Saturday, when it shall be effected	before the hour of two in the afternoon (*ib.*).
Service effected after six shall be deemed to have been effected	on the following day (*ib.*),
except on Saturday, when service effected after two shall be deemed to have been effected	on the following Monday (*ib.*).

Time—*continued.*	
(j) Days not expressed to be clear days shall be reckoned	exclusively of the first day and inclusively of the last day (O. 64, r. 12).
(k) Where no proceeding for one year from last proceeding in any cause or matter, party who desires to proceed must give to other party	*one month's* notice of his intention to proceed (O. 64, r. 13).
Trial.	
1. NOTICE OF TRIAL—	
(a) Notice of trial may be given—	
(i.) By plaintiff:	with the reply, if any, whether it closes the pleadings or not, or where no order for a reply has been made, on the expiration of *four days* after defence, or the last of the defences has been delivered, or at any time after the issues of fact are ready for trial (O. 36, r. 11).
(ii.) By defendant:	where the plaintiff does not give notice of trial within *six weeks* after the time when he first becomes entitled to do so as above stated, or within time extended by order, the defendant may give notice of trial or apply to dismiss action (O. 36, r. 12).
(b) Avoidance of notice of trial. In London and Middlesex the notice of trial shall be no longer in force unless the trial shall be entered by one party or the other	within *six days* after notice of trial (O. 36, r. 16).
(c) Length of notice of trial—	
(i.) Ordinary notice	*ten days* (O. 36, r. 14).
(ii.) Short notice	*four days* (*ib.*).
2. ENTRY OF ACTION FOR TRIAL—	
(a) In London, Middlesex, Manchester or Liverpool	within *six days* after notice of trial (O. 36, r. 16). If the party giving the notice of trial omits to enter the trial on the day of, or day after giving notice, the party to whom notice has been given may, unless the notice has been countermanded, within *four days* enter the trial (O. 36, r. 20).
(b) Elsewhere than in London, Middlesex, Manchester, or Liverpool,	after notice of trial has been given, at any time not less than *seven days*, before the commission day (O. 36 r. 22B).
3. WITH JURY.	
An application for a trial with a jury may be made by either party	within *ten days* after notice of trial has been given (O. 36, r. 6).
4. WITH SPECIAL JURY—	
(a) By notice. Parties in any cause or matter in which they are entitled to a jury may have the	

Trial—*continued.*

issues tried by a special jury upon giving notice in writing to that effect—	
(i.) By the plaintiff	at the time when he gives notice of trial (O. 36, r. 7*b*).
(ii.) By the defendant	at any time after the close of the pleadings or settlement of the issues and before notice of trial, or if notice of trial has been given, then not less than *six clear days* before the day for which notice of trial has been given (O. 36, r. 7*c*).
(b) By order. An order for a special jury may be made	at any time (O. 36, r. 7*d*).

Vacation, Long. *See* "TIME."

Warning. *See* "APPEARANCE."

Writ of Summons.

Original writ in force	*twelve months* from the day of the date thereof, including the day of such date (O. 8, r. 1).
,, ,, to be served or renewed	within *twelve months* from the day of the date thereof, including the day of such date (O. 8, r. 1).
Renewed writ to be served or renewed	within *six months* from the date of the renewal, including the day of such date (O. 8, r. 1).
Concurrent writ may be issued	at any time during *twelve months* after issue of original writ (O. 6, r. 1).
,, ,, to be served	within *twelve months* after issue of original writ (O. 6, r. 1).
,, ,, in force	for the period during which the original writ is in force (O. 6, r. 1).
Endorsement of date of service to be made	within *three days* after such service (O. 9, r. 15).
Service out of jurisdiction.	*See* "APPEARANCE TO WRIT OF SUMMONS."

TIME TO BE LIMITED FOR ENTERING APPEARANCE AFTER SERVICE OUT OF THE JURISDICTION OF WRIT OR NOTICE OF WRIT.

"The time allowed for entering appearance after service out of the jurisdiction is, as a general rule, double the ordinary time it takes to reach the place where the defendant is, or probably may be found, and the first column of the table contains the approximate time occupied in course of post from London to the places mentioned in the second column.

"To the time allowed for appearing after service abroad, there has in all cases been added the eight days allowed for appearing after service within the jurisdiction, and when the place is difficult of access a slight further addition has been made.

"It will also generally be advisable to allow a certain area for service not limited to the actual place where the defendant is, or probably may be found, but in such cases care should be taken to allow sufficient further time to admit of service at the most distant point of that area ; *e.g.*, when the service is to be 'at Paris or elsewhere in the republic of France,' the time allowed for Nice, and not for Paris, should be inserted."

ORDER XI., RR. 4 AND 5.

TABLE OF TIME TO BE LIMITED FOR ENTERING APPEARANCE AFTER SERVICE OUT OF THE JURISDICTION OF WRIT OR NOTICE OF WRIT.

Postal Table of Time occupied.		NAME OF PLACE.	Days for Appearance.
D'ys	H'rs.		
11	—	Aden	30
		Africa :	
4	—	North Coast	16
17	—	West Coast	42
—	15	Amsterdam	10
15	—	Antigua	38
—	11	Antwerp	10
29	—	Argentine Republic	66
28	—	Ascension	64
5	—	Athens	20
39	—	Auckland (New Zealand), *viâ* San Francisco	88
16	—	Bahamas	40
18	—	Bahia	44
1	—	Bale	10
13	—	Barbadoes	34
1	18	Barcelona	14
32	—	Batavia	72
1	6	Bayonne	12
18	—	Belize (British Honduras), *viâ* New Orleans	46
1	2	Berlin	12
15	—	Bermuda, *viâ* Halifax	38
1	8	Berne	12
9	—	Beyrout	26
18	—	Bombay	44
—	22	Bordeaux	10
—	—	Borneo, North	90
1	2	Bremen	12
2	18	Brindisi	14
45	—	Brisbane	98
23	—	British Columbia	54
14	12	British Guiana	38
—	10	Brussels	10
2	—	Buda Pesth	12
20	—	Buenos Ayres	66
21	—	Bushire (Persian Gulf)	50
29	—	Busreh (Persian Gulf)	66
3	12	Cadiz	16
6	—	Cairo	20
21	—	Calcutta	50
41	—	Caldera, *viâ* Panama	90
32	—	Callao „	72
35	—	Cameroons (Africa)	78

Postal Table of Time occupied.		NAME OF PLACE.	Days for Appearance.
D'ys.	H'rs.		
24	—	Cape Coast Castle	56
21	—	Cape Town	50
24	—	Carthagena (Columbia)	56
—	—	Channel Islands	12
2	—	Christiania	14
40	—	Cobija	88
—	15	Cologne	10
20	—	Colombo (Ceylon)	48
21	—	Colon	50
43	—	Congo (Africa)	94
5	—	Constantinople, *viâ* Varna	24
8	—	„ „ Brindisi	
2	—	Copenhagen	14
42	—	Coquimbo, *viâ* Magellan	92
8	—	Cyprus	24
36	—	Delagoa Bay	80
14	12	Demerara	38
14	8	Dominica	38
1	12	Dresden	12
35	—	Falkland Islands	78
36	—	Fernando Po	80
44	—	Fiji	100
2	—	Florence	14
1	8	Frankfort-on-Maine	12
38	—	Gaboon (Africa)	84
1	4	Geneva	12
1	17	Genoa	12
4	—	Gibraltar	16
3	—	Goree (Africa)	36
14	—	Gothenburg	14
10	—	Grand Canary	28
14	—	Grenada	36
24	—	Grey Town	56
14	15	Guadaloupe	38
26	—	Guayaquil, *viâ* Panama	60
—	16	Hague, The	10
1	8	Hamburg	12
16	—	Havana	40
37	—	Hong Kong	82
24	—	Honolulu	56
10	—	Iceland	30
35	—	Inhambane (Africa)	78
1	10	Interlaken	12
38	—	Iquique, *viâ* Panama	84
—	—	Ireland	10

Postal Table of Time occupied.		Name of Place.	Days for Appearance.
D'ys.	H'rs.		
18	—	Jamaica	44
12	—	Jeddah (Arabia)	32
33	—	King George's Sound	74
21	—	Kurrachee	50
31	—	Lagos (Africa)	70
23	—	La Guayra	54
3	23	Lisbon	20
47	—	Loanda (Africa)	102
1	12	Lucerne	12
—	22	Lyons	10
5	—	Madeira	18
20	—	Madras	48
2	—	Madrid	14
3	12	Malaga	16
4	12	Malta	18
—	—	Man, Isle of	10
1	6	Marseilles	12
14	—	Martinique	36
20	—	Mauritius	48
40	—	Melbourne	88
1	12	Milan	14
35	—	Mollendo, *viâ* Panama	78
19	—	Monrovia (Africa)	46
26	—	Monte Video	60
15	—	Montserrat (West Indies)	38
3	12	Moscow	18
27	—	Moulmein	62
26	—	Mozambique, *viâ* Brindisi	60
1	16	Munich	14
24	—	Muscat	56
2	20	Naples	16
26	—	Natal	60
8	—	Newfoundland	24
10	—	New York	28
1	13	Nice	14
9	—	Nova Scotia (Halifax)	26
1	8	Nuremberg	12
3	20	Odessa	18
38	—	Old Calabar (Africa)	84
4	—	Oporto	16
22	—	Panama	52
—	10	Paris	10
28	—	Payta, *viâ* Panama	64
—	—	Pekin	142
26	—	Penang	60
16	—	Pernambuco	40
36	—	Perth (West Australia)	80
20	—	Point de Galle	48
16	—	Port-au-Prince	40
50	—	Port Darwin	108
15	—	Porto Rico (San Juan)	38
25	—	Puerto Cabello	58
33	—	Punta Arenas (Magellan)	74
10	—	Quebec	28
29	—	Quillimane (Africa)	66
25	—	Rangoon	58
2	15	Réunion	64
28	—	Riga	16
21	—	Rio de Janeiro	50
2	18	Rome	16
—	13	Rotterdam	10
34	—	Saïgon (Cochin China)	76
18	—	St. Helena	44
15	23	St. Kitts	40
13	13	St. Lucia	36
1	2	St. Nazaire (France)	12
3	—	St. Petersburg	16
16	12	St. Thomas	42
10	—	St. Vincent	28
13	12	St. Vincent (West Indies)	36
53	—	Samoa	114
16	—	San Francisco	40
27	—	Santa Martha (Colombia)	62
2	12	Santander	14
25	—	Santos (Brazil)	58
24	—	Savanilla	56
—	—	Scotland (mainland)	10
—	—	„ (islands)	14
18	—	Senegal	44
23	—	Seychelles	54
42	—	Shanghai	92
17	—	Sierra Leone	42
28	—	Singapore	64
3	10	Stockholm	16
1	—	Strassburg	10
1	6	Stuttgart	12
6	12	Suez	22
43	—	Sydney	94
9	—	Teneriffe	26
10	—	Tiflis (Caucasus)	28
3	—	Trieste	16
14	13	Trinidad	38
1	10	Turin	12
39	—	Valparaiso, *viâ* Magellan	94
43	—	Valparaiso, *viâ* Panama	
2	4	Venice	14
25	—	Vera Cruz	58
1	20	Vienna	14
3	—	Vigo	14
42	—	Wellington (New Zealand), *viâ* San Francisco	94
43	—	Yokohama	94
21	—	Zanzibar	50
1	6	Zurich	12

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APPENDIX I.

STATUTES.

NOTE.—*In many instances, only those sections of the various statutes which directly affect the practice of the Probate Division are quoted in this Appendix. Such portions of the various statutes as are printed in italics have been repealed.*

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PART I.—GENERAL.

STATUTE OF WESTMINSTER II., 1285.

(13 Edw. 1, stat. 1, c. 19.)

[A.D. 1285.]

The ordinary chargeable to pay the debts of an intestate.

19. Whereas after the death of a person dying intestate, which is bounden to some other for debt, the goods come to the ordinary to be disposed; the ordinary from henceforth shall be bound to answer the debts as far forth as the goods of the dead will extend, in such sort as the executors of the same party should have been bounden, if he had made a testament.

ADMINISTRATION UPON INTESTACY ACT, 1357.

(31 Edw. 3, stat. 1, c. 11.)

[A.D. 1357.]

The ordinary shall commit administration upon an intestacy.

The administrators shall have the same rights and charges as executors.

11. Item it is accorded and assented, that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the King's Court, for to administer and dispend for the soul of the dead; and shall answer also in the King's Court to other to whom the said dead person was holden and bound, in the same manner as executors shall answer; and they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come.

PROBATE AND ADMINISTRATION ACT, 1529.

(21 Hen. 8, c. 5.)

[A part of sec. 2.]

An Act concerning Fines and Sums of Money to be taken by the Ministers of Bishops and other Ordinaries of Holy Church for the Probate of Testaments.

[A.D. 1529.]

To what persons administration of effects of intestates, etc., shall be granted by ordinaries.

2. And in case any person die intestate, or that the executors named in any such testaments refuse to prove the said testament, then the said ordinary or other person or persons having authority to take probate of testaments as is above said, shall grant the administration of the goods of the testator or person deceased to the widow [of the same person deceased] or to the next of his kin or to both as by the discretion of the same ordinary shall be thought good, *taking surety of him or them to whom shall be made such commission for true administration of the goods, chattels, and debts which he or they shall be so authorised to minister* (*a*). And in case where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin where indeed divers persons [be] in equality of kindred as is aforesaid, that in every such case the ordinary be at his election and liberty to accept any one or more making request, where divers do require the administration; or where but one or more of them and not all being in equality of degree, [do] make request, then the ordinary to admit the widow and him or them only making request or any one of them at his pleasure.

STATUTE OF FRAUDS, 1677.

(29 Car. 2, c. 3.)

Secs. 5, 6, 19—24 (*b*).

An Act for Prevention of Frauds and Perjuries.

[A.D. 1677.]

Devises of land shall be in writing, and attested by three or four witnesses.

5. *That from and after the said 24th day of June* [1677] *all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom shall be in writing, and signed by the party so devising the same or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.*

How the same shall be revocable.

6. *And moreover, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall at any time after the said 24th day of June be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.*

Nuncupative wills.

19. *And for the prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury: be it enacted, that from and after the aforesaid 24th day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the*

(*a*) Repealed by Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 80.

(*b*) All these sections repealed, as to wills since 1838, by the Wills Act, 1837, s. 2.

same did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased; and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

Probate of nuncupative wills.

20. *That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony or the substance thereof were committed to writing within six days after the making of the said will.*

21. *That no letters testamentary or probate of any nuncupative will shall pass the seal of any Court till fourteen days at the least after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please.*

Repeal of wills.

22. *That no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.*

Soldiers' and mariners' wills excepted.

23. *Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages, and personal estate, as he or they might have done before the making of this Act.*

The jurisdiction of Courts saved.

24. *That nothing in this Act shall extend to or alter or change the jurisdiction, or right of probate of wills concerning personal estates, but that the Prerogative Court of the Archbishop of Canterbury, and other Ecclesiastical Courts, and other Courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect, subject nevertheless to the rules and directions of this Act.*

ADMINISTRATION OF ESTATES ACT, 1789 (c).

(38 GEO. 3, c. 87.)

AN Act for the Administration of Assets in Cases where the Executor to whom Probate has been granted is out of the Realm.

[28th June, 1798.]

Preamble.

[See Court of Probate Act, 1857, s. 74.]

WHEREAS the laws now existing are not sufficient to enforce a speedy distribution of the assets of deceased persons where the executor to whom probate of the will hath been granted is out of the jurisdiction of his Majesty's Courts of law and equity; Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that, at the expiration of twelve calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of his Majesty's Courts of law and equity, it shall be lawful for the Ecclesiastical Court which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on the affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment [*stamped only with one five shilling stamp, and shall pay no further or other duty to his Majesty, his heirs or successors* (*d*)].

(c) Extended by the Court of Probate Act, 1857, s. 74; Court of Probate Act, 1858, s. 18.

If, after a certain period, the executor to whom probate is granted, shall not reside within the jurisdiction of his Majesty's Courts, on application of a creditor, etc., special administration may be granted, for which a 5*s*. stamp duty shall be paid.

2. And be it further enacted, that the party applying to the spiritual Court to grant such administration as aforesaid, shall make an affidavit in the following words, or to the purport and effect following:

The party applying to make the following affidavit.

"I, A. B. of do swear, that there is due and owing to me, upon bond or simple contract, or upon account unsettled, as the case may happen to be (in which latter case he shall swear to the best of his belief only), from the estate and effects of deceased, the sum of and that C. D., the only executor capable of acting, and to whom probate hath been granted, hath departed this kingdom and is now out of the jurisdiction of his Majesty's Courts of law and equity, and that this deponent is desirous of exhibiting a bill in equity in his Majesty's Court of for the purpose of being paid his demand out of the assets of the said testator."

Affidavit.

[See Court of Probate Act, 1858, s. 18.]

3. And be it further enacted, that the administration to be granted pursuant to this Act shall be in the form hereinafter mentioned; (that is to say,)

Administration to be granted in the following form.

" by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan, to our well-beloved in Christ Greeting: Whereas it has been alleged before the Worshipful Doctor of Laws, Surrogate of Doctor of Laws, Master, Keeper, or Commissary of our Prerogative Court of Canterbury, lawfully constituted by you the said that did, whilst living and of sound mind, memory, and understanding, make and duly execute his last will and testament in writing, and did therefore nominate, constitute, and appoint, his executors (or, sole executor), who in the month of proved the said will by the authority of our said Court, and now reside (or, resides) out of this kingdom, and out of the jurisdiction of his Majesty's Courts of law and equity (as in and by an affidavit duly made and sworn to by and brought into and left in the registry of our said Court, reference being thereunto had, will more fully and at large appear): And whereas the Surrogate aforesaid, having duly considered the premises, did, at the petition of the said decree letters of administration of all and singular the goods, chattels, and credits of the said deceased, to be committed and granted to you the said named by or on the behalf of the said a creditor (legatee), or (one of the next of kin) of the said deceased (as the case may be), limited for the purpose,

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(*d*) Repealed 44 Geo. 3, c. 98.

to become and be made a party to a bill or bills to be exhibited against you in any of his Majesty's Courts of equity, and to carry the decree or decrees of any of the said Court or Courts into effect, but no further or otherwise (justice so requiring): And we being desirous that the said goods, chattels, and credits, may be well and faithfully administered, applied, and disposed of, according to law, do therefore, by these presents, grant full power and authority to you, in whose fidelity we confide, to administer, and faithfully dispose of the said goods, chattels, and credits, according to the tenor and effect of the said will, limited as aforesaid, so far as such goods, chattels, and credits of the deceased will thereto extend, and the law requires, you having been already sworn, well and faithfully to administer the same, and to make a true and perfect inventory of all and singular the said goods, chattels, and credits, so far as the same may come to your hands, and to exhibit the same into the registry of our said Prerogative Court of Canterbury, on or before the next ensuing, and also to render a just and true account thereof: And we do by these presents ordain and constitute you administrator of all and singular the goods, chattels, and credits, of the said deceased, limited as aforesaid, but no further, or otherwise.

"Given at London, the day of in the
year of our Lord and in the
year of our translation."

Court may appoint persons to collect outstanding debts.

4. And be it further enacted, that it shall be lawful for the Court of Equity in which such suit shall be depending, to appoint (if it shall be needful) any persons or person to collect in any outstanding debts or effects due to such estate, and to give discharges for the same, such persons or person giving security in the usual manner, duly to account for the same.

Stock belonging to the estate of the deceased may be transferred into the name of the Accountant-General in Chancery, in trust for such purposes as the Court shall direct in any suit.

Executors returning to reside within jurisdiction of the Court, to be made a party in such suit.

5. And be it further enacted, that it shall be lawful for the Accountant-General of the High Court of Chancery, or for the Secretary, or Deputy Secretary, of the Governor and Company of the Bank of England, to transfer, and for the Governor and Company of the Bank of England to suffer a transfer to be made of any stock belonging to the estate of such deceased person, into the name of the Accountant-General, in trust, for such purposes as the Court shall direct, in any suit in which the person to whom such administration hath been granted, shall be, or may have been, a party: Provided nevertheless, that if the executors or executor capable of acting as such, shall return to and reside within the jurisdiction of any of the said Courts pending such suit, such executors or executor shall be made party to such suit, and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons, or out of such fund as the Court where such suit is depending shall direct.

Where an infant is sole executor, administration

6. And whereas inconveniences arise from granting probate to infants under the age of twenty-one; be it enacted, that where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him.

7. And be it enacted, that the person to whom such administration shall be granted, shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him durante minore ætate of the next of kin (*e*).

to be granted to the guardian, etc. who shall have the same power as where administration is granted durante minore ætate of the next of kin.

WILLS ACT, 1837.

(1 VICT. C. 26.)

AN Act for the Amendment of the Laws with respect to Wills.

[3rd July, 1837.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for settling a Revenue upon His Majesty in lieu thereof," or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest), therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Meaning of certain words in this Act;
"will":
12 Car. 2, c. 24.
14 & 15 Car. 2 (I.).
"real estate":
"personal estate":
number:
gender.

Repealed by 37 & 38 Vict. c. 35 (S. L. R.).

2. *And be it further enacted, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two Parts of his Land"; and also an Act passed in the thirty-fourth and*

Repeal of the Statutes of Wills, 32 H. 8, c. 1, and

(*e*) This statute is extended to administrators by the Court of Probate Act, 1857, s. 74. See also Court of Probate Act, 1858, s. 18.

34 & 35 H. 8, c. 5.
10 Car. 1, sess. 2, c. 2 (I.).
Secs. 5, 6, 12, 19, 20, 21, and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12 (I.).
Sec. 14 of 4 & 5 Anne, c. 16.
6 Anne, c. 10 (I.).
Sec. 9 of 14 G. 2, c. 20.
25 G. 2, c. 6 (except as to colonies).
25 G. 2, c. 11 (I.).
55 G. 3, c. 192.

thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills"; and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, etc. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins"; and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to Amend the Law concerning Common Recoveries, and to explain and amend an Act made in the Twenty-ninth Year of the Reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates pur autre vie; and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of Great Britain called England, and in His Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates"; and also an Act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same Acts or any of them respectively relate to any wills or estates pur autre vie to which this Act does not extend.

Repealed by 37 & 38 Vict. c. 35 (S. L. R.).

All property may be disposed of by will,

3. *And be it further enacted, that* it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner herein-after required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates pur autre vie;

contingent interests;

rights of entry;

and property acquired after execution of the will.

As to the fees and fines payable by devisees of customary and copyhold estates.

4. Provided always, *and be it further enacted*, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering,

or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

5. *And be it further enacted, that* when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, etc., when such estates are not now devisable as he would have been from the heir in case of descent.

Estates pur autre vie.

6. *And be it further enacted, that* if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

No will of a person under age valid;

7. *And be it further enacted, that* no will made by any person under the age of twenty-one years shall be valid.

nor of a feme covert, except such as might now be made.

8. Provided also, *and be it further enacted,* that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

Every will shall be in writing, and signed by the

9. *And be it further enacted, that* no will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end (*f*) thereof by the

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(*f*) See 15 Vict. c. 24, *post*, p. 739.

testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

testator in the presence of two witnesses at one time.

10. *And be it further enacted, that* no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Appointments by wills to be executed like other wills, and to be valid, although other required solemnities are not observed.

11. Provided always, *and be it further enacted*, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

Soldiers' and mariners' wills excepted.

12. *And be it further enacted, that* this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

Act not to affect certain provisions of 11 G. 4 & 1 W. 4, c. 20, with respect to wills of petty officers and seamen and marines.

13. *And be it further enacted, that* every will executed in manner herein-before required shall be valid without any other publication thereof.

Publication not to be requisite.

14. *And be it further enacted, that* if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Will not to be void on account of incompetency of attesting witness.

15. *And be it further enacted, that* if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

Gifts to an attesting witness to be void.

16. *And be it further enacted, that* in case by any will any real or personal estate shall be charged with any debt or debts, and any

Creditor attesting to be

admitted a witness.

creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

17. *And be it further enacted, that* no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

18. *And be it further enacted, that* every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

No will to be revoked by presumption.

19. *And be it further enacted, that* no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

20. *And be it further enacted, that* no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

No alteration in a will shall have any effect unless executed as a will.

21. *And be it further enacted, that* no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

22. *And be it further enacted, that* no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

A devise not to be rendered inoperative by any

23. *And be it further enacted, that* no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

subsequent conveyance or act.

24. *And be it further enacted, that* every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. [See 56 & 57 Vict. c. 63, s. 3.]

A will shall be construed to speak from the death of the testator.

25. *And be it further enacted, that,* unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

A residuary devise shall include estates comprised in lapsed and void devises.

26. *And be it further enacted, that* a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

27. *And be it further enacted, that* a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A general gift shall include estates over which the testator has a general power of appointment.

28. *And be it further enacted, that* where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

A devise without any words of limitation shall be construed to pass the fee.

29. *And be it further enacted, that* in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

30. *And be it further enacted, that* where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

31. *And be it further enacted, that* where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Devises of estates tail shall not lapse.

32. *And be it further enacted, that* where any person to whom any real estate shall be devised for an estate tail or an estate in quasi-entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

33. *And be it further enacted, that* where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838.

34. *And be it further enacted, that* this Act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate pur autre vie of any person who shall die before the first day of January one thousand eight hundred and thirty-eight.

Act not to extend to Scotland.

35. *And be it further enacted, that* this Act shall not extend to Scotland.

Act may be altered this session.

36. *And be it enacted, that this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present session of Parliament.*

Repealed by 37 & 38 Vict. c. 35 (S. L. R.).

WILLS ACT AMENDMENT ACT, 1852.

(15 VICT. C. 24.)

(LORD ST. LEONARDS' ACT.)

AN Act for the Amendment of an Act passed in the First Year of the Reign of her Majesty Queen Victoria, intituled An Act for the Amendment of the Laws with respect to Wills.

[17th June, 1852.]

WHEREAS the laws with respect to the execution of wills require further amendment: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1 Vict. c. 26. [Wills Act, 1837.]

When signature to a will shall be deemed valid.

1. Where by *an Act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills,"* it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

Act to extend to certain wills already made.

2. The provisions of this Act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will.

Interpretation of "will."

3. The word "will" shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the *said Act of the first year of the reign of her Majesty Queen Victoria* (*a*).

Short title of Act.

4. This Act may be cited as "The Wills Act Amendment Act, 1852."

COURT OF PROBATE ACT, 1857.

(20 & 21 VICT. C. 77.)

AN Act to amend the Law relating to Probates and Letters of Administration in England. [25th August, 1857.]

WHEREAS it is expedient that all jurisdiction in relation to the grant and revocation of probates of wills and letters of administration in England should be exercised, in the name of her Majesty, by one Court: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Commencement of Act.

1. *This Act (except where otherwise specially provided) shall come into operation on such day, not sooner than the first day of January one thousand eight hundred and fifty-eight, as her Majesty shall by Order in Council appoint, provided that such order shall be made one month at least previously to the day so to be appointed.*

Sec. 1 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Interpretation of terms.

2. In the construction of this Act, unless the context be inconsistent with the meaning hereby assigned—

"Will" shall comprehend "testament" and all other testamentary instruments of which probate may now be granted:

"Administration" shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes:

"Matters and causes testamentary" shall comprehend all matters and causes relating to the grant and revocation of probate of wills or of administration:

(*a*) The Wills Act, 1837.

"Common form business" shall mean the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.

Testamentary jurisdiction of Ecclesiastical and other Courts abolished.

3. *The voluntary and contentious jurisdiction and authority of all Ecclesiastical, Royal Peculiar, Peculiar, Manorial, and other Courts and persons in England, now having jurisdiction or authority to grant or revoke probate of wills or letters of administration of the effects of deceased persons, shall in respect of such matters absolutely cease; and no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall belong to or be exercised by any such Court or person.*

Sec. 3 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Testamentary jurisdiction to be exercised by a Court of Probate.

4. The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons now vested in or which can be exercised by any Court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary, shall belong to and be vested in her Majesty, and shall, except as herein-after is mentioned, be exercised in the name of her Majesty in a Court to be called the Court of Probate, and to hold its ordinary sittings and to have its principal registry at such place or places in London or Middlesex as her Majesty in Council shall from time to time appoint.

Power to her Majesty to appoint a judge of the Court of Probate.

5. *There shall be one judge of her Majesty's Court of Probate; and it shall be lawful for her Majesty from time to time, by letters patent under the Great Seal of the United Kingdom, to appoint a person, being or having been an advocate of ten years' standing, or a barrister-at-law of fifteen years' standing, to be such judge.*

Sec. 5 repealed by 44 & 45 Vict. c. 59, s. 3.

Judge's tenure of office.

6. *The judge of the Court of Probate shall hold his office during good behaviour, provided that it shall be lawful for her Majesty to remove any such judge from his office upon an address of both Houses of Parliament.*

Sec. 6 repealed by 44 & 45 Vict. c. 59, s. 3.

Judge before acting to take the following oath.

7. *Every judge of the Court of Probate shall, before executing any of the duties of his office, take the following oath, which the Lord Chancellor or the Master of the Rolls for the time being is hereby respectively authorised and required to administer:*

"I A. B. do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and power, execute the office of judge of the Court of Probate.

"So help me God."

Sec. 7 repealed by 34 & 35 Vict. c. 48, s. 8.

Rank and precedence of judge, who

8. *The judge shall have rank and precedence with the puisne judges of her Majesty's superior Courts of common law at Westminster* shall appoint a secretary and usher.

according to the date of his appointment, and he shall have a secretary and usher, to be from time to time appointed and removed by him at his pleasure.

Sec. 8 repealed by 42 & 43 Vict. c. 78, s. 29.

Salaries of judge, secretary, and usher.

9. *There shall be paid to the judge the net yearly salary of four thousand pounds, and to his secretary the net yearly salary of three hundred pounds, and to his usher the net yearly salary of one hundred and fifty pounds.*

Sec. 9 repealed by 44 & 45 Vict. c. 59, s. 3.

Judge of Court of Probate to be also judge of the Admiralty Court on the next vacancy.

10. *Upon the next vacancy in the office of judge of the High Court of Admiralty of England it shall be lawful for her Majesty, if she so think fit, to appoint the person then being judge of the Court of Probate to be also judge of the said Court of Admiralty, or in case the office of judge of the Court of Probate become vacant before the office of judge of the Court of Admiralty, the judge of the Court of Admiralty may, with his consent, be appointed to and hold also the office of judge of the Court of Probate, and after the union of the said two offices they shall be thenceforth held by the same person.*

Sec. 10 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

As to increase of salary upon union of the two offices.

11. *From and after the union under this Act of the two offices of judge of the Court of Probate and judge of the Court of Admiralty in the same person, the said yearly salary of four thousand pounds payable under this Act shall be increased to five thousand pounds, and the salary now payable to the judge of the Court of Admiralty shall cease.*

Sec. 11 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Retiring pensions of judges.

12. *Her Majesty, by letters patent under the Great Seal of the United Kingdom, may grant unto any person executing the office of judge of her Majesty's Court of Probate an annuity, not exceeding two thousand pounds, or if such person be also executing the office of judge of the said Court of Admiralty, not exceeding three thousand five hundred pounds, to commence immediately after the day when the person to whom such annuity shall be granted shall resign the said office or offices, and to continue during his natural life: Provided that her Majesty may, in and by such letters patent, limit the duration of payment of such annuity, or any part thereof, to such periods of time during the natural life of such person in which he shall not exercise any office of profit under her Majesty, so that such annuity, together with the salary and profits of such other office, shall together not exceed in the whole the said sum of two thousand pounds or three thousand five hundred pounds, as the case may be: Provided also, that no annuity granted to any person having executed the office of judge under this Act, except the present judge of the Prerogative Court, shall be valid unless such person shall have held such office for the period of fifteen years, or have held such office and any of the offices of judge in any of the superior Courts of law or equity or the High Court of Admiralty for periods amounting together to fifteen years, or shall be afflicted with some permanent infirmity disabling him from the due execution of his office, which shall be distinctly recited in the said grant.*

Sec. 12 repealed by 44 & 45 Vict. c. 59, s. 3.

District registries to be established

13. There shall be established for each of the districts specified in Schedule (A.) to this Act, and at the places respectively mentioned in such schedule, a public registry attached to and under the control of the Court of Probate, herein-after referred to as "the district registry."

as in Schedule (A.).

14. *There shall be three registrars, two record keepers, and one sealer for the principal registry of the Court of Probate, and there shall be one district registrar, for each district registry herein-after referred to as the district registrar, and there shall be so many clerks and other officers for the Court and the principal registry as the judge of the Court, with the sanction of the Commissioners of her Majesty's Treasury, may from time to time think fit: Provided, that if at any time it appear to her Majesty in Council that the duties of the registrars of the principal registry of the Court of Probate can be performed by two registrars, it shall be lawful for her Majesty by Order in Council to direct that the number of registrars for such principal registry be reduced accordingly.*

Appointment of officers of the Court of Probate.

Sec. 14 repealed by 42 & 43 Vict. c. 78, s. 29.

15. *Charles Dyneley Esquire, John Iggulden Esquire, and William F. Gostling Esquire, the present deputy registrars of the Prerogative Court of Canterbury, shall, if willing to accept the office, be the first registrars of the principal registry of the Court of Probate; Joseph Todd and John Smith, the present record keepers of the said Prerogative Court, shall, if willing to accept the office, be the first record keepers at the said principal registry; and William John Berry, the present Sealer of the said Prerogative Court, shall, if willing to accept the office, be the first Sealer at the said principal registry; and George Jarvis Foster, Clerk of the Papers in the said Prerogative Court, shall, if willing to accept the office, be the first Clerk of Papers at the said principal registry.*

As to appointment of the first officers of the principal registry.

Sec. 15 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

16. *The other clerks and officers now employed in the said Prerogative Court shall be transferred to such situations in the Court of Probate and the principal registry thereof as the Lord Chancellor may in that behalf direct, so that their duties may be such as, in the opinion of the said Lord Chancellor, may be as nearly as possible similar to those which they have heretofore discharged in the said Prerogative Court: Provided always, that no such clerk or other officer shall be so transferred whom the said Lord Chancellor shall consider to be from age, infirmity, or other cause, incompetent to the discharge of his duties.*

Clerks and officers of Prerogative Court to be transferred to like offices in Court of Probate.

Sec. 16 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

17. *The registrar or deputy registrar (as the case may be) now executing in person the duties of registrar of a diocesan or other Court exercising testamentary jurisdiction at any place at which a district registry is to be established under this Act, or where there is more than one such registrar or deputy registrar so acting such one of them as the judge shall select, shall be appointed the first district registrar for such district, save where the judge shall consider such registrar or deputy registrar, or all such registrars or deputy registrars if more than one, to be from age, infirmity, or other cause incompetent to the discharge of the duties of district registrar: Provided that where there is now more than one such registrar or deputy registrar competent to the discharge of the duties, the judge may appoint them or more than one of them to hold such office of district registrar jointly with benefit of survivorship.*

Existing diocesan registrars to be entitled to be appointed district registrars at the same places.

Sec. 17 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

As to appointment to offices. Salaries of officers.

18. *The registrars, district registrars, and other officers of the Court of Probate, except as herein provided, shall be appointed by the judge: there shall be paid to the several officers mentioned in Schedule (B.) to this Act the several salaries set opposite to their respective titles in the same schedule, and the said district registrars shall, for the performance of their duties under this Act, including the services of any clerks they may employ, be entitled to take in respect of the business in their respective district registries such fees as shall be fixed as herein-after provided; and, except as aforesaid, there shall be paid to the several clerks and other officers appointed under this Act such salaries or other remuneration as the judge, with the consent of the Commissioners of her Majesty's Treasury, shall from time to time in each case direct.*

Sec. 18 repealed by 42 & 43 Vict. c. 78, s. 29.

Tenure of office of officers.

19. The registrars and district registrars shall hold their offices during good behaviour, *subject to be removed by order of the Lord Chancellor for some reasonable cause to be in such order expressed; and the other officers of the Court may be removed by the judge, with the sanction of the Lord Chancellor.*

See 42 & 43 Vict. c. 78, s. 29.

Qualification of registrars and district registrars.

20. No person shall be appointed a registrar or district registrar who shall not be or have been an advocate, barrister-at-law, proctor, solicitor, or attorney-at-law, unless at the time of the passing of this Act he is performing in person the duties of registrar or deputy registrar of some Ecclesiastical Court in England, or is acting as articled clerk or paid clerk to a proctor in Doctors' Commons, or as officer or clerk in the office of the said Prerogative Court, or of the Prerogative Court of York, or of any diocesan Court.

Amended by 21 & 22 Vict. c. 95, s. 8.

Officers of the Court to execute their offices in person. Registrars, etc., not to act as proctors, etc.

21. All registrars, district registrars, officers, and clerks of the Court of Probate shall execute their respective offices in person and not by deputy; and no registrar of the principal registry of the Court, nor any officer or clerk in the principal registry thereof, shall during the time of his holding such office directly or indirectly practise as an advocate, barrister, proctor, solicitor, or attorney, or receive or participate in the fees of any other person so practising.

Power to judge to cause seals of the Court to be provided.

22. The judge shall cause to be made seals for the Court of Probate, that is to say, one seal to be used in its principal registry, and separate seals to be used in the several district registries, and may cause the same respectively from time to time to be broken, altered, and renewed at his discretion; and all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof, respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

Amended by 21 & 22 Vict. c. 95, s. 33.

The Court to have throughout all England the same powers as the Prerogative Court within

23. The Court of Probate shall be a Court of record, and such Court shall have the same powers, and its grants and orders shall have the same effect, throughout all England, and in relation to the personal estate in all parts of England of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary and those effects of deceased persons which are within the jurisdiction of the said Prerogative Court; and all duties which, by statute or otherwise, are imposed on or should be performed by ordinaries generally, or on or by the said Prerogative Court, in respect of probates, administrations, or matters or causes testamentary within their respective jurisdictions, shall be performed by the Court of Probate: Provided that no suits for legacies, or suits for the distribution of residues, shall be entertained by the Court, or by any Court or person whose jurisdiction as to matters and causes testamentary is hereby abolished.

the province of Canterbury.

Suits for legacies or distribution not to be entertained.

24. The Court of Probate may require the attendance of any party in person, or of any person whom it may think fit to examine or cause to be examined in any suit or other proceeding in respect of matters or causes testamentary, and may examine or cause to be examined upon oath or affirmation, as the case may require, parties and witnesses by word of mouth, and may, either before or after or with or without such examination, cause them or any of them to be examined on interrogatories, or receive their or any of their affidavits or solemn affirmations, as the case may be; and the Court may by writ require such attendance, and order to be produced before itself or otherwise any deeds, evidences, or writings, in the same form, or nearly as may be, as that in which a writ of subpœna ad testificandum, or of subpœna duces tecum, is now issued by any of her Majesty's superior Courts of law at Westminster; and every person disobeying any such writ shall be considered as in contempt of the Court, and also be liable to forfeit a sum not exceeding one hundred pounds.

Power to examine witnesses.

As to production of deeds, etc.

25. *The Court of Probate shall have the like powers, jurisdiction, and authority for enforcing the attendance of persons required by it as aforesaid, and for punishing persons failing, neglecting, or refusing to produce deeds, evidences, or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court.*

Powers of the Court to enforce orders.

Sec. 25 repealed by 44 & 45 Vict. c. 59, s. 3.

26. The Court of Probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the Court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open court, or upon interrogatories respecting the same, and such person

Order to produce any instrument purporting to be testamentary.

shall be bound to answer such questions or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court and had made such default; and the costs of any such motion, petition, or other proceeding shall be in the discretion of the Court.

Amended by 21 & 22 Vict. c. 95, s. 33.

Registrars, etc., to have power to administer oaths.

Power to appoint, also, Commissioners to administer oaths, etc.

27. *The registrars and district registrars shall respectively have full power to administer oaths; and all persons who at the commencement of this Act shall be acting as surrogates of any Ecclesiastical Court, and any other persons whom the judge shall, under the seal of the Court, from time to time appoint, shall respectively have full power to administer oaths and perform such other duties in reference to matters and causes testamentary as may be assigned to them from time to time by the rules and orders under this Act; and the persons so appointed shall be styled "Commissioners of her Majesty's Court of Probate": Provided, that any party required to be examined, or any person called as a witness or required or desiring to make an affidavit or deposition under or for the purposes of this Act, shall be permitted to make his solemn affirmation or declaration instead of being sworn in the circumstances and manner in which a person called as a witness or desiring to make an affidavit or deposition would be permitted so to do under the Common Law Procedure Act*, 1854, *in cases within the provisions of that Act; and any person who shall wilfully give false evidence, or who shall wilfully swear, affirm, or declare falsely in any affidavit or deposition before the Court of Probate, or before any registrar, district registrar, or commissioner of the Court, shall be liable to the penalties and consequences of wilful and corrupt perjury.*

Sec. 27 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Penalty on forging or counterfeiting seals or signatures of officers.

28. If any person forge the signature of any registrar, district registrar, or commissioner for taking oaths, or forge or counterfeit any seal of the Court of Probate, or knowingly use or concur in using any such forged or counterfeit signature or seal, or tender in evidence any document with a false or counterfeit signature of such registrar, district registrar, or commissioner, or with a false or counterfeit seal, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of his life *or any term not less than seven years, or to imprisonment for any term not exceeding three years, with or without hard labour.*

Practice of the Court.

29. The practice of the Court of Probate shall, except where otherwise provided by this Act, or by the rules or orders to be from time to time made under this Act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court.

Rules and orders to be made for regulating the procedure of the Court.

30. *And to the intent and end that the procedure and practice of the Court may be of the most simple and expeditious character, it shall be lawful for the Lord Chancellor, at any time after the passing of this Act, with the advice and assistance of the Lord Chief Justice of the*

Court of Queen's Bench, or any one of the judges of the superior Courts of law to be by such Chief Justice named in that behalf, and of the judge of the said Prerogative Court, to make rules and orders, to take effect when this Act shall come into operation, for regulating the procedure and practice of the Court, and the duties of the registrars, district registrars, and other officers thereof, and for determining what shall be deemed contentious and what shall be deemed non-contentious business, and, subject to the express provisions of this Act, for fixing and regulating the time and manner of appealing from the decisions of the said Court, and generally for carrying the provisions of this Act into effect; and after the time when this Act shall come into operation it shall be lawful for the judge of the Court of Probate from time to time, with the concurrence of the Lord Chancellor and the said Lord Chief Justice, or any one of the judges of the superior Courts of law to be by such Chief Justice named in this behalf, to repeal, amend, add to, or alter any such rules and orders as to him, with such concurrence as aforesaid, may seem fit.

Mode of taking evidence in contentious matters.

31. Subject to the regulations to be established by such rules and orders as aforesaid, the witnesses, and where necessary the parties, in all contentious matters where their attendance can be had, shall be examined orally by or before the judge in open court: Provided always, that, subject to any such regulations as aforesaid, the parties shall be at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite party orally in open court as aforesaid, and after such cross-examination may be re-examined orally in open court as aforesaid by or on behalf of the party by whom such affidavit was filed.

Court may issue commissions or give orders for examination of witnesses abroad, or who are unable to attend.

32. *Provided, that where a witness in any such matter is out of the jurisdiction of the Court, or where, by reason of his illness or otherwise, the Court shall not think fit to enforce the attendance of the witness in open court, it shall be lawful for the Court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the Court to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said Court, or other person to be named in such order for the purpose; and all the powers given to the Courts of law at Westminster by the Acts of the thirteenth year of King George the Third, chapter sixty-three, and of the first year of King William the Fourth, chapter twenty-two, for enabling the Courts of law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such Courts, and to enforce such examination, and all the provisions of the said Acts, and of any other Acts for enforcing or otherwise applicable to such examination, and the witnesses examined, shall extend and be applicable to the said Court of Probate and to the examination of witnesses under the commissions and orders of the said Court, and to the witnesses examined, as if such Court were one of the Courts of law at Westminster, and the matter before it were an action pending in such Court.*

Sec. 32 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Rules of evidence in common law Courts to be observed.

33. *The rules of evidence observed in the superior Courts of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in the Court of Probate.*

Sec. 33 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Common law judges may sit, on request of judge of Court.

34. *It shall be lawful for the judge of the Court of Probate to sit, with the assistance of any judge or judges of any of the superior Courts of law at Westminster, who, upon the request of the judge of the Court of Probate, may find it convenient to attend for that purpose.*

Sec. 34 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Court may cause questions of fact to be tried by a jury before itself, or direct an issue to a Court of law.

35. *It shall be lawful for the Court of Probate to cause any question of fact arising in any suit or proceeding under this Act to be tried by a special or common jury before the Court itself, or by means of an issue to be directed to any of the superior Courts of common law, in the same manner as an issue may now be directed by the Court of Chancery, and such question shall be so tried by a jury in any case where an heir-at-law, cited or otherwise made party to the suit or proceeding, makes application to the Court of Probate for that purpose; and in any other case where all the parties to the suit or proceeding concur in such an application, and where any party or parties other than such heir-at-law make a like application (the other party or parties not concurring therein), and the Court shall refuse to cause such question to be tried by a jury, such refusal of the Court shall be subject to appeal as herein provided.*

Sec. 35 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Powers of the Court for the trial of questions by a jury.

36. *When the Court shall order a question of fact to be tried before itself by a jury, the Court may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special or common jury for the trial of such question as may now be made by any of the superior Courts of common law at Westminster, and may also make any other orders which to such Court may seem requisite; and every such jury shall consist of persons possessing the qualifications, and shall be struck, summoned, balloted for, and called in like manner as if such jury were a jury for the trial of any cause in any of the said superior Courts; and every juryman so summoned shall be entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of the said superior Courts; and every party to any such proceeding shall be entitled to the same rights as to challenge and otherwise as if he were a party to any such cause; and generally for all purposes of or auxiliary to the trial of questions of fact by a jury before the Court itself, and in respect of new trials thereof, and also for all purposes in relation to or consequential upon the direction of issues, the Court of Probate shall have the same jurisdiction, powers, and authority in all respects as belong to any superior Court of common law, or to any judge thereof, or to the High Court of Chancery, or any judge thereof, for the like purposes.*

Sec. 36 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Question to be stated, and jury sworn to try it.

Court, on trial, to have

37. *When any such question shall be so ordered to be tried by a jury before the Court itself, such question shall be reduced into writing in such form as the Court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court of*

Probate shall have the same powers, jurisdiction, and authority as belong to any judge of any of the said superior Courts sitting at Nisi Prius.

the same authority as a judge at Nisi Prius.

Sec. 37 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Court may direct where issues shall be tried.

38. *Where the Court of Probate directs an issue, it shall be lawful for such Court to direct such issue to be tried either before a judge of Assize in any county or at the sittings for the trial of causes in London or Middlesex, and either by a special or common jury, in like manner as is now done by the Court of Chancery.*

Sec. 38 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Appeal to the House of Lords.

39. *Any person considering himself aggrieved by any final or interlocutory decree or order of the Court of Probate may appeal therefrom to the House of Lords: Provided always, that no appeal from any interlocutory order of the Court of Probate shall be made without leave of the Court of Probate first obtained, but on the hearing of an appeal from any final decree all interlocutory orders complained of shall be considered as under appeal as well as the final decree.*

Sec. 39 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Advocates admitted to practise.

Barristers may practise in contentious causes.

40. *All persons who at the time of the passing of this Act have been admitted advocates in any of the Ecclesiastical Courts shall be entitled to practise as advocates or counsel in all matters and causes whatsoever in the Court of Probate; and all serjeants and barristers-at-law shall be entitled to practise as advocates or counsel in all contentious matters and causes in the said Court; and such persons who have been so admitted advocates and serjeants and barristers-at-law shall have respectively the same rank and precedence which they now have before the Judicial Committee of the Privy Council, unless and until her Majesty shall otherwise order.*

Sec. 40 repealed by 44 & 45 Vict. c. 59, s. 3.

Advocates admitted to practise as barristers.

41. *All persons who at the time of the passing of this Act have been admitted as advocates as aforesaid shall be entitled to practise as counsel in any of her Majesty's Courts of law or equity in England, with the same eligibility to appointments, under Acts of Parliament or otherwise, as if they had respectively been duly called to the degree of barrister-at-law on the days on which they respectively were so admitted as advocates, and with the same rank and precedence which they now have before the said Judicial Committee, unless and until her Majesty shall otherwise order.*

Sec. 41 repealed by 44 & 45 Vict. c. 59, s. 3.

Proctors admitted to practise.

42. *Every person who at the time of the passing of this Act is actually admitted and practising as a proctor in the Courts in Doctors' Commons, or in the Prerogative Court of York, or in any diocesan Court, or in any archidiaconal Court, having previously duly served under articles of clerkship either to an attorney or proctor, may, upon his application, at any time within one year after the passing of this Act, be admitted a proctor of the Court of Probate, without payment of any fee or stamp duty.*

Sec. 42 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Admission of registrars and proctors as solicitors.

43. *Every person who at the time of the commencement of this Act is acting as registrar or deputy registrar of any Ecclesiastical Court, or is actually admitted and practising as a proctor in the Courts in Doctors'*

Commons, or in any Ecclesiastical Court in England or Wales, may, within one year after the passing of this Act, be admitted, without the payment of any stamp duty, fee, charge, or gratuity whatsoever, as a solicitor of the High Court of Chancery, upon the production of his appointment or admission as such registrar, deputy registrar, or proctor, or an official certificate thereof; and upon the production of an official certificate that such appointment or admission continued in force at the time of the passing of this Act, and upon signing the roll of solicitors of the High Court of Chancery, but not otherwise, such person shall be entitled to be admitted as a solicitor of such Court, and to be afterwards in like manner admitted and enrolled as an attorney of her Majesty's superior Courts.

Sec. 43 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Admission of articled clerks to proctors as solicitors.

44. *Every person who at the time of the commencement of this Act has served or is actually serving as an articled clerk to a proctor entitled to take such articled clerk, and who has not been admitted as a proctor, shall be entitled to be admitted as a solicitor of the High Court of Chancery, in the same manner, and subject to the same rules and regulations, and upon the same conditions as if he had before the commencement of this Act been articled to a solicitor or to an attorney-at-law; and such admission shall entitle such articled clerk so admitted as a solicitor to be afterwards in like manner admitted and enrolled as an attorney of her Majesty's superior Courts: Provided, that if any such proctor to whom any such clerk is now articled shall retire from practice after the passing of this Act, he shall and is hereby required to transfer such articled clerk to some other proctor, or to a solicitor, or to an attorney-at-law, for the unexpired term of his articles of clerkship; provided that the Court shall at any time have the same power to transfer such clerk, during the unexpired term of his articles of clerkship, to any other proctor, or to a solicitor, or to an attorney-at-law, as the judge of the Prerogative Court now has in respect to clerks articled to proctors practising in the Court of Arches.*

Sec. 44 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Practitioners.

45. *All solicitors and attornies-at-law may practise in the Court of Probate, and the laws and statutes now in force concerning solicitors and attornies shall extend to solicitors and attornies practising in the said Court; and the commissioners for taking oaths in the High Court of Chancery shall be commissioners for taking oaths in the Court of Probate.*

Sec. 45 repealed by 44 & 45 Vict. c. 59, s. 3.

Probates and administration may be granted in common form by district registrars, if it shall appear by affidavit that the testator, etc., had a fixed place of abode.

46. Probate of a will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the Court of Probate and under the seal appointed to be used in such district registry, if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, such place of abode being stated in the affidavit, and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of England accordingly.

Affidavit to be conclusive for authorising grant of probate.

47. Such affidavit shall be conclusive for the purpose of authorising the grant, by the district registrar, of probate or administration; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death; and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required.

District registrars not to make grants where there is contention, etc.

48. The district registrar shall not grant probate or administration in any case in which there is contention as to the grant until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form.

As to transmission of notice of application for grants of probate, etc., to district registrar.

49. Notice of every application to any district registrar for the grant of probate or administration shall be transmitted by such district registrar to the registrars of the principal registry by the next post after such application shall have been made; and such notice shall specify the name and description, or addition (if any), of the testator or intestate, the time of his death, and the place of his abode at his decease, as stated in the affidavit made in support of such application, and the name of the person by whom the application has been made, and such other particulars as may be directed by rules or orders under this Act; and no probate or administration shall be granted in pursuance of such application until such district registrar shall have received a certificate, under the hand of one of the registrars of the principal registry, that no other application appears to have been made in respect of the goods of the same deceased person, which certificate the said registrar of the principal registry shall forward as soon as may be to the district registrar; all such notices in respect of applications in the district registries shall be filed and kept in the principal registry, and the registrars of the principal registry shall, with reference to every such notice, examine all notices of such applications which may have been received from the several other district registries, and the applications which may have been made for grants of probate or administration at the principal registry, so far as it may appear necessary to ascertain whether or no application for probate or administration, in respect of the goods of the same deceased person, may have been made in more than one registry, and shall communicate with the district registrars as occasion may require in relation to such applications.

District registrar in case of doubt as to grant to take the directions of the judge.

50. In every case where it appears to a district registrar that it is doubtful whether the probate or letters of administration which may be applied for should or should not be granted, or where any question arises in relation to the grant, or application for the grant, of any probate or administration, the district registrar shall transmit a statement of the matter in question to the registrars of the Court of Probate, who shall obtain the directions of the judge in relation thereto, and the judge may direct the district registrar to proceed in the matter of the application according to such instructions as to the judge may seem necessary, or may forbid any further proceeding by the district registrar in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Court of Probate through its principal registry, or, if the case be within its jurisdiction, to a County Court.

District registrars to transmit lists of probates and administrations, and copies of wills.

51. On the first Thursday of every month, or oftener if required by any rules or orders to be made in that behalf, every district registrar shall transmit to the registrars of the principal registry a list, in such form and containing such particulars as may be from time to time required by the Court of Probate, or by any rules or orders under this Act, of the grants of probate and administration made by such district registrar up to the last preceding Saturday, and not included in a previous return, and also a copy, certified by the district registrar to be a correct copy, of every will to which any such probate or administration relates.

District registrars to preserve original wills.

52. Every district registrar shall file and preserve all original wills of which probate or letters of administration with the will annexed may be granted by him, in the public registry of the district, subject to such regulations as the judge of the Court of Probate may from time to time make in relation to the due preservation thereof, and the convenient inspection of the same.

As to caveats.

53. Caveats against the grant of probates or administrations may be lodged in the principal registry or in any district registry, and (subject to any rules or orders under this Act) the practice and procedure under such caveats in the Court of Probate shall, as near as may be, correspond with the practice and procedure under caveats now in use in the Prerogative Court of Canterbury; and immediately upon a caveat being lodged in any district registry, the district registrar shall send a copy thereof to the registrars to be entered among the caveats in the principal registry; and immediately upon a caveat being entered in the principal registry, notice thereof shall be given to the district registrar of the district, if any, in which it is alleged the deceased resided at the time of his decease, and to any other district registrar to whom it may appear to the registrar of the principal registry expedient to transmit the same.

Where personalty is under £200, and real property is under £300, County Court to have jurisdiction.

54. *Where it shall appear by affidavit of the person or some or one of the persons applying for probate or letters of administration that the testator or intestate had at the time of his death his fixed place of abode in one of the districts specified in Schedule (A.) to this Act, and that the personal estate in respect of which such probate or letters of administration should be granted under this Act, exclusive of what the deceased shall have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, is under the value of two hundred pounds, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate, or that the value of the real estate of or to which he was seised or entitled beneficially at the time of his death was under the value of three hundred pounds, the judge of the County Court having jurisdiction in the place in which it shall be sworn that the deceased had at the time of his death his fixed place of abode shall have the contentious jurisdiction and* *authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto.*

Sec. 54 repealed by 21 & 22 Vict. c. 95, s. 11.

Registrar of County Court to transmit certificate of decree for grant or revocation of probate.

55. On a decree being made by a judge of a County Court for the grant or revocation of a probate or administration in any such cause, the registrar of the County Court shall transmit to the district registrar of the district in which it shall have been sworn that the deceased had at the time of his decease his fixed place of abode a certificate under the seal of the County Court of such decree having been made, and thereupon, on the application of the party or parties in favour of whom such decree shall have been made, a probate or administration in compliance with such decree shall be issued from such district registry; or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar according to the effect of such decree.

The judge of the County Court to decide causes and enforce judgments as in other cases.

56. The judge of any County Court before whom any disputed question shall be raised relating to matters and causes testamentary under this Act shall, subject to the rules and orders under this Act, have all the jurisdiction, power, and authority to decide the same and enforce judgment therein, and to enforce orders in relation thereto, as if the same had been an ordinary action in the County Court.

Affidavit of the facts giving the County Court jurisdiction to be conclusive, unless disproved while the matter is pending.

57. The affidavit as to the place of abode and state of the property of a testator or intestate which is to give contentious jurisdiction to the judge of a County Court under the previous provisions shall, except as hereinafter provided, be conclusive for the purpose of authorising the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the jurisdiction of such judge or within any of the said districts at the time of his death, or by reason that the personal estate sworn to be under the value of two hundred pounds did in fact amount to or exceed that value, or that the value of the real estate of or to which the deceased was seised or entitled beneficially at the time of his death amounted to or exceeded three hundred pounds: Provided, that where it shall be shown to the judge of a County Court before whom any matter is pending under this Act that the place of abode or state of the property of the testator or intestate in respect of whose will or estate he may have been applied to for grant or revocation of probate or administration has not been correctly stated in the affidavit, and if correctly stated would not have authorised him to exercise such contentious jurisdiction, he shall stay all further proceedings in this Court in the matter, leaving any party to apply to the Court of Probate for such grant or revocation, and making such order as to the costs of the proceedings before him as he may think just.

As to appeals from County Court.

58. Any party who shall be dissatisfied with the determination of the judge of the County Court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this Act, may appeal from the same to the Court of Probate, in such manner and subject to such regulations as may be provided by the rules and orders to be made under this Act, and the decision of the Court of Probate on such appeal shall be final.

Not obligatory to apply for probate, etc., to district registries or County Court, but may in every case be made to Court of Probate.

[Amended C. P. Act, 1858, ss. 12, 20.]

59. It shall not be obligatory on any person to apply for probate or administration to any district registry, or through any County Court, but in every case such application may be made through the principal registry of the Court of Probate, wherever the testator or intestate may at the time of his death have had his fixed place of abode: Provided, that where in any contentious matter arising out of any such application it is shown to the Court of Probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a County Court, the Court of Probate may send the cause to such County Court, and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his Court in the first instance.

Rules and orders for regulating the procedure of County Courts under the Act to be made by the judges now having authority for the like purpose.

60. *For regulating the procedure and practice of the County Courts, and the judges, registrars, and officers thereof, in relation to their jurisdiction and proceedings under this Act, rules and orders may be from time to time framed, amended, and certified by the County Court judges appointed for the time being to frame rules and orders for regulating the practice of the County Courts under the Act of the session holden in the nineteenth and twentieth years of her Majesty, chapter one hundred and eight, and shall be subject to be allowed or disallowed or altered, and shall be in force from the day named for that purpose by the Lord Chancellor, as in the said Act is provided in relation to other rules and orders regulating the practice of the same Courts; and for establishing rules and orders to be in force when this Act comes into operation the power given by this enactment shall be exercised as soon as conveniently may be after the passing of this Act.*

Sec. 60 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Where a will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

61. Where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this Act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees and other persons having or pretending interest in the real estate affected by the will shall, subject to the provisions of this Act, and to the rules and orders under this Act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin or others having or pretending interest in the personal estate affected by a will should be cited or summoned, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to such rules and orders, and to the discretion of the Court.

Where the will is proved in solemn form, or its

62. Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her Majesty's Court of Probate, shall in all Courts, and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked, on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders.

validity otherwise decided on, the decree of the Court to be binding on the persons interested in the real estate.

Heir in certain cases not to be cited, and where not cited not to be affected by probate.

63. Nothing herein contained shall make it necessary to cite the heir-at-law or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the Court and the Court is satisfied that the deceased was at the time of his decease seised of or entitled to or had power to appoint by will some real estate beneficially, or in any case where the will propounded or of which the validity is in question would not in the opinion of the Court, though established as to personalty, affect real estate, but in every such case, and in any other case in which the Court may, with reference to the circumstances of the property of the deceased or otherwise, think fit, the Court may proceed without citing the heir or other persons interested in real estate: Provided that the probate, decree, or order of the Court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

Probate or office copy to be evidence of the will in suits concerning real estate, save where the validity of the will is put in issue.

64. In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition.

As to costs of proof of will.

65. *In every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the Court or judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid.*

Sec. 65 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Place of deposit of original wills.

66. There shall be one place of deposit under the control of the Court of Probate, at such place in London or Middlesex as her Majesty may by Order in Council direct, in which all the original wills brought into the Court or of which probate or administration with the will annexed is granted under this Act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the district registries, and such other documents as the Court may direct, shall be deposited and preserved, and may be inspected under the control of the Court and subject to the rules and orders under this Act.

Judge to cause calendars to be made from time to time in the principal registry, and to be printed.

67. The judge shall cause to be made from time to time in the principal registry of the Court of Probate calendars of the grants of probate and administration in the principal registry, and in the several district registries of the Court, for such periods as the judge may think fit, each such calendar to contain a note of every probate or administration with the will annexed granted within the period therein specified, and also a note of every other administration granted within the same period, such respective notes setting forth the dates of such grants, the registry in which the grants were made, the names of the testators and intestates, the place and time of death, the names and descriptions of the executors and administrators, and the value of the effects ; and the calendars to be so made shall be printed as the same are from time to time completed.

Registrar to transmit printed copies to certain offices.

68. The registrars shall cause a printed copy of every calendar to be transmitted through the post or otherwise to each of the district registries, and to the office of her Majesty's Prerogative in Dublin, the office of the commissary of the county of Midlothian in Edinburgh, and such other offices, if any, as the Court of Probate shall from time to time by rule or order direct ; and every printed copy of a calendar so transmitted as aforesaid shall be kept in the registry or office to which it is transmitted, and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected.

Official copy of whole or part of will may be obtained.

69. An official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act.

Administration pendente lite.

[Amended C. P. Act, 1858, s. 22.]

70. Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person ; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the Court, and act under its direction.

Receiver of real estate pendente lite.

[Amended C. P. Act, 1858, s. 21.]

71. It shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid or any other person to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any will of such deceased person by which his real estate may be affected, and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the Court may direct.

Remuneration to administrators pendente lite and receivers.

72. The Court of Probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased such reasonable remuneration as the Court think fit.

Power as to appointment of administrator.

73. Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who if this Act had not been passed would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who if this Act had not passed would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit.

38 Geo. 3, c. 87, extended to administrators.

[Amended C. P. Act, 1858, s. 18.]

74. The provisions of an Act passed in the thirty-eighth year of his late Majesty King George the Third, chapter eighty-seven, shall apply (in like manner) to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her Majesty's Courts of law and equity.

After grant of administration no person to have power to sue as an executor.

75. After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked.

Revocation of temporary grants not to prejudice actions or suits.

76. Where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the Court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent thereupon, and that the proceedings shall be continued in the name of the new executor or administrator, in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such Court may direct.

Payments under revoked probates or administration to be valid.

77. Where any probate or administration is revoked under this Act, all payments bona fide made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or administration shall be afterwards granted might have lawfully made.

Persons, etc., making payment upon probates granted for estate of deceased person to be indemnified.

78. All persons and corporations making or permitting to be made any payment or transfer bona fide, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration.

Rights of an executor renouncing probate to cease as if he had not been named in the will.

[Amended C. P. Act, 1858, s. 16.]

79. Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

Sureties to administration bonds.

80. *So much of an Act passed in the twenty-first year of King Henry the Eighth, chapter five, and of an Act passed in the twenty-second and twenty-third years of King Charles the Second, chapter ten, and of an Act passed in the first year of King James the Second, chapter seventeen, as requires any surety, bond, or other security to be taken from a person to whom administration shall be committed, shall be repealed.*

Sec. 80 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Persons to whom grant of administration shall be committed shall give bond.

81. Every person to whom any grant of administration shall be committed shall give bond to the judge of the Court of Probate to enure for the benefit of the judge for the time being, and, if the Court of Probate or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct: Provided that it shall not be necessary for the Solicitor for the Affairs of the Treasury or the Solicitor of the Duchy of Lancaster applying for or obtaining administration to the use or benefit of her Majesty to give any such bond as aforesaid.

Penalty on bond.

82. Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the Court or district registrar so to do, and the Court or district registrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court or district registrar shall think reasonable.

Power of Court to assign bond.

83. The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond.

Pending suits transferred to Court of Probate.

Not to apply to appeals pending before her Majesty in council.

84. *All suits, whether original or by way of appeal, which at the commencement of this Act shall be pending in any Court in England respecting any grant of probate or administration, shall be transferred, with all the proceedings therein, to the Court of Probate, there to be dealt with and decided according to the rules and practice of the said Court, except so far as such Court may think it expedient to adopt, for the purposes of such transferred suits or any of them, the rules or practice of the Court in which the same shall have been pending, to which end the Court of Probate shall, for the purposes of such suits, have all the jurisdiction, power, and authority possessed by the Court from which such suits shall be transferred; but this enactment shall not apply to proceedings by way of appeal pending before her Majesty in council, which proceedings shall be carried on and prosecuted in the same manner in all respects as if this Act had not passed; and every person who if this Act had not passed might have appealed to her Majesty in council against any proceeding, decree, or sentence of any Court respecting the grant of any probate or administration, may, notwithstanding this Act, appeal to her Majesty in council against such proceeding, decree, or sentence: Provided also, that her Majesty in council may remit to the Court of Probate any cause or proceeding pending by way of appeal as aforesaid, or to be brought before her Majesty in council upon appeal as aforesaid, with such directions as the justice of the case may require.*

Sec. 84 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Power to judges whose jurisdiction is determined to deliver written judgments.

85. *Provided, that if at the commencement of this Act any cause which would be transferred to the Court of Probate under the enactment hereinbefore contained shall have been heard before any judge having jurisdiction in relation to such cause before the commencement of this Act, and shall be standing for judgment, such judge may, at any time within six weeks after the commencement of this Act, give in to one of the registrars of the Court a written judgment thereon, signed by him, and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment; and every such decree or order shall have the same force and effect as if it had been drawn up in pursuance of a judgment of the Court of Probate on the day on which the same shall so be delivered to the registrar, and shall be subject to appeal under this Act.*

Sec. 85 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Void and voidable pro-

86. *All grants of probates and administrations made before the commencement of this Act, which may be void or voidable by reason* bates and administrations.

only that the Courts from which respectively the same were obtained had not jurisdiction to make such grants, shall be as valid as if the same had been obtained from Courts entitled to make such grants: Provided, that any such grants of probate or administration shall not be made valid by this Act when the same shall before the commencement of this Act have been revoked or determined by any Court of competent jurisdiction to have been void; nor shall this Act prejudice or affect any proceedings pending at the time of the passing of this Act in which the validity of any such probate or administration shall be in question: if the result of such proceeding shall be to invalidate the same, such probate or administration shall not be rendered valid by this Act; and if such proceedings abate or become defective by reason of the death of any party, any person who but for this Act would have any right by reason of the invalidity of such probate or administration shall retain such right, and may commence proceedings for enforcing the same within six calendar months after the death of such party.

Sec. 86 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Probates and administrations granted before this Act comes into operation.

87. Legal grants of probate and administration made before the commencement of this Act, and grants of probate and administration made legal by this Act, shall have the same force and effect as if they had been granted under this Act, but in every such case there shall be due and payable to her Majesty such further stamp duty, if any, as would have been chargeable on any probate or administration which but for this Act would or ought to have been obtained in respect of the personal estate not covered by the grant; and all inventories and accounts in respect thereof shall be returnable to the Court of Chancery, and all bonds taken in respect thereof may be enforced by or under the authority of the Court of Chancery, at the discretion of the Court.

Probate or administration may be granted of personal estate not affected by the former grants.

88. Provided that where any probate or administration has been granted before the commencement of this Act, and the deceased had personal estate in England not within the limits of the jurisdiction of the Court by which the probate or administration was granted, or otherwise not within the operation of the grant, it shall be lawful for the Court of Probate to grant probate or administration only in respect of such personal estate not covered by any former probate or administration, and such grant may be limited accordingly.

Judges of present Ecclesiastical Courts and others to transmit all wills, etc., to the registry.

89. The acting judge and registrar of every Court, and other person now having jurisdiction to grant probate or administration, and every person having the custody of the documents and papers of or belonging to such Court or person, shall, upon receiving a requisition for that purpose, under the seal of the Court of Probate, from a registrar, and at the time and in the manner mentioned in such requisition, transmit to the Court of Probate, or to such other place as in such requisition shall be specified, all records, wills, grants, probates, letters of administration, administration bonds, notes of administration, Court books, calendars, deeds, processes, acts, proceedings, writs, documents, and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be easy of reference, under the control and direction of the Court.

Penalty for default.

90. *No judge, registrar, or other person who shall wilfully refuse or neglect so to transmit such records, wills, grants, probates, letters of administration, administration bonds, notes of administration, Court books, calendars, deeds, processes, acts, proceedings, writs, documents, or any other instrument relating to matters or causes testamentary, shall be entitled to any compensation under this Act, and every judge, registrar, or other person so refusing or neglecting shall be liable to a penalty of one hundred pounds, to be sued for and recovered, together with full costs of suit, in any of her Majesty's superior Courts, by the registrars.*

Sec. 90 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

As to depositories for safe custody of the wills of living persons.

91. One or more safe and convenient depository or depositories shall be provided, under the control and directions of the Court of Probate, for all such wills of living persons as shall be deposited therein for safe custody; and all persons may deposit their wills in such depository upon payment of such fees and under such regulations as the judge shall from time to time by any order direct.

This Act not to affect the stamp duties on probates and administrations.

92. Nothing in this Act contained shall affect the stamp duties now by law payable upon probates and administrations; and all the clauses, provisions, rules, regulations, and directions contained in any Act of Parliament relating to the said duties, and to wills, probates of wills, and letters of administration, for securing the said duties. not superseded by or inconsistent with the express provisions of this Act, shall be in full force, and shall be observed, applied, and put in execution for securing the duties payable on probates of wills and letters of administration granted under this Act, as if such duties had been granted by this Act, and the said clauses, provisions, rules, and regulations relating thereto were herein repeated and specially enacted.

The registrars to deliver copies of wills, etc., to the Commissioners of Inland Revenue.

93. The registrars of the Court of Probate shall, within such period as the judge shall direct after probate of any will or letters of administration shall have been granted, deliver or cause to be delivered to the Commissioners of Inland Revenue, or their proper officer, the following documents respectively; that is to say, in the case of a probate or administration with a will annexed a copy of the will and the original affidavit, and in the case of letters of administration without a will annexed such original affidavit, and in every case of letters of administration a copy or extract thereof, and in every case such certificate or note of the grant as the said Commissioners may require.

Secs. 8 and 9 of 53 Geo. 3, c. 127, repealed in part as to the Court of Probate.

94. Whereas by an Act passed in the fifty-third year of King George the Third, chapter one hundred and twenty-seven, it is enacted, that if any proctor of any Ecclesiastical Court shall act as such, or permit his name to be used in any suit appertaining to the office of a proctor, or in obtaining probates of wills or letters of administration, for or on account or for the profit or benefit of any person not entitled to act as a proctor, or shall permit any such person to participate in such profit or benefit, such proctor shall be subject to certain penalties therein mentioned; and it is also therein further enacted, that if any person shall, in his own name, or in that of any other person, do or perform any act whatever belonging to the office of a proctor in consideration of any gain, fee, or reward, or with a view to participate in the benefit to be derived from the office, functions, or practice of a proctor, without being admitted and enrolled, every such person shall be subject to certain other penalties therein mentioned : Be it enacted, nothing in the said Act contained shall prevent any proctor of the Court of Probate from acting as agent of any attorney or solicitor in relation to any matter testamentary, or from allowing him to participate in the profits of and incident thereto.

Fees to be taken by officers of Court and by officers of County Courts.

95. *The Lord Chancellor, with such assistance as is hereinbefore provided as to rules and orders to be made in pursuance of this Act, shall, as soon as conveniently may be after the passing of this Act, fix a table or tables of fees to be taken by the officers of the Court of Probate, and the proctors, solicitors, and attornies practising therein including the district registrars, and the proctors, solicitors, and attornies practising in district registries, and of fees to be taken by the officers of the County Courts, in respect of business under this Act, and of fees to be payable in respect of searches, inspection, and printed and other copies of and extracts from records, wills, and other documents in the custody or under the control of the Court of Probate, and the judge of the Court of Probate, with such concurrence as is hereinbefore provided in respect of the amendment of rules and orders, is hereby empowered, from time to time after this Act shall come into operation, to add to, reduce, alter, or amend such table or tables of fees, as he may see fit: Provided that such tables of fees and every alteration of the same, except so far as respects the fees which are to be taken by district registrars, proctors, and others, for their own remuneration and to their own use, shall be subject to the approval of the Commissioners of her Majesty's Treasury; and every such table of fees, and every addition, reduction, alteration, or amendment to, in, or of the same, shall be published in the "London Gazette"; and no other fees than those specified and allowed in such tables of fees shall be demanded or taken by such officers, and proctors, solicitors, and attornies.*

Sec. 95 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Taxation of costs.

96. *The bill of any proctor, attorney, or solicitor, for any fees, charges, or disbursements in respect of any business transacted in the Court of Probate, whether contentious or otherwise, or any matters connected therewith, shall, as well between proctor or attorney or solicitor and client as between party and party, be subject to taxation by any one of the registrars of the said Court, and the mode in which any such bill shall be referred for taxation, and by whom the costs of taxation shall be paid, shall be regulated by the rules and orders to be made under this Act, and the certificate of the registrar of the amount at which such bill is taxed shall be subject to appeal to the judge of the said Court.*

Sec. 96 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Fees not to be paid in money, but by stamps.

97. *None of the fees payable to the officers of the Court of Probate, or of any County Court, in respect of business under this Act, except the fees of the district registrars (which are to be taken as their remuneration, and for their own use), the fees of proctors, solicitors, and attornies, and such fees as may be authorised to be taken for their own use by surrogates and commissioners for administering oaths, shall be received in money, but every such fee shall be collected and received* *by a stamp denoting the amount of the fee which otherwise would be payable.*

Sec. 97 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Provisions of Acts relating to stamps to be applicable to stamps for collecting fees.

98. *The fees to be collected by means of stamps under the provisions of this Act shall be deemed " stamp duties," and shall be placed under the management of the Commissioners of Inland Revenue, to be collected and paid into the Exchequer under the same laws and regulations as those made in respect of the other duties of " stamps," and the provisions in the several Acts for the time being in force relating to stamps under the care or management of the Commissioners of Inland Revenue shall in all cases not hereby expressly provided for be of full force and effect with respect to the stamps to be provided under or by virtue of this Act, and to the vellum, parchment, or paper on or to which the same stamps shall be impressed or affixed, and be applied and put in execution for collecting and securing the sums of money denoted thereby, and for preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully and effectually to all intents and purposes as if such provisions had been herein repeated and specially enacted with reference to the said last-mentioned stamps and sums of money respectively; but a separate and distinct account of all money received in respect of the said last-mentioned stamps for every year ending the thirty-first day of March shall be laid before both Houses of Parliament within one month after the termination of such year of accounts, or, if Parliament be not then sitting, within one month after the commencement of the next session of Parliament.*

Sec. 98 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

No document to be received or used unless stamped.

99. *No document which under this Act, and any table of fees for the time being in force under this Act, ought to have a stamp in respect of such fee impressed thereon or affixed thereto, shall be received or filed or be used in relation to any proceeding in the Court of Probate, or be of any validity for any purpose whatsoever, unless or until the same shall have the proper stamp impressed thereon or affixed thereto: Provided that if at any time it shall appear that any such document has through mistake or inadvertence been received, or filed, or used without having such stamp impressed thereon or affixed thereto, it shall be lawful for the judge of the Court of Probate, if he think fit, to order that such stamp shall be impressed thereon or affixed thereto, and thereupon, when a stamp shall have been impressed on such document or affixed thereto in compliance with any such order, such document and every proceeding in reference thereto shall be as valid and effectual as if such stamp had been impressed thereon or affixed thereto in the first instance.*

Sec. 99 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Officers of the Court may be dismissed for fraud or wilful neglect in relation to stamps.

100. *If any officer of the Court of Probate, or any other person employed under this Act, shall do or commit or connive at any fraudulent act or practice in relation to any stamp to be used under the provisions of this Act, or to any fee or sum of money to be collected, or which ought to be collected, by means of any such stamp, or if any such officer or person shall be guilty of any wilful act, neglect, or omission whereby any fee or money which ought to be collected by means of a stamp under this Act shall be lost, or the payment thereof evaded, every such officer or person so offending shall be dismissed from his office* *or employment if the judge of the Court of Probate shall think fit so to order.*

Sec. 100 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Salary of judge and compensations to be charged on Consolidated Fund.

101. *The salary of the judge of the Court of Probate, and any retiring annuity granted to a judge of the Court of Probate under this Act, and all compensations payable under this Act, shall be charged on and payable out of the Consolidated Fund of the United Kingdom.*

Sec. 101 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Salaries and expenses not charged on the Consolidated Fund to be paid out of monies to be provided by Parliament.

102. *It shall be lawful for the Commissioners of her Majesty's Treasury, out of such monies as may be provided and appropriated by Parliament for the purpose, to cause to be paid all salaries payable to the registrars, clerks, and other officers under this Act, and all necessary expenses of the Court of Probate and its registries, and other expenses which may be incurred in carrying the provisions of this Act into effect (except such salary, retiring annuity, and compensations as are hereinbefore charged on the said Consolidated Fund).*

Sec. 102 repealed by 42 & 43 Vict. c. 78, s. 29.

Compensation to registrars, etc., of existing Courts.

103. *It shall be lawful for the Commissioners of the Treasury to grant to any archdeacons, judges, deputy judges, registrars, deputy registrars, and other persons holding office in the Courts now exercising jurisdiction in matters and causes testamentary who may sustain any loss of emoluments by reason of the passing of this Act, and who are not transferred or appointed by or under this Act to offices of equal value in the Court of Probate, such compensation as, having regard to the tenure of their respective offices and appointments, and to the provisions of the Act of the session holden in the sixth and seventh years of King William the Fourth, chapter seventy-seven, section twenty-five, and of the Act of the session holden in the tenth and eleventh years of her Majesty, chapter ninety-eight, section nine, and the several subsequent Acts continuing the provisions of the said Acts respectively, the said Commissioners deem just and proper to be awarded: Provided that where persons whose claims in respect of offices, held for life or otherwise, are excluded by the said provisions, have executed in person the duties of such offices, the said provisions shall not be deemed to prevent the said Commissioners from granting to such persons such compensation as the said Commissioners would deem just and proper to be awarded on the abolition or reduction of the emoluments of like offices, if held at the pleasure of the Crown; and it shall be lawful for the said Commissioners to grant to all managing and other clerks who have been continuously employed in the offices of registrars of the said Courts for fifteen years and upwards immediately before the passing of this Act, and may sustain any loss of emoluments as aforesaid, and are not transferred or appointed as aforesaid, such compensation as the said Commissioners may deem just and proper: Provided always, that if any person to whom any yearly sum is awarded for compensation as aforesaid is or shall be appointed to any office or situation under this Act, or in the public service, the payment of such compensation shall be suspended so long as he continues to receive the salary or emoluments of such office or situation, if the amount thereof be equal to or greater than the amount of emoluments in respect of the loss whereof compensation is awarded; and if the amount of such last-mentioned emoluments be greater than the salary or emoluments of such office or situation, no* *more of such compensation shall be paid than will, with such salary or emoluments, be equal to the emoluments in respect of the loss whereof such compensation is payable.*

Sec. 103 repealed by 42 & 43 Vict. c. 78, s. 29.

Persons receiving compensation to continue to discharge the remaining duties of their offices.

104. *Any person to whom compensation is awarded under this Act in respect of the loss of emoluments of any office, and who at the passing of this Act shall have been discharging or liable to discharge in respect of such office duties other than those in matters and causes testamentary, shall, so long as he shall receive such compensation, be bound to discharge such other duties on the same terms on which, whether gratuitously or otherwise, he discharged or was liable to discharge the same before the passing of this Act.*

Sec. 104 repealed by 42 & 43 Vict. c. 78, s. 29.

Compensation to proctors.

105. *Whereas the fees or emoluments of the persons now practising as proctors in the Courts now exercising jurisdiction in matters and causes testamentary may be damaged by the abolition of the exclusive rights and privileges which they have hitherto enjoyed as such proctors in such Courts: Be it enacted, that the Commissioners of her Majesty's Treasury, by examination on oath or otherwise, which oath they are hereby authorised to administer, may inquire into and may, by the production of such evidence as they shall think fit to require, ascertain and absolutely determine the net annual amount of the profits arising from the transaction of business by proctors in matters and causes testamentary, on an average of five years immediately preceding the commencement of this Act, or of such proportion of five years as shall have elapsed since each and every such proctor was admitted to practise in such Courts, and shall award to each and every such proctor a sum of money or annual payment during the term of his natural life of such amount as shall be equal in value to one half of the net profits derived by such proctor in respect of matters and causes testamentary upon the said average of five years immediately preceding the commencement of this Act, or of such proportion of the said five years as shall have elapsed since the admission of each and every such proctor to practise in the Courts now exercising jurisdiction in matters and causes testamentary.*

Sec. 105 repealed by 42 & 43 Vict. c. 78, s. 29.

Compensation to proctors in partnership.

106. *And whereas divers proctors practising in the Courts now exercising jurisdiction in matters and causes testamentary now are or may at the commencement of this Act be associated together in partnership: Be it therefore enacted, that in all such cases the Commissioners of her Majesty's Treasury shall inquire into and ascertain the terms or conditions of such partnerships, and shall absolutely determine and award compensation in respect thereof as hereinbefore provided to each of such partnerships, in like manner as if all the emoluments thereof had been derived by one individual, and shall apportion such compensation among the members of each such partnership, with or without benefit of survivorship, regard being had to the existing terms and conditions of the same.*

Sec. 106 repealed by 42 & 43 Vict. c. 78, s. 29.

For the protection of the interests of

107. *And whereas the Most Reverend Charles late Archbishop of Canterbury, by virtue of the power given by an Act of the ninth year of King George the Fourth, "to authorise the Lord Archbishop of*

Viscount Canterbury.

Canterbury for the time being to appoint a person or persons to the office of registrar of his prerogative, without a previous surrender of the existing grant or grants of the said office," did, by letters patent under his archiepiscopal seal, dated the twenty-first day of June one thousand eight hundred and twenty-eight, with the confirmation of the Dean and Chapter of the Cathedral and Metropolitical Church of Christ, Canterbury, grant the said office of registrar of his prerogative to the Right Honourable Charles Manners Sutton, now Viscount Canterbury, then Charles Manners Sutton, Esquire, the eldest son and next heir male of the Right Honourable Charles Manners Sutton, late Viscount Canterbury, for his life, subject and without prejudice to the estates and interests, rights and privileges, of the Reverend George Moore and Robert Moore (who then held the said office by virtue of such grant as therein mentioned), and the survivor of them: and whereas by an Act passed in the session of Parliament held in the second and third years of the reign of his late Majesty King William the Fourth, intituled An Act for settling and securing annuities on the Right Honourable Charles Manners Sutton and on his next heir male, in consideration of the eminent services of the Right Honourable Charles Manners Sutton, it was enacted, that an annuity of four thousand pounds should be payable out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland to the said Right Honourable Charles Manners Sutton late Viscount Canterbury during his life, and that after the decease of the said Charles late Viscount Canterbury one annuity of three thousand pounds be payable out of the said Consolidated Fund to the then heir male of the body of the said Charles late Viscount Canterbury during the natural life of such heir male; and it was further enacted, that, in the event of the said Charles now Viscount Canterbury having succeeded to and being in the possession of the said annuity of three thousand pounds, and afterwards becoming entitled to the full possession of the said office of registrar of the Prerogative of the Lord Archbishop of Canterbury, and to the fees, perquisites, profits, and emoluments thereof (provided the same should exceed the annual sum of three thousand pounds), then and in either of the cases aforesaid the said annuity of three thousand pounds should cease and determine and be no longer payable to the said Charles now Viscount Canterbury: provided nevertheless, that if the said fees, perquisites, profits, and emoluments of the said office of registrar should not produce the net annual sum of three thousand pounds to the said Charles now Viscount Canterbury, then there should be issued and paid out of the said Consolidated Fund such a sum of money annually as, together with the said fees, perquisites, profits, and emoluments, would make a clear annual income to the said Charles now Viscount Canterbury of three thousand pounds: and whereas the said Charles now Viscount Canterbury, upon the decease of the said Charles late Viscount Canterbury, succeeded to and is now in possession of the annuity of three thousand pounds, but he is not yet in possession of the said office of registrar: there shall be awarded to the said Charles now Viscount Canterbury, as a compensation for the fees, perquisites, profits, and emoluments of the said office of registrar of the Prerogative of the Lord Archbishop of Canterbury, an annuity to be calculated upon the average yearly net receipts of the legal fees, per-

2 & 3 Will. 4, c. 109.

quisites, profits, and emoluments of the said office during such period next preceding the time when this Act shall come into operation as the Commissioners of her Majesty's Treasury shall think proper; and such annuity shall commence from the time of this Act coming into operation, if the said Charles Viscount Canterbury shall then be in possession of the said office, and if not, then from the time at which the said Charles Viscount Canterbury would have become entitled, but for the passing of this Act, to the full possession of the said office, and to the receipt of the fees, perquisites, profits, and emoluments thereof, and shall be paid to the said Charles Viscount Canterbury thenceforth during his life; Provided that if the said annuity by way of compensation shall exceed the annual sum of three thousand pounds, then the said annuity of three thousand pounds payable under the last-recited Act to the said Charles Viscount Canterbury shall, from and after the commencement of the said annuity by way of compensation, cease and determine, and shall not be payable to the said Charles Viscount Canterbury; and in case the annuity awarded by way of compensation shall be less than the net annual sum of three thousand pounds, the provision contained in the said recited Act passed in the session of Parliament held in the second and third years of his late Majesty King William the Fourth, for the payment unto the heir male of the body of the said Charles Viscount Canterbury, out of the said Consolidated Fund, of such a sum of money annually as, together with the said fees, perquisites, profits, and emoluments, would make up a clear income to him of three thousand pounds, shall, from and after the commencement of the said annuity by way of compensation, be applicable to and be in force for the purpose of making up, together with the said annuity so to be awarded in lieu of such fees, perquisites, profits, and emoluments as aforesaid, a clear annual income of three thousand pounds to the said Charles now Viscount Canterbury during his life.

Sec. 107 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

The registry of Prerogative Court of Canterbury to vest in registrars of the Court.

108. *All the claim, title, and interest which at the time of the passing of this Act the Reverend Robert Moore, clerk, has or is entitled to in or in respect of the building at present used as the public registry of the Prerogative Court, shall at the time appointed for the commencement of this Act vest in the registrars for the time being of the Court, subject to the payment of such rents, and the performance and fulfilment of such contracts in respect thereof, as the said Robert Moore, his executors or administrators, shall be subject to at the time of such vesting.*

Sec. 108 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Compensation to Sir John Dodson in case he be not appointed judge of the Court of Probate.

109. *In case Sir John Dodson, the present judge of the Prerogative Court of Canterbury and Dean of the Court of Arches, be not appointed the first judge of the Court of Probate, there shall be paid to him during his natural life, as well by way of retiring pension as of salary as Dean of the Court of Arches, the net yearly sum of two thousand pounds, to commence from the time appointed for the coming into operation of this Act, and to be paid out of the fund and in manner herein provided for the payment of compensations.*

Sec. 109 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Establishments in district registries.

110. There shall be a clerk or so many clerks in each district registry, and there shall be paid to such clerk or clerks such salary or respective salaries as the judge of the Court, with the sanction of the Commissioners of her Majesty's Treasury, may from time to time think fit to direct; and it shall be lawful for such judge to prescribe from time to time the qualifications which shall be possessed by persons appointed to be clerks in such district registries, and generally to regulate the establishment of such district registries with reference to the duties to be performed therein; and the clerk or clerks in each district registry shall be appointed by the district registrar, with the approval of the judge; and every such clerk may be removed by such judge, or by the district registrar with the approval of the judge.

Fees payable to district registrars.

111. *Each district registrar shall, out of the fees taken by him in respect of the business in his respective district registry, pay the salary or salaries of the clerk or clerks in such registry, and the residue of such fees shall be retained by such district registrar to his own use; and every district registrar shall keep an account of all fees so taken by him as aforesaid, and shall within one month after the end of each year render to the Commissioners of her Majesty's Treasury a faithful account in writing of all such fees received by him during such year: Provided that it shall be lawful for the Commissioners of her Majesty's Treasury, at any time after the commencement of this Act, to order that the district registrars under this Act, or any of them, shall be paid by salaries instead of fees, and to fix the salaries to be payable to them respectively; and thereupon all fees payable to the district registrars so ordered to be paid by salaries shall be accounted for and paid into the Exchequer at such times and under such regulations as the Commissioners of her Majesty's Treasury shall direct, and shall be carried to and form part of the Consolidated Fund of the United Kingdom, and the salaries of such district registrars and of their clerks shall be paid out of such monies as shall be provided by Parliament for that purpose, and no such district registrar shall be deemed to have any claim to compensation on account of any diminution of his emoluments by reason of any such order.*

District registrars may be paid by salaries instead of fees.

Sec. 111 repealed by 42 & 43 Vict. c. 78, s. 29.

Compensation to clerical surrogates, etc.

112. *It shall be lawful for the Commissioners of the Treasury to grant to every clerical surrogate or other clerical person who, at the time of the passing of this Act, shall have been appointed surrogate in either of the provinces of Canterbury or York, such compensation for any loss the said surrogates or persons may sustain by the passing of this Act as the said Commissioners deem just and proper to be awarded; the said Commissioners having regard in awarding such compensation to the circumstance of the said clerical surrogates not being able to follow any other professional employment in lieu of the said office of surrogate.*

Sec. 112 repealed by 42 & 43 Vict. c. 78, s. 29.

Persons receiving compensation to be liable to be called upon to fill offices, etc.

113. *That every person to whom any compensation shall be granted under this Act shall at all times when called upon be liable to fill any public office or situation in England under the Crown for which his previous services in any office abolished by this Act may render him eligible; and that if he shall decline when called upon so to do to take upon himself such office or situation, and execute the duties thereof satisfactorily, being in a competent state of health, he shall forfeit his right to any compensation or allowances which may have been granted to him in respect of such previous services.*

Sec. 113 repealed by 42 & 43 Vict. c. 78, s. 29.

Publication of accounts.

114. *The Commissioners of her Majesty's Treasury shall cause to be prepared in each year ending December thirty-one a return of all fees and monies levied in such year under the authority of this Act; also a return of the annual salaries of the judge of the said Court of Probate, and of the registrars, deputy registrars, clerks, and all others holding offices either in London or in the country districts, with an account of all the incidental expenses relating to the offices aforesaid, whether such salaries and expenses be defrayed out of fees or out of any other monies; also a return of all superannuations, pensions, annuities, retiring allowances and compensations made payable under this Act in each year, stating the gross amount and the amount in detail of such charges: Provided always, that all such returns aforesaid shall be presented to both Houses of Parliament on or before the thirty-first day of March in each year, if Parliament is then sitting, and if Parliament is not sitting, then such returns shall be presented within one month of the first meeting of Parliament after the thirty-first day of March in each year: Provided also, that every district registrar shall keep an account of all fees so taken by him as aforesaid, and shall within one month after the end of each year render to the Commissioners of her Majesty's Treasury a faithful account in writing of all such fees received by him during such year.*

Sec. 114 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Judge if a Privy Councillor to be a member of Judicial Committee.

115. *The judge of the Court if a privy councillor shall be a member of the Judicial Committee of the Privy Council.*

Sec. 115 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

College of Doctors of Law may let, sell, etc. their real and personal estate, and lay out monies in purchase of other estates, etc.

116. And whereas, with reference to the abolition of the jurisdiction hereby abolished and otherwise, it is expedient to give, confirm, or extend certain powers to or of "The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts," incorporated under that style and title by letters patent, dated the twenty-second day of June, in the eighth year of his late Majesty King George the Third: Be it enacted, that it shall be lawful for the said college from time to time hereafter to let, sell, or exchange for other real or personal estate, or both, all or any part of the real and personal estate which shall for the time being belong to the said college, either directly or through the medium of any trustee or trustees, and to lay out the monies to be received on any such sale or exchange, or otherwise, belonging to the said college as aforesaid, in the purchase of other real or personal estate, or both, but so that the said college shall not at any one time hold or enjoy real estate of a yearly value exceeding one thousand pounds in the whole, and to pay, apply, and dispose of the income of all the real and personal estate which shall for the time being belong to the said college as aforesaid to or for the benefit of such body or bodies politic or corporate, or person or persons, whether being or including, or not being or including, the said college, and all or any individual members or member thereof for the time being, and generally for such purposes and in such manner as the said college shall think fit; and further, to alien and dispose of all or any part of such real and personal estate, and the proceeds of any sale thereof, either by way of donation, voluntary disposition, or otherwise, unto, between, or amongst any body or bodies politic or corporate, or any person or persons whatsoever, whether being or not being a member or members of the said college: provided always that no donation or other voluntary disposition of the corpus, or any part of the corpus, of the real and personal estate of the said college to any person or persons being a member or members thereof at the time of such donation or other voluntary disposition shall be effectual without the previous consent thereto of a majority of the members of the said college present at any meeting of the college, and the receipt of the treasurer for the time being of the said college shall be an effectual discharge for all gross annual and other sums which shall for the time being belong or be payable to the said college.

College may surrender their charter, and upon such surrender shall be dissolved.

117. It shall be lawful for the said college, at any time after a resolution to that effect shall have been come to at a meeting of the college, by a majority of the members present at such meeting, to surrender and yield up to her Majesty, her heirs or successors, at such times as in such resolution shall be determined, the charter of incorporation of the said college, and all franchises and privileges thereby conferred, or which shall for the time being belong to the said college; and upon and by such surrender the said corporation shall be dissolved, and shall cease to exist, for all purposes whatsoever, (except so far as its existence may be requisite for the saving of the rights of her Majesty, her heirs and successors, and of all and every person and persons, body and bodies politic or corporate, whatsoever other than the said college,) and all real and personal estate which at the time of such dissolution of the said college shall belong to the said college for its own use and benefit, either directly or through the medium of any trustee or trustees, shall thenceforth belong, for all the estate and interest therein which at the time of such dissolution belonged to the said college absolutely, to all the persons who at the time of such dissolution thereof shall be the president and fellowes of the said college, in equal shares as tenants in common, to and for their own use and benefit respectively, but subject to any charges or incumbrances affecting the same at the time of such dissolution, and all real and personal estate of which the said college at the time of such dissolution thereof be seised or possessed, upon any trust or trusts, shall thereupon become vested in the four persons who at the time of such dissolution shall be the president and three senior fellowes of the said college, as joint tenants, their heirs, executors, or administrators, according to the nature of the real and personal estates respectively, upon the trust or trusts affecting the same respectively.

Treasury to provide the buildings for registries, etc.

118. *It shall be lawful for the Commissioners of her Majesty's Treasury, out of such monies as may be provided and appropriated by Parliament for that purpose, to cause to be purchased, erected, hired, or otherwise provided such offices and buildings as may be suitable for the district registries and depository or depositories for wills, and such buildings, if any, as may be necessary for the Court and principal registry, in addition to the building by their Act vested in said registrars, or after the determination of their interest in such building.*

Sec. 118 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Rules and orders to be

119. All rules and orders to be made under this Act, concerning procedure and practice, and the table of fees to be fixed under this

Act, and all alterations thereof to be from time to time made, shall be laid before both Houses of Parliament within one month after the making thereof if Parliament be then sitting, or if Parliament be not then sitting, within one month after the commencement of the then next session of Parliament.

laid before Parliament.

SCHEDULE (A.).

DISTRICTS AND PLACES OF DISTRICT REGISTRIES THROUGHOUT ENGLAND AND WALES.

Districts.	Places of District Registries.
County of Northumberland (*a*)	Newcastle-on-Tyne.
County of Durham . . .	Durham.
Counties of Cumberland and Westmoreland.	Carlisle.
West Riding of the County of York.	Wakefield.
North Riding ditto . . East Riding ditto (*b*) including the City of York and Ainsty	York.
County of Lancaster, except the Hundred of Salford and West Derby and the City of Manchester.	Lancaster.
City of Manchester and Hundred of Salford.	Manchester.
Hundred of West Derby in Lancashire	Liverpool.
County of Chester (*c*) . .	Chester.
Counties of Carnarvon and Anglesea.	Bangor.
Counties of Flint, Denbigh, and Merioneth.	St. Asaph.
County of Derby . . .	Derby.
County of Nottingham (*d*) .	Nottingham.
Counties of Leicester and Rutland.	Leicester.
County of Lincoln (*e*) . .	Lincoln.
Counties of Salop and Montgomery.	Shrewsbury.
Northern Division of Northampton, and Counties of Huntingdon and Cambridge (*f*).	Peterborough.
County of Norfolk (*g*) . .	Norwich.
Eastern Division of the County of Suffolk and North Division of the County of Essex.	Ipswich.
Western Division of the County of Suffolk.	Bury St. Edmunds.
County of Bedford and Southern Division of Northamptonshire (*h*).	Northampton.
County of Warwick (*i*) . .	Birmingham.
County of Stafford (*k*) . .	Lichfield.
Counties of Radnor, Brecknock, and Hereford.	Hereford.
Counties of Cardigan, Carmarthen (*l*), and Pembroke (*m*) with the Deaneries of East and West Gower in the County of Glamorgan.	Carmarthen.
Counties of Glamorgan (with the exception of the Deaneries of East and West Gower) and Monmouth.	Llandaff.
County of Worcester (*n*) . .	Worcester.
County of Gloucester (*o*), except the present Bristol County Court District.	Gloucester.
Bristol and Bath present County Court Districts.	Bristol.
Counties of Oxford (*p*), Berks, Bucks.	Oxford.
Eastern Division of the County of Somerset, except the present Bath County Court District, and the Part in Somersetshire of the present Bristol County Court District.	Wells.

(*a*) Including the towns and counties of Newcastle-on-Tyne and Berwick-upon-Tweed.

(*b*) Including the town and county of Kingston-on-Hull.

(*c*) Including the city of Chester.

(*d*) Including the town of Nottingham.

(*e*) Including the city of Lincoln.

(*f*) Including the University of Cambridge.

(*g*) Including the city of Norwich.

(*h*) Including the town of Northampton.

(*i*) Including the city of Coventry.

(*k*) Including the city of Lichfield.

(*l*) Including the town of Carmarthen.

(*m*) Including the town of Haverfordwest.

(*n*) Including the city of Worcester.

(*o*) Including the city of Gloucester.

(*p*) Including the University of Oxford.

SCHEDULE A.—*continued.*

Districts.	Places of District Registries.	Districts.	Places of District Registries.
Western Division of the County of Somerset.	Taunton.	County of Hants (*s*)	Winchester.
County of Devon (*q*)	Exeter.	Eastern Division of the County of Sussex (*t*).	Lewes.
County of Cornwall	Bodmin.	Western Division of the County of Sussex.	Chichester.
County of Wilts	Salisbury.	East Division of the County of Kent (*u*).	Canterbury.
County of Dorset (*r*)	Blandford.		

The divisions of counties referred to in the Schedule are the divisions of the same counties described for election purposes in the Act of the second and third years of King William the Fourth chapter sixty-four, and the cities and towns herein referred to are to be taken to include the counties of such cities and towns as are counties of themselves.

(*q*) Including the city of Exeter.

(*r*) Including the town of Poole.

(*s*) Including the town of Southampton and Isle of Wight.

(*t*) Including such of the Cinque Ports and their dependencies as are locally situate in the county of Sussex.

(*u*) Including the city of Canterbury and such of the Cinque Ports and their dependencies as are locally situate in the county of Kent.

SCHEDULE (B.).

	Annual Salary.
The Three Registrars in London, each	£1,500
The Record Keepers, each	600
The Sealer	300

Schedule repealed by 57 & 58 Vict. c. 56 (S. L. R.).

PROBATE AND LETTERS OF ADMINISTRATION (IRELAND) ACT, 1857.

(20 & 21 VICT. C. 79.)

Sections 94 & 95.

Probates granted in England to be of like force as if originally granted in Ireland on being re-sealed.

94. From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to and a copy thereof deposited with the registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last-mentioned Court, and being duly stamped shall be of the like force and effect and have the same operation in Ireland as if it had been originally granted by the Court of Probate in Ireland.

Probates granted in Ireland to be of like force as if originally granted in England on being re-sealed.

95. From and after the period at which this Act shall come into operation, when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to and a copy thereof deposited with the registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the last-mentioned Court, and being duly stamped shall be of the like force and effect and have the same operation in England as if it had been originally granted by the Court of Probate in England.

CONFIRMATION OF EXECUTORS (SCOTLAND) ACT, 1858.

(21 & 22 VICT. C. 56.)

Sections 9, 12, 14—17.

Inventory may include personal estate in any part of United Kingdom.

[Amended 39 & 40 Vict. c. 70, s. 41.]

9. From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland or both: Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile: Provided also, that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.

Confirmation produced in Probate Court of England, and sealed, to have the effect of probate or administration.

[Amended 39 & 40 Vict. c. 70, ss. 41–44.]

12. From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, *together with a certified copy of the interlocutor of the commissary* finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.

Probate or letters of administration produced in Commissary Court and certified, to have effect of confirmation.

[Amended 39 & 40 Vict. c. 70, ss. 41–44.]

14. From and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the county of Edinburgh, and a copy thereof deposited with the commissary clerk of the said Court; the commissary clerk shall endorse or write on the back or face of such grant a certificate in the form as near as may be of the schedule (F.) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect and have the same operation in Scotland as if a confirmation had been granted by the said Court.

For securing the stamp duties, probates, etc. to be deemed granted for all the property in the

15. In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in England or in Ireland, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United

United Kingdom.

Kingdom, within the meaning of the Act of Parliament passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, and of all other Acts of Parliament granting or relating to Stamp Duties on probates and letters of administration in England and Ireland respectively; and the affidavit required by law to be made on applying for probate or letters of administration in England or Ireland as to the value of the estate and effects of the deceased; and also where the Commissary shall in manner aforesaid find that the deceased was domiciled in Scotland, the inventory required by law to be exhibited and recorded in the proper Commissary Court in Scotland before obtaining confirmation, or intermitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in Scotland, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom, and the value thereof; and the stamp duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in Scotland.

Inventory to include all such property.

Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act.

16. For the purpose aforesaid, and also for granting relief where too high a stamp duty shall have been paid on any such probate or letters of administration, or inventory, the provisions contained in sections forty, forty-one, forty-two, and forty-three, of the said Act passed in the fifty-fifth year of his Majesty King George the Third, relating to probates and letters of administration granted in England, and the like provisions in the Act passed in the fifty-sixth year of the said King, chapter fifty-six, relating to probates and letters of administration granted in Ireland, and the provisions contained in the Act passed in the forty-eighth year of the said King, chapter one hundred and forty-nine, relating to inventories in Scotland, and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.

Affidavit as to domicile to be made on applying for

17. Provided, that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in England or in Ireland, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorise the same to be so stated in or upon the probate or letters of administration; Provided also, that any such statement, and the interlocutor of the commissary finding that the deceased was domiciled in Scotland, shall be evidence, and have effect for the purposes of this Act only.

probate or administration.

COURT OF PROBATE ACT, 1858.

(21 & 22 VICT. C. 95.)

An Act to amend the Act of the twentieth and twenty-first Victoria, chapter seventy-seven.

[*2nd August*, 1858.]

20 & 21 Vict. c. 77.

WHEREAS in the last session of Parliament an Act was passed, intituled An Act to amend the Law relating to Probates and Letters of Administration in England, hereinafter designated "The Court of Probate Act:" and whereas it is expedient to amend the same: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

The judge of the High Court of Admiralty and the judge of the Court of Probate may sit for each other.

1. *It shall be lawful for the judge of the High Court of Admiralty to sit in open Court or in chambers for the judge of her Majesty's Court of Probate, and it shall be lawful for the judge of her Majesty's Court of Probate to sit in open Court or chambers for the judge of the High Court of Admiralty; and all orders, decrees, or sentences, and other acts whatsoever, made, decreed, pronounced, or done by either of the judges aforesaid acting for the other, shall, in the Court books, be stated to have been made, decreed, pronounced, or done by such judge sitting and acting on behalf of such other judge; and such orders, decrees, sentences, and other acts so made, decreed, pronounced, or done shall have the same force and validity in law as if they had been made, decreed, pronounced, or done by the judge on whose behalf they purport to have been so made, decreed, pronounced, or done.*

Serjeants and barristers may practise in Court of Probate.

2. *All serjeants and barristers-at-law shall be entitled from and after the passing of this Act to practise in all causes and matters whatsoever in the Court of Probate.*

Secs. 1 and 2 repealed by 44 & 45 Vict. c. 59, s. 3.

The judge of the Court of Probate may sit in chambers.

3. It shall be lawful for the judge of the Court of Probate for the time being to sit in chambers for the dispatch of such part of the business of the said Court as can in the opinion of the said judge, with advantage to the suitors, be heard in chambers; and the times at which such sittings shall be held shall from time to time be fixed by the judge: Provided always, that no question shall be heard in chambers which either party shall require to be heard in open Court.

The Treasury to cause chambers to be provided.

4. *The Commissioners of her Majesty's Treasury shall from time to time provide chambers in which the judge of the Court of Probate shall sit for the dispatch of such business as aforesaid; and until such chambers are provided elsewhere the said judge shall sit in chambers in any room which he may find convenient for the purpose.*

Sec. 4 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Powers of judge when sitting in chambers.

5. *The judge of the Court of Probate, when so sitting in chambers, shall have and exercise the same power and jurisdiction in respect of the business to be brought before him as if sitting in open Court.*

Sec. 5 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Power to appoint an additional registrar.

6. *Whereas there are now three registrars only of the principal registry of the said Court, that is to say, Augustus Frederic Bayford, the senior registrar; Charles John Middleton, the second registrar; and Edward Francis Jenner, the third registrar: And whereas the duties of the said principal registry cannot be efficiently discharged by three registrars: Be it enacted, that it shall be lawful for the judge of the said Court to appoint a fourth registrar for the principal registry of the said Court, in addition to the three registrars appointed under the Court of Probate Act; and from and after the appointment of such fourth registrar there shall be paid to each of the said registrars the annual salary mentioned in the Schedule to this Act, in lieu of the salary provided by the Court of Probate Act, such salaries to be paid out of any monies provided by Parliament for the purposes of the said Act: Provided always, that nothing herein contained shall be construed to diminish the salary of any of the three registrars appointed before the passing of this Act,*

Sec. 6 sepealed by 55 & 56 Vict. c. 19 (S. L. R.).

Vacancy in office of registrar how to be filled up.

7. *On the death, resignation, or removal of any of the four registrars of the said principal registry, other than the junior registrar for the time being, the vacancy thereby occasioned shall be filled up by the registrar next in seniority to whom no sufficient objection shall be made to the satisfaction of the judge of the said Court.*

Sec. 7 repealed by 56 & 57 Vict. c. 54 (S. L. R.).

Clerks in the principal registry eligible to be registrars, etc.

8. Clerks having served five years in the principal registry of the Court of Probate shall be eligible to be appointed registrars or district registrars of the said Court.

Certain articled clerks to be admitted proctors of the Court of Probate.

9. *It shall be lawful for the judge of the Court of Probate to admit any person who at the time of the passing of the Court of Probate Act was articled to a proctor in Doctors Commons, or to a proctor belonging to any Ecclesiastical Court, so soon as he shall have served the full term for which he was articled, or within the period of one year therefrom, to be a proctor of Her Majesty's Court of Probate, upon the payment of such fees as shall be fixed by the judge of the said Court, with the sanction of the commissioners of Her Majesty's Treasury.*

Sec. 9 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Where personalty is under £200 County Court to have jurisdiction.

10. Where it appears by affidavit to the satisfaction of a registrar of the principal registry that the testator or intestate in respect of whose estate a grant or revocation of a grant of probate of letters of administration is applied for had at the time of his death his fixed place of abode in one of the districts specified in Schedule (A.) to the said "Court of Probate Act," and that the personal estate in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of two hundred pounds, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of three hundred pounds or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto.

Sec. 54 of 20 & 21 Vict. c. 77, repealed.

11. *Section fifty-four of the said Court of Probate Act shall be and the same is hereby repealed.*

Sec. 11 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Sec. 59 of 20 & 21 Vict. c. 77, to apply to applications for revocation of grants.

12. The said Court of Probate Act, section fifty-nine, shall, so far as the County Courts or a judge thereof are concerned, apply to an application for the revocation of a grant of probate or administration as well as to an application for any such grant.

Power to make rules and orders and frame scales of fees for the County Courts.

13. *The power and authority to make rules and orders for regulating the proceedings of the County Courts shall extend and be applicable to all proceedings in the County Courts under this Act, and also to framing a scale of costs and charges to be paid to counsel, proctors, solicitors, and attornies, in respect of proceedings in County Courts, under the said Court of Probate Act or this Act.*

Sec. 13 repealed by 55 & 56 Vict. c. 19 (S. L. R.).

Non-contentious business pending in any Ecclesiastical Court to be transferred.

14. *All non-contentious business pending in any Ecclesiastical Court at the time when "the Court of Probate Act" came into operation shall be deemed to have been transferred to the Court of Probate, in the same way as all pending suits were transferred to the said Court under the said Act, and all Acts executed under the authority of any such Ecclesiastical Court with reference to such business which would have been valid if the authority of such Court had not been abolished shall be valid, and all oaths and bonds sworn and executed in manner required by any Ecclesiastical Court in reference to such business, prior to the eleventh day of January one thousand eight hundred and fifty-eight, shall continue to have and be deemed to have had the same force and effect in law as they would have had if sworn and executed in pursuance of the provisions of the said Act or of this Act.*

Sec. 14 repealed by 38 & 39 Vict. c. 66 (S. L. R.).

Bonds given before January 11th, 1858, to remain in force.

15. Bonds given to any archbishop, bishop, or any other person exercising testamentary jurisdiction in respect of grants or letters of administration made prior to the eleventh day of January one thousand eight hundred and fifty-eight, or in respect of grants made in pursuance of the Court of Probate Act or of this Act, whether taken under a commission or requisition executed before or after the said eleventh day of January, shall enure to the benefit of the judge of the Court of Probate, and, if necessary, shall be put in force in the same manner and subject to the same rules (so far as the same may be applicable to them) as if they had been given to the judge of the said Court subsequently to that day.

An executor not acting or not appearing to a citation to be treated as if he had renounced.

16. Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

Judge of the Court of Probate may amend grants made before January 11th, 1858.

17. The judge of the Court of Probate shall have and exercise the same power of altering and amending grants of probate and letters of administration made before the eleventh day of January one thousand eight hundred and fifty-eight as any Ecclesiastical Court had and exercised in respect of such grants.

Provisions of 38 Geo. 3, c. 87, and 20 & 21 Vict. c. 77, extended to all cases of executors and administrators.

18. The provisions of an Act passed in the thirty-eighth year of George the Third, chapter eighty-seven, and of "the Court of Probate Act," shall be extended to all executors and administrators residing out of the jurisdiction of Her Majesty's Courts of law and equity, whether it be or be not intended to institute proceedings in the Court of Chancery, and to all grants made before and subsequently to the passing of the last-mentioned Act, and it shall be lawful to alter the language of the grant prescribed by the first-named statute so as to make it apply to grants made in the Court of Probate under the said last-mentioned Act.

Between the death of the person deceased and the grant the property to vest in the judge ordinary.

19. From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary.

Second and subsequent grants to be made where the original will or the original letters of administration are deposited.

20. All second and subsequent grants of probate or letters of administration shall be made in the principal registry, or in the district registry where the original will is registered or the original grant of letters of administration has been made, or in the district registry to which the original will or a registered copy thereof, or the record of the original grant of administration, have been transmitted, by virtue of a requisition issued in pursuance of section eighty-nine of "The Court of Probate Act;" and for and in respect of such second or subsequent grants of probate or letters of administration to be made in a district registry it shall not be requisite that it should appear by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made.

The Court of Probate may require security from a receiver of real estate.

21. It shall be lawful for the Court of Probate to require security by bond, in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said Court, under section seventy-one of "The Court of Probate Act;" and the Court may, on application, made on motion or in a summary way, order one of the registrars of the Court to assign the same to some person to be named in such order; and such person, his executors or administrators, shall thereupon be entitled to sue on the said security, or put the same in force in his or their own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said Court, and shall be entitled to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof.

Administration pending suit deemed to apply to appeals.

22. All the provisions contained in the Court of Probate Act respecting grants of administration pending suit shall be deemed to apply to the case of appeals to the House of Lords under the said Act.

Registrar may issue subpœnas to produce papers, etc.

23. It shall be lawful for a registrar of the principal registry of the Court of Probate, and whether any suit or other proceeding shall or shall not be pending in the said Court, to issue a subpœna requiring any person to produce and bring into the principal or any district registry, or otherwise, as in the said subpœna may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpœna, shall be bound to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said Court, and had been ordered by the judge of the Court of Probate to produce and bring in such paper or writing.

The registrars to do all acts heretofore done by surrogates.

24. The registrars of the principal registry shall be invested with and shall and may exercise with reference to proceedings in the Court of Probate the same power and authority which surrogates of the judge of the Prerogative Court of Canterbury could or might before the passing of the Court of Probate Act have exercised in chambers with reference to proceedings in the said Prerogative Court.

Copies of wills may be certified by a stamp.

25. Copies of wills required to be transmitted by a district registrar, and certified by him to be correct copies, under section fifty-one of the Court of Probate Act, may be so certified and transmitted under a stamp provided by the district registrar for that purpose, and approved of by the judge of the Court of Probate.

Certificates from the principal registry may be stamped.

26. Certificates issued from the principal registry with reference to notices of applications transmitted from the district registrars under section forty-nine of the Court of Probate Act need not be made under the hand of a registrar of the principal registry, as required by the said Act, but may be issued under a stamp provided for that purpose, and approved of by the judge of the Court of Probate.

Requisitions may be issued for the transmission of a single paper.

27. *Whereas doubts have been entertained whether a requisition can be issued under section eighty-nine of the Court of Probate Act for the transmission of one or more papers only, not being all the papers and documents in the custody of the person to whom any such requisition may be addressed: Be it therefore enacted and declared, That* the said section shall be construed to extend to all requisitions, whether for the transmission of one or of more records, wills, grants, probates, letters of administration, administration bonds, notes of administration, Court books, calendars, deeds, processes, acts, proceedings, or other instruments relating exclusively or principally to matters and causes testamentary.

Power to enforce decree as to costs.

28. The judge of the Court of Probate, and the registrars of the principal registry thereof, shall respectively, in any case where an Ecclesiastical or other Court having testamentary jurisdiction had previously to the eleventh day of January one thousand eight hundred and fifty-eight made any order or decree in respect of costs, have the same power of taxing such costs, and enforcing payment thereof, or of otherwise carrying such order or decree into effect, as if the cause wherein such decree was made had been originally commenced and prosecuted in the said Court of Probate: Provided that in taxing any such costs, or any other costs incurred in causes depending in any such Courts before the time aforesaid, all fees, charges, and expenses shall be allowed which might have been legally made, charged and enforced according to the practice of the Prerogative Court of Canterbury.

Letters of administration granted in Ireland not to be re-sealed in England, until sufficient bond is given.

29. Letters of administration granted by the Court of Probate in Ireland shall not be re-sealed, under section ninety-five of the twentieth and twenty-first Victoria, chapter seventy-nine, until a certificate has been filed under the hand of a registrar of the Court of Probate in Ireland that bond has been given to the judge of the Court of Probate in Ireland in a sum sufficient in amount to cover the property in England as well as in Ireland in respect of which such administration is required to be re-sealed.

Commissioners may be appointed in the Isle of Man, etc.

30. *It shall be lawful for the judge of the Court of Probate to appoint, by commission under seal of the Court, any persons practising as solicitors in the Isle of Man, in the Channel Islands, or any of them, to administer oaths, and to take declarations or affirmations, and to exercise any other powers which can be exercised by commissioners of her Majesty's Court of Probate; and such persons shall be entitled from time to time to charge and take such fees as any other persons performing the same duties in the Court of Probate may charge and take.*

Sec. 30 repealed by 52 & 53 Vict. c. 10, s. 12.

Affidavits, before whom to be sworn when parties making them reside in foreign parts.

31. *In cases where it is necessary to obtain affidavits, declarations, or affirmations to be used in the Court of Probate from persons residing in foreign parts out of her Majesty's dominions, the same may be sworn, declared, or affirmed before the persons empowered to administer oaths, under the Act of the sixth of George the Fourth, chapter eighty-seven, or under the Act of the eighteenth and nineteenth of Victoria, chapter forty-two: Provided that in places where there are no such persons as are mentioned in the said Acts such affidavits, declarations, or affirmations may be made, declared, and affirmed before any foreign local magistrate or other person having authority to administer an oath.*

Sec. 31 repealed by 52 & 53 Vict. c. 10, s. 12.

Affidavits, before whom to be sworn.

32. *Affidavits, declarations, and affirmations to be used in the Court of Probate may be sworn and taken in Scotland, Ireland, the Isle of Man, the Channel Islands, or any colony, island, plantation, or place out of England under the dominion of her Majesty, before any Court, judge, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place respectively, or, so far as relates to the Isle of Man and the Channel Islands, before any commissary, ecclesiastical judge, or surrogate, who, at the time of the passing of "The Court of Probate Act," was authorised to administer oaths in the Isle of Man or in the Channel Islands respectively, and all registrars and other officers of the Court of Probate shall take judicial notice of the seal or signature, as the case may be, of any such Court, judge, notary public, or person, which shall be attached, suspended, or subscribed to any such affidavit, declaration, or affirmation, or to any other document.*

Sec. 32 repealed by 52 & 53 Vict. c. 10, s. 12.

Persons forging seal or signature guilty of felony.

33. *If any person shall forge any such seal and signature as last aforesaid, or any seal or signature impressed, affixed, or subscribed, under the provisions of the said Act of the sixth of George the Fourth, or of the said Act of the eighteenth and nineteenth Victoria, to any* *affidavit, declaration, or affirmation to be used in the Court of Probate, or shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to penal servitude for the term of his life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years nor less than one year; and whenever any such document has been admitted in evidence by virtue of this Act, the Court or the person who has admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded, and be kept in the custody of some officer of the Court or other proper person, for such period and subject to such conditions as to the said Court or person shall seem meet; and every person charged with committing any felony under this Act may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county, district, or place in which he may be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried.*

Sec. 33 repealed by 52 & 53 Vict. c. 10, s. 12.

Persons taking a false oath before surrogate guilty of perjury.

34. *Any person who shall wilfully give false evidence, or who shall wilfully swear, affirm, or declare falsely, in any affidavit or deposition before any surrogate having authority to administer oaths under the Court of Probate Act, or before any person who before the passing of the said Act was a surrogate authorised to administer oaths in any of the Channel Islands, or before any person authorised to administer oaths under this Act, shall be liable to the penalties and consequences of wilful and corrupt perjury.*

Sec. 24 repealed by 52 & 53 Vict. c. 10, s. 12.

Provision for the necessary absence of officers.

35. In case any officer appointed or to be appointed by virtue of the Court of Probate Act, 1857, or of this Act, shall, by reason of ill-health or other infirmity, become temporarily incapable of performing the duties of his office, it shall be lawful for the judge to appoint some other fit and proper person to discharge the duties of such office for any period not exceeding six calendar months at any one time, and the person so appointed shall, during such period, have all the power and authority of the officer in whose place he shall be so appointed, and shall be paid by such officer such sum by way of salary or allowance as shall be agreed upon between them respectively or be fixed by the judge, and the judge may, at his discretion, give leave of absence to any officer of the Court for any period not exceeding two months in any year, and shall have the like power of making provision for the discharge of the duties of the office during such absence.

The judge to have the same powers over practitioners as judges of other Courts.

36. *The judge of the Court of Probate shall have and exercise over proctors, solicitors, and attorneys practising in the said Court, the like authority and control as is now exercised by the judges of any Court of equity or common law over persons practising therein as solicitors or attornies.*

Sec. 36 repealed by 44 & 45 Vict. c. 59, s. 3.

Provision for expenses of indexing, etc. documents required to be removed under requisition.

37. When any requisition shall issue in pursuance of section eighty-nine of "The Court of Probate Act, 1857," it shall be lawful for the Commissioners of her Majesty's Treasury out of such monies as may be provided and appropriated by Parliament for that purpose, to cause to be paid all such expenses attending the arranging, classification, indexing, carriage, or otherwise connected with the removal of the documents or books required by such requisition to be removed, as the judge shall from time to time certify to the said Commissioners to be proper and necessary.

Short title of Act.

38. *In citing the Act of the twentieth and twenty-first Victoria, chapter seventy-seven, in any instrument, document, or proceeding,* it shall be sufficient to use the expression "The Court of Probate Act, 1857," and in citing this Act, the expression "Court of Probate Act, 1858."

SCHEDULE.

Senior Registrar	£1,600
Second	1,400
Third	1,200
Fourth	1,000

Schedule repealed by 44 & 45 Vict. c. 59, s. 3.

WILLS ACT, 1861.

(24 & 25 VICT. C. 114.)

(LORD KINGSDOWN'S ACT.)

An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.

[*6th August*, 1861.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent charge of domicile of the person making the same.

Nothing in this Act to invalidate wills otherwise made.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrumemt may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

Extent of Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

THE NAVY AND MARINES (WILLS) ACT, 1865.

(28 & 29 VICT. C. 72.)

An Act to make better Provision respecting Wills of Seamen and Marines of the Royal Navy and Marines.

[29*th June*, 1865.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as The Navy and Marines (Wills) Act, 1865.

Interpretation of terms.

2. In this Act—

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the commissioners for executing the office of Lord High Admiral:

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen.

Will made before entry ineffectual as to wages, etc.

3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty.

Will invalid if combined with power of attorney.

4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney.

Regulations for wills of seamen, etc. as to wages, etc.

5. A will made after the commencement of this Act by any person while serving as a seaman or marine, *or when he has ceased so to serve* (*a*), shall not be valid to pass any wages, prize money, bounty

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(*a*) These words are repealed by the Navy and Marines (Wills) Act, 1897 (60 Vict. c. 12), in respect to a person dying after the 3rd of June, 1897.

money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions :—

(1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea :

(2.) Where the will is made on board one of her Majesty's ships one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty's naval or marine or military force :

(3.) Where the will is made elsewhere than on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public (*b*) :

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England ; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.

As to wills made by prisoners of war.

6. Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions :—

(1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's naval hospital, or a notary public :

(2.) If the will is made according to the forms required by the law of the place where it is made :

(3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or marines or seamen at sea.

Payment under will not in conformity with Act.

7. Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a

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(*b*) By the Navy and Marines (Wills) Act, 1897 (60 Vict. c. 12), in respect of a person dying after the 3rd of June, 1897, the words " or a solicitor or in Scotland a law agent " are inserted here.

mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with.

Commencement of Act.

8. This Act shall commence on such day, not later than the first day of January one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct; nevertheless her Majesty in council may, if it seems fit, with reference to any places out of the United Kingdom, direct that this Act do not commence there, respectively, until a time after that day, and with respect to every such place the time so appointed shall be deemed the time of commencement of this Act.

Publication of Orders in Council.

9. Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and if not, then within thirty days after the next meeting of Parliament.

NAVY AND MARINES (PROPERTY OF DECEASED) ACT, 1865.

(28 & 29 Vict. c. 111.)

An Act to regulate the Disposal of Money and Effects under the Control of the Admiralty belonging to Deceased Officers, Seamen, and Marines of the Royal Navy and Marines, and other Persons.
[5th July, 1865.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as "The Navy and Marines (Property of Deceased) Act, 1865."

2. In this Act—

Interpretation of terms.

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the commissioners for executing the office of Lord High Admiral:

The term "officer" means a commissioned, warrant, or subordinate officer, or assistant engineer, in her Majesty's naval or marine force:

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part, in any capacity, of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force (not being an officer within the meaning of this Act), or a petty officer or man of the Royal Naval Reserve or Naval Coast Volunteers:

The term "representation" includes probate and letters of administration, with or without will annexed:

The term "representative" means any person taking out representation:

The term "person" includes a corporation.

Residue belonging to deceased officers, seamen, or marines.

3. On the death of any person being or having been an officer, seaman, or marine, the amount (if any) to the credit of the deceased in the books of the Admiralty, in respect of sale of effects, arrears of pay, wages, prize money, bounty money, grants, or other allowances in the nature thereof, or other money payable by the Admiralty (which amount is hereafter in this Act, with reference to every such case, called the residue), shall be disposed of according to the provisions of this Act.

Residue belonging to deceased persons in civil service of navy.

4. On the death of any person being or having been employed in any of her Majesty's dockyards or other naval establishment, or in any of the civil departments of the navy, or entitled to an allowance from the Compassionate Fund, or of any widow entitled to a pension on the establishment of the navy, the amount (if any) due by the Admiralty (which amount is hereafter in this Act, with reference to every such case, called the residue) shall be disposed of according to the provisions of this Act.

Residue exceeding £100 to be paid to representative.

5. Where the residue exceeds one hundred pounds the Admiralty shall dispose thereof by paying it to the representative of the deceased.

Residue not exceeding £100 to be paid to representative, if any.

6. Where the residue does not exceed one hundred pounds it shall not be necessary for any purpose that representation to the deceased be taken out; but in any case the Admiralty may, if they think fit, require representation to be taken out, and, if on that requisition or otherwise, representation is taken out, then the Admiralty shall dispose of the residue by paying it to the representative.

Power to require certificate, etc., before representation.

7. In the case, nevertheless, of a seaman or marine, the Admiralty shall not be bound to pay the residue (whatever be its amount) to the representative of the deceased, if representation has been taken out either by a creditor as such, or by any person without such certificate respecting the title to representation having been first obtained from the Admiralty, or such other regulations or conditions having been duly observed or performed, as is or are prescribed by Order in Council; and in any such case the Admiralty shall dispose of the residue in pursuance of this Act as if representation had not been taken out.

Residue not exceeding £100, and no representation, power to pay it to widow, etc.

8. Where the residue does not exceed one hundred pounds, and representation is not taken out, then, subject to the other provisions of this Act, the Admiralty shall, as soon as may be, dispose of the residue as follows:

(1.) They shall, if they think fit, pay the residue to any person showing herself or himself to their satisfaction to be entitled to take out representation to the deceased (otherwise than as a creditor)—to the end that the residue may be applied by the person to whom it is so paid in a due course of administration; and the same shall be so applied accordingly (for which application the Admiralty may require such security as they think fit):

(2.) Or else the Admiralty shall, if they think fit, pay to the persons (if any) beneficially interested in the residue their respective shares thereof:

(3.) And in cases where the foregoing provisions of the present section do not apply, and the amount of the residue appears to the Admiralty insufficient to cover the expense of representation, the Admiralty shall dispose of the residue in manner prescribed by Order in Council.

Admiralty not bound to pay to nominee of representative.

9. In the case of a seaman or marine, the Admiralty shall not pay the residue or any part thereof to any nominee of the representative of the deceased or of a person entitled to take out representation to the deceased, whether such nominee be appointed by power of attorney or otherwise, unless in special circumstances it appears to the Admiralty safe and proper to make such payment to any such nominee.

Admiralty not to dispose of residue for three months, etc.

10. Notwithstanding anything in this Act, the Admiralty shall not in any case dispose of the residue or any part thereof otherwise than by paying the same to the representative of the deceased, until after the expiration of three months from the receipt by the Admiralty of notice of the death, unless in special circumstances it appears to the Admiralty safe and proper to dispose of the residue or any part thereof at an earlier time.

Provision for payment of debts out of residue.

11. In the case of a seaman or marine, where representation is not taken out, the Admiralty shall before disposing of the residue or any part thereof satisfy out of the residue (as far as the same will extend) any debt of the deceased of which they have notice, subject to the following conditions:

First.—That the debt accrued due within three years before the death:

Second.—That payment of it is claimed within two years after the death:

Third.—That the claimant proves the debt to the satisfaction of the Admiralty:

Fourth.—That six months have elapsed from the receipt by the Admiralty of notice of the death, and no person has shown herself or himself to the satisfaction of the Admiralty to be entitled to take out representation to the deceased.

In any such case, any person claiming to be a creditor of the deceased shall not be entitled to obtain payment of his debt out of any money being under this Act in the hands of the Admiralty by any means or proceeding whatever except by means of a claim lodged with the Admiralty and proceedings thereon under and according to this Act.

Saving for existing claims.

12. *Nothing in this Act shall prejudicially affect the claim of any creditor in respect of a debt incurred before the commencement of this Act.*

Sec. 12 repealed by 56 & 57 Vict. c. 14 (S. L. R.).

Provision as to unsold effects, etc.

13. The provisions of this Act relative to the residue, in the case of a deceased officer, seaman, or marine, shall extend and apply, mutatis mutandis, to unsold effects and money (if any) in charge of the Admiralty.

Disposal of medals and decorations.

14. Medals and decorations belonging to an officer, seaman, or marine dying on service shall not be considered as comprised in the personal estate of the deceased with reference to the claims of creditors, or for any of the purposes of administration under this Act or otherwise; and, notwithstanding anything in this or any other Act, the same shall be held and disposed of according to regulations prescribed by Order in Council.

Exemptions from duty.

15. Where the residue does not exceed one hundred pounds and is administered and disposed of under this Act without representation being taken out, it shall not be liable to the payment of any duty; and if in any case the Admiralty under this Act require security by bond for the application of a residue in due course of administration, the bond shall be exempt from stamp duty where an ordinary administration bond relative to the same residue would be so exempt; but this provision shall not affect any exemption from duty existing independently hereof.

Validity of payments, sales, etc., under this Act.

16. Every payment or application of money, and every sale or other disposition of property, made by the Admiralty in pursuance of this Act, or of any Order in Council for carrying this Act into effect, shall be good and valid as against all persons whomsoever; and the Admiralty shall be by virtue of this Act absolutely discharged from all liability in respect of the money or other property so paid, applied, or disposed of.

Her Majesty may make Orders in Council.

17. Her Majesty in council may from time to time make such Orders in Council as seem meet for the better execution of any of the purposes of this Act.

Orders in Council to be published in the *London Gazette.*

18. Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof if Parliament is then sitting, and if not then within thirty days after the next meeting of Parliament.

Commencement of Act.

19. This Act shall commence on such day, not later than the first day of January, one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct.

Any Order in Council for the better execution of any of the purposes of this Act may nevertheless be made before that day, but not so as to commence before it.

ORDER IN COUNCIL, DECEMBER 28TH, 1865,

MADE IN PURSUANCE OF THE NAVY AND MARINES (PROPERTY OF DECEASED) ACT.

At the Court at Osborne House, Isle of Wight, the 28th day of December, 1865. Present the Queen's most Excellent Majesty in Council.

WHEREAS by the Navy and Marines (Property of Deceased) Act, 1865, it is enacted (among other things), that her Majesty in council may from time to time make such Orders in Council as seem meet for the better execution of any of the purposes of that Act, and that the said Act shall commence on such day not later than the first day of January, one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct :

Now, therefore, her Majesty, by virtue of the powers in this behalf by the said Act or otherwise in her vested, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered as follows :

Preliminary.

I. The said Act and this Order shall commence from and immediately after the thirty-first day of December, one thousand eight hundred and sixty-five.

II. In this Order—

The term "naval assets" includes all property affected by the Navy and Marines (Property of Deceased) Act, 1865 :

The term "will" includes codicil :

The term "probate" includes letters of administration with will annexed :

Other terms have the same respective meanings as in the said Act.

I.—WILLS OF SEAMEN AND MARINES.

Deposit of Will in Testator's Lifetime.

III. In the office of the Inspector of Seamen's Wills (hereafter in this Order called the inspector) there shall be a repository for wills of seamen and marines.

IV. The will of a seaman or marine intended to pass naval assets, may, as soon as practicable after its execution, be sent to the Secretary of the Admiralty to be examined by the inspector.

V. On receipt of any instrument purporting to be such a will the inspector shall register it in books kept in his office for the purpose, specifying the date and place of execution, the name and description of the testator, the name, description and address of the person appointed executor, and those of the attesting witnesses.

VI. If the instrument appears to the inspector invalid as a will on account of any informality or of non-accordance in any respect with the Navy and Marines (Wills) Act, 1865, or otherwise, he shall, as soon as may be, return it to the intending testator, with a statement in writing of the objection to its validity and of the mode in which the objection may be removed.

VII. If the instrument does not appear to the inspector invalid as a will, he shall cause it to be stamped with the official stamp of the Admiralty, and to be placed in the repository for wills of seamen and marines, under official seal, and shall issue a receipt for it to the testator, specifying the matters required to be registered as aforesaid.

VIII. With reference to every such will the inspector shall also proceed as follows :

(1.) He shall, with all convenient speed, issue to the person appointed executor, if any, a cheque of the will, not giving any information respecting the testator's disposition of his property, but containing directions as to the steps to be taken on the testator's death.

(2.) If there is not any person appointed executor, then, with the assent of the testator, either implied by the mode of transmission of the will to the Admiralty Office or expressed, but not otherwise, he shall, with all convenient speed, issue to the residuary or the universal legatee, or other person most beneficially interested under the will, a cheque in lieu of the will, containing directions as to the steps to be taken on the testator's death.

(3.) If in any such last-mentioned case, by reason of the absence of such assent, a cheque is not issued in the testator's lifetime, then he shall, with all convenient speed, after the testator's death, issue to the residuary or the universal legatee, or other person most beneficially interested under the will, a cheque in lieu of the will, containing directions as to the steps to be taken in consequence of the testator's death.

Deposit of Will after Testator's Death.

IX. On the death of a seaman or marine leaving a will, if the will is not already deposited with the inspector, it shall be forthwith sent to the Secretary of the Admiralty by the executor or other person having possession of it, to be examined by the inspector.

X. On receipt of any instrument purporting to be such a will, the inspector shall register it in books kept in his office for the purpose, specifying the date and place of execution, the name and description of the testator, and the name, description and address of the person appointed executor, and those of the attesting witnesses.

XI. If the inspector doubts the authenticity of the alleged will, or if the instrument appears to him invalid as a will on account of any informality or of non-accordance in any respect with the Navy and Marine (Wills) Act, 1865, or otherwise, he shall, as soon as may be, give notice in writing to the person appointed executor, or, if none, to the residuary or the universal legatee or other person most beneficially interested under the alleged will, informing him that the alleged will is stopped, and stating the reason thereof.

XII. If the inspector does not doubt the authenticity of the will, and the instrument does not appear to him invalid as a will, he shall cause it to be stamped with the official stamp of the Admiralty, and shall issue to the person appointed executor, or, if none, to the residuary or the universal legatee or other person most beneficially interested under the will, a cheque in lieu of the will, containing directions as to the steps to be taken in consequence of the testator's death.

Proceedings on Testator's Death.

XIII. Where a seaman or marine dies leaving a will, and a cheque has been issued in pursuance of the foregoing provisions, the following steps shall be taken (in cases where this course of proceeding is applicable) by and with respect to the holder of the cheque :—

(1.) The officiating minister of the parish or district parish wherein the holder of the cheque resides shall on his request examine him and two inhabitant householders of the parish produced by him for the purpose.

(2.) In the presence of the minister, the holder of the cheque shall sign the application, and the householders shall sign the certificate, subjoined to the cheque (all blanks being first filled up according to truth, and the minister having first read over to the holder of the cheque and householders the caution printed on the cheque), for which purpose the holder of the cheque and householders shall attend at such time and place as the minister appoints.

(3.) The minister being, on the examination of the holder of the cheque and householders, satisfied of the truth of their statements, and of the holder of the cheque being the executor, or other person therein described as qualified to act, and of the persons certifying being inhabitant householders of the parish, and having seen the parties sign the application and certificate respectively, shall add a description of the height, complexion, colour of eyes and hair, and age of the holder of the cheque, and of any observable peculiarities of person about him, and shall certify to the several particulars by subscribing his signature thereto.

(4.) The holder of the cheque shall, before signing the application, pay to the minister a fee of 2*s.* 6*d.* for his trouble in the matter.

(5.) The application and certificates being completed, the minister shall return them with the cheque addressed as directed.

XIV. If the inspector, on the return of the cheque, application, and certificates, is satisfied of the right of the claimant he shall proceed as follows:—

(1.) In case representation is required or intended to be taken out, he shall endorse on the original will a certificate (in such form and to such effect as he thinks fit) to enable the claimant to take out representation, and shall deliver the will to the claimant: and probate, obtained in accordance with the certificate, being produced to the inspector and registered, and being endorsed by him as available for receipt of naval assets, shall be so available.

(2.) In case representation is not required or intended to be taken out, the inspector shall issue to the claimant a certificate, which shall be available for receipt of naval assets, without probate.

XV. If the inspector, on the return of the cheque, application, and certificates, is not satisfied of the right or fitness of the claimant, he may (by endorsement on the original will) certify to that effect, and that he declines to interfere; or, if he thinks fit, he may (by endorsement on the original will) certify his objections for the information of the Court out of which representation would be taken, and if the Court thinks fit to grant probate to the claimant, the same, being produced to the inspector and registered, shall be endorsed by him as available for receipt of naval assets, and shall be so available accordingly.

XVI. If in any case the minister is not satisfied that the holder of the cheque is the person qualified to act according to the instructions therein, he shall forthwith advise the Admiralty of his reasons by letter addressed as directed.

XVII. Notwithstanding anything in the foregoing provisions, where probate, or in Scotland, confirmation of executor, in case of testacy, is obtained without the inspector's certificate, and naval assets form part of the effects, the inspector, if satisfied on subsequent investigation, from official or other information, that there is no reason to doubt that representation has been obtained by the proper person, may admit the probate or confirmation of executor as authority for receipt of naval assets by endorsement thereon, and the same shall be available accordingly.

II.—Intestacies of Seamen and Marines.

XVIII. Where a seaman or marine dies intestate leaving naval assets, the following proceedings shall be taken:—

(1.) On receipt by the inspector of a letter from a person claiming the naval assets (as widow or next of kin) of the deceased, the inspector shall, if, after the requisite preliminary inquiries, there appear sufficient grounds for entertaining the claim, send by post, under cover to the officiating minister of the parish or district parish wherein the claimant resides, a form of application to be filled up, and a letter of instructions for the minister's guidance.

(2.) The inspector shall at the same time send to the claimant a letter advising her or him of the transmission to the minister of the form of application and pointing out the steps to be taken by the claimant for substantiating the claim.

(3.) After the minister's receipt of the form, he shall, on the request of the claimant, examine her or him and two inhabitant householders of the parish produced by her or him for the purpose.

(4.) In the presence of the minister the claimant shall sign the application and the householders shall sign the certificate subjoined thereto (all blanks being first filled up according to truth, and the minister having first read over to the claimant and householders the caution printed on the form of application), for which purpose the claimant and householders shall attend at such time and place as the minister appoints.

(5.) The minister being, on examination of the claimant and householders, satisfied of the truth of their statements, and of the persons certifying being inhabitant householders of the parish, and having seen the parties sign the application and certificate respectively, shall add a description of the height, complexion, colour of eyes and hair, and age of the claimant, and of any observable peculiarities of person about her or him, and shall certify to the several particulars by subscribing his signature thereto.

(6.) The claimant shall, before signing the application, pay to the minister a fee of 2*s.* 6*d.* for his trouble in the matter.

(7.) The application and certificates being completed, the minister shall return them addressed as directed.

XIX. If the inspector, on the return of the application and certificates, is satisfied of the right of the claimant he shall proceed as follows :—

(1.) In case representation is required or intended to be taken out, he shall issue to the claimant a certificate (in such form and to such effect as the inspector thinks fit) to enable the claimant to take out representation ; and letters of administration obtained in accordance with the certificate being produced to the inspector and registered, and being endorsed by him as available for receipt of naval assets, shall be so available.

(2.) In case representation is not required or intended to be taken out, the inspector shall issue to the claimant a certificate, which shall be available for receipt of naval assets, without administration.

XX. If the inspector, on the return of the application and certificates, is not satisfied of the right or fitness of the claimant, he may certify to that effect, and that he declines to interfere ; or if he thinks fit he may certify his objection for the information of the Court out of which letters of administration or confirmation of executor dative would be taken, and if the Court thinks fit to grant such letters or confirmation to the claimant, the same, being produced to the inspector and registered, shall be endorsed by him as available for receipt of naval assets, and shall be so available accordingly.

XXI. If in any case within two calendar months from the minister's receipt of the form a request for examination is not made to him by the claimant, or effectual steps are not taken by the claimant to complete the application, the minister shall, at the expiration of those two months, return the form, addressed as directed, with his reason for doing so noted thereon.

XXII. If in any case the minister rejects any claim for want of satisfactory proof he shall state his reason for such rejection on the form, and forthwith return it addressed as directed.

XXIII. Notwithstanding anything in the foregoing provisions, where letters of administration have, or in Scotland confirmation of executor (on intestacy) has, been obtained without the inspector's certificate, and naval assets form part of the effects, the inspector, if satisfied on subsequent investigation, from official or other information, that there is no reason to doubt that representation has been obtained by the proper person, may admit the letters of administration or confirmation of executor as authority for receipt of naval assets by endorsement thereon, and the same shall be available accordingly.

III.—OFFICERS, PENSIONERS, CIVIL SERVANTS, AND OTHERS.

XXIV. Where an officer or any person described in section 4 of the Navy and Marines (Property of Deceased) Act, 1865, dies, testate or intestate, leaving naval assets not exceeding £100 and representation is not required or intended to be taken out in England, the inspector, after making such preliminary inquiries as seem to him requisite, shall proceed as follows:—

(1.) He may (if he thinks fit) require the form of application to be certified by an officiating minister and two householders, as prescribed in this Order in the case of a seaman or marine; or else—

(2.) He may (if he thinks fit) require a statutory declaration by the claimant, suited to the circumstances of the case, and a certificate from two householders, certifying to the claimant's identity, and to their belief in the truth of the statement declared to; or—

(3.) He may, in any case where the foregoing provisions do not apply, accept such other evidence in support of the claim as seems to him sufficient.

XXV. On the return to the inspector of the application or statutory declaration (as the case may be), and the certificate of the householders, or after such other investigation as he thinks fit under the authority of the last foregoing provision of this Order to substitute, and, where there is a will, on the production to him thereof, then if he is satisfied of the right of the claimant, he shall issue to the claimant a certificate which shall be available for receipt of naval assets, without probate or administration.

XXVI. Where, however, representation is taken out in any Court other than the Court of Probate in England, the inspector may, instead of issuing any certificate, admit the letters of administration, probate, or other equivalent instrument as authority for receipt of naval assets by endorsement thereon, and the same shall be available accordingly without the seal of the Court of Probate in England.

XXVII. In every such case the provisions of the Navy and Marines (Property of Deceased) Act, 1865, with respect to the payment of debts out of the residue, shall apply mutatis mutandis, except that on the claim of a creditor not being entertained or allowed the creditor may take out representation.

IV.—INTESTACY, GENERALLY.

XXVIII. Notwithstanding anything in this Order the inspector shall not in any case of intestacy (except in cases exempted by a general order of the Admiralty from the operation of the present clause) issue a certificate available for receipt of naval assets without administration, until after the expiration of three calendar months from the receipt by the Admiralty of notice of the intestate's death, unless in special circumstances it appears to the inspector safe and proper to issue his certificate at an earlier time.

V.—SPECIAL DISPOSAL OF RESIDUE BY ADMIRALTY.

XXIX. With respect to any case provided for by paragraph (3) of section 8 of the Navy and Marines (Property of Deceased) Act, 1865, the ground of the non-applicability of paragraphs (1) and (2) of that section being the absence of proof of the death of some person, proof of whose death is requisite to make those paragraphs applicable, then and in every such case if it appears to the inspector that those paragraphs would have been applicable but for the desertion or misconduct of the person, proof of whose death is wanting, the inspector shall proceed as if the death of that person were proved.

VI.—BASTARDS.

XXX. Where a person, subject to the Navy and Marines (Property of Deceased) Act, 1865, dies intestate, being a bastard, and not leaving a widow or children or descendants, and leaving naval assets, the following provisions shall have effect:—

(1.) Where the naval assets exceed £10 no petition to her Majesty for a grant shall be entertained by the Lords Commissioners of her Majesty's Treasury, unless and until the inspector has investigated the facts of the case in such manner as seems to him expedient, and has certified for the information of the said Lords Commissioners the result of his investigation.

(2.) Where the naval assets do not exceed £10, it shall not be necessary that a grant from her Majesty be obtained, but the inspector may issue a certificate authorising payment of the naval assets to the person who would (in the judgment of the inspector), according to the practice observed by the Lords Commissioners of her Majesty's Treasury, obtain a grant if the naval assets exceeded £10.

VII.—GENERAL PROVISIONS.

XXXI. Notwithstanding anything in this Order, the inspector may make such investigations as seem to him expedient into any statements submitted to him and into the facts and circumstances of the case,—in any case whatever, in addition to the investigations prescribed by this Order,—and in any case where the provisions of this Order are not applicable, or the naval assets do not exceed 10*s*., in substitution for the investigations prescribed by this Order, or any of them.

XXXII. The provisions of this Order shall have effect without prejudice to the rules and practice for the time being in force and observed under the Navy and Marines (Property of Deceased) Act, 1865, with respect to the discharge of the claims of creditors.

VIII.—MEDALS AND DECORATIONS.

XXXIII. Any medal or decoration to which an officer, seaman or marine is entitled, but which is not issued at the time of his death, shall be issued in favour of his—

(1.) Wife;
(2.) Father or mother;
(3.) Son or daughter } according to seniority;
(4.) Brother or sister }

and not in favour of any other person, except under the special directions of the Admiralty.

XXXIV. Any medal or decoration belonging to an officer, seaman or marine, issued before his death shall, on coming into the custody of the Admiralty, be delivered to his representative, unless representation has been taken out by a creditor as such, in which case it shall be disposed of as if it had not been issued.

And the Lords Commissioners of her Majesty's Treasury and the Lords Commissioners of the Admiralty are to give the necessary directions herein as to them may respectively appertain.

ARTHUR HELPS.

INTESTATES' WIDOWS AND CHILDREN ACT, 1873.

(36 & 37 VICT. c. 52.)

AN Act for the Relief of Widows and Children of Intestates where the Personal Estate is of Small Value. [28th July, 1873.]

WHEREAS many poor persons die intestate, possessed of property of small amount, and it is desirable to increase the facilities for taking out letters of administration to their estates and effects, and to reduce the expenses attending the same:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

For purposes of Act application may be made to a registrar of a County Court.

1. Where the whole estate and effects of an intestate shall not exceed in value the sum of one hundred pounds, his widow or any one or more of his children, provided such widow or children respectively shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the County Court within the district of which the intestate had his fixed place of abode at the time of his death, and the said registrar shall fill up the usual papers required by the Court of Probate to lead to a grant of letters of administration of the estate and effects of the said intestate, and shall swear the applicant and attest the execution of the administration bond according to the practice of the Court of Probate, and shall then transmit the said papers by post to the registrar of the Court of Probate having jurisdiction in the matter, who shall in due course make out and seal the letters of administration of the estate and effects of the said intestate, and transmit them by post to the said registrar of the County Court, to be by him delivered to the party so applying for the same, without the payment of any fee for the same save as is provided by this Act.

2. The registrar of the County Court may require such proof as he may think sufficient to establish the identity and relationship of the applicant.

Identity of person may be required.

3. If the registrar of the County Court has reason to believe that the whole estate and effects of which the intestate died possessed exceeds in value one hundred pounds, he shall refuse to proceed with the application until he is satisfied as to the real value thereof.

Registrar may refuse to take affidavit.

4. All registrars of County Courts shall for the purposes of this Act have power and are hereby authorised to administer oaths, and to take declarations and affirmations, and to exercise any other powers which can be exercised by Commissioners of the Court of Probate. In the necessary absence of the registrar of the County Court, applicants may be sworn and execute any necessary documents at the office of the said registrar before any Commissioner of the Court of Probate.

Registrars may exercise powers of Commissioners of Court of Probate.

5. Any rules and orders and tables of fees requisite for carrying this Act into operation shall be framed and may from time to time be altered by the judge of the Court of Probate, subject as regards the tables of fees to the approval of the Commissioners of her Majesty's Treasury; and such proportions of the said fees as the said judge, with such approval as aforesaid, shall think proper, may be made payable to the registrars of the County Courts acting in the said matters, but the total amount to be charged to applicants shall not in any one case exceed the sums mentioned in the schedule to this Act.

Power to frame rules, orders, etc.

6. Provided always, that nothing herein contained shall be construed to affect any duty now payable on letters of administration.

Not to affect duty on administration.

7. The provisions of this Act shall apply to Ireland, subject to the modifications following; (that is to say,)

The term the "registrar of the County Court" shall be construed to mean the "registrar of the Civil Bill Court":

The term "Court of Probate" shall be construed to mean the "Court of Probate in Dublin."

Application of Act to Ireland.

SCHEDULE.

Where the whole estate and effects of the intestate shall not exceed in value twenty pounds, the sum of five shillings; and where the whole estate and effects shall exceed in value twenty pounds, the sum of five shillings, and the further sum of one shilling for every ten pounds or fraction of ten pounds by which the value shall exceed twenty pounds.

INTESTATES' WIDOWS AND CHILDREN ACT EXTENSION ACT, 1875.

(38 & 39 VICT. C. 27.)

AN Act to extend to the Surviving Children of Poor Widows the Benefits of the Act thirty-sixth and thirty-seventh Victoria, chapter fifty-two, intituled An Act for the Relief of Widows and Children of Intestates where the Personal Estate is of Small Value. [29th June, 1875.]

WHEREAS it is desirable that the provisions of the Act of thirty-six and thirty-seven Victoria, chapter fifty-two, intituled An Act for the relief of widows and children of intestates where the personal estate is of small value, should be made applicable to the surviving children of a poor widow who dies intestate:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Extension of Act of 36 & 37 Vict. c. 52 to children of poor intestate widows.

1. Where the whole estate and effects of an intestate widow shall not exceed in value the sum of one hundred pounds, any one or more of her children, if they shall reside at a distance exceeding three miles from the registry of the Court of Probate having jurisdiction in the matter, may apply to the registrar of the County Court within the district in which the intestate had her fixed place of abode at the time of her death, and on compliance with the regulations prescribed in the said Act of thirty-six and thirty-seven Victoria shall be entitled to the benefits in that case made and provided by the said Act, and the schedule thereunto annexed.

Construction of the Act.

2. This Act shall be read and construed along with and as part of the recited Act.

SHERIFF COURTS (SCOTLAND) ACT, 1876.

(39 & 40 VICT. c. 70.)

Sections 41—44.

VIII.—*Amendment of Law as to Confirmation of Executors.*

Note in confirmation by sheriff clerk or commissary clerk that deceased died domiciled in Scotland substituted for certified copy interlocutor by the sheriff commissary and to have like effect.

41. Where, under the provisions of the ninth and subsequent sections of the *Act* (*a*) *passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, intituled "An Act to amend the law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation and of grants of probate and administration,"* it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the sheriff clerk to insert in the confirmation or to note thereon and sign a statement that the deceased died domiciled in Scotland; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland; *and sections twelve and thirteen of the said Act, so far as they make it a condition of the sealing of a confirmation in the principal Court of Probate in England or in the Court of Probate in Dublin, that the copy of the confirmation provided to be deposited with the registrar shall be accompanied by such a certified copy interlocutor, are hereby repealed.*

Extension of the provisions of ss. 12 and 13 of 21 & 22 Vict. c. 56.

42. When an additional inventory has been given in and recorded and confirmation granted in a sheriff Court in Scotland of estate situated in England or Ireland of a person who died domiciled in Scotland, and the additional confirmation shall be produced in the principal Court of Probate in England, or in the Court of Probate in

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(*a*) Confirmation of Executors (Scotland) Act, 1858, *ante*, p. 773.

Dublin, as the case may be, and a copy thereof deposited with the registrar of the Court, such additional confirmation shall be sealed with the seal of the Court and returned to the person producing the same, and that whether the original confirmation shall have been sealed with the seal of the Court or not, and although the additional inventory confirmed shall not contain any estate of the deceased situated in Scotland, and such additional confirmation when so sealed shall thereafter have the same force and effect as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed.

Confirmation of Scotch estate with note of trust funds in England or Ireland to be sealed in Probate Courts as if it contained English or Irish estate of the deceased.

43. When any confirmation or additional confirmation of personal estate situated in Scotland, which shall contain or have appended thereto and signed by the sheriff clerk a note or statement of funds in England or Ireland, or both, held by the deceased in trust, shall be produced in the principal Court of Probate in England or in the Court of Probate in Dublin, as the case may be, such confirmation shall be sealed with the seal of such Court in the same manner as is provided by sections twelve and thirteen of the Act passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, as amended by this Act, with respect to sealing confirmations which include personal estate situated in England or Ireland respectively; and such confirmation shall thereafter have the like force and effect in England and Ireland with respect to such funds as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed; and such note or statement may be inserted or appended as aforesaid by the sheriff clerk, provided the same shall have been set forth in any inventory which has been recorded in the books of the Court of which he is clerk.

Schedule (C.) of 21 & 22 Vict. c. 56 hereby repealed, and new form of intimation, etc.

44. The sheriff clerk shall, after a petition for the appointment of an executor has been intimated by him as provided by section four of the Act passed in the twenty-first and twenty-second years of the reign of her present Majesty, chapter fifty-six, and after receiving the certified copy of the printed and published particulars therein set forth, forthwith certify these facts on the petition in the following or similar terms: "Intimated and published in terms of the statute," which certificate (in lieu of the certificate in the form of Schedule (C.) annexed to the said Act, which Schedule (C.) is hereby repealed) shall be dated and signed by him, and shall be sufficient evidence of the facts therein set forth: Provided always, that special intimation shall be made to all executors already decerned or confirmed to a deceased person of any subsequent petition for the appointment of an executor which may be presented with reference to the personal estate of the same deceased person.

MARRIED WOMEN'S PROPERTY ACT, 1882.

(45 & 46 VICT. c. 75.)

Sections 1—5, 18, 22—27.

AN Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled The Married Women's Property Act, 1870, and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled An Act to amend the Married Women's Property Act, 1870:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Married woman to be capable of holding property and of contracting as a feme sole.

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown* (*a*).

(4.) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire* (*a*).

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole.

Property of a woman married after the Act to be held by her as a feme sole.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

(*a*) Sub-secs. 3 and 4 of sec. 1 repealed by 56 & 57 Vict. c. 63, s. 4.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Loans by wife to husband.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

Execution of general power.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

Married woman as an executrix or trustee.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Repeal of 33 & 34 Vict. c. 93. 37 & 38 Vict. c. 50.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Legal representative of married woman.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or

Interpretation of terms.

intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

Commencement of Act.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

Extent of Act.

26. This Act shall not extend to Scotland.

Short title.

27. This Act may be cited as the Married Women's Property Act, 1882.

INTESTATES' ESTATES ACT, 1890.

(53 & 54 VICT. c. 29.)

AN Act to amend the Law by making better Provision for the Widows of certain Intestates in the Distribution of such Intestates' Property. [25th July, 1890.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Intestates' estate not exceeding £500 to belong to widow where no issue.

1. The real and personal estates of every man who shall die intestate after the first day of September one thousand eight hundred and ninety leaving a widow with no issue shall, in all cases where the net value of such real and personal estates shall not exceed five hundred pounds, belong to his widow absolutely and exclusively.

Intestate's estate not exceeding £500, widow to have a charge for £500.

2. Where the net value of the real and personal estates in the preceding section mentioned shall exceed the sum of five hundred pounds the widow of such intestate shall be entitled to five hundred pounds part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such five hundred pounds, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment.

How charge to be borne as between realty and personalty.

3. As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively.

Above provision to be in addition to share of residue.

4. The provision for the widow intended to be made by this Act shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of five hundred pounds, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed.

How realty to be valued.

5. The net value of such real estates as aforesaid shall for the purposes of this Act be estimated in the case of a fee simple upon the basis of twenty years' purchase of the annual value by the year at the date of the death of the intestate as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the schedule annexed to the statute sixteenth and seventeenth Victoria, chapter fifty-one, and in the case of an estate for a life or lives according to the said tables and rules.

[Succession Duties Act, 1853.]

6. The net value of such personal estate as aforesaid shall be ascertained by deducting from the gross value thereof all debts, funeral and testamentary expenses of the intestate, and all other lawful liabilities and charges to which the said personal estate shall be subject.

How personalty to be valued.

7. This Act may be cited as the Intestates' Estates Act, 1890.

Short title.

8. This Act shall not extend to Scotland.

Extent of Act.

COLONIAL PROBATES ACT, 1892.

(55 VICT. c. 6.)

AN Act to provide for the Recognition in the United Kingdom of Probates and Letters of Administration granted in British Possessions. [20th May, 1892.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probates and letters of administration granted by the Courts of the United Kingdom, direct by Order in Council that this Act shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

Application of Act by Order in Council.

2.—(1.) Where a Court of probate in a British possession to which this Act applies has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a Court of probate in the United Kingdom, be sealed with the seal of that Court, and, thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court.

Sealing in United Kingdom of colonial probates and letters of administration.

(2.) Provided that the Court shall, before sealing a probate or letters of administration under this section, be satisfied—

(a) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom; and

(b) in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which the letters of administration relate;

and may require such evidence, if any, as it thinks fit as to the domicile of the deceased person.

(3.) The Court may also, if it thinks fit, on the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in the United Kingdom.

(4.) For the purposes of this section, a duplicate of any probate or letters of administration sealed with the seal of the Court granting the same, or a copy thereof certified as correct by or under the authority of the Court granting the same, shall have the same effect as the original.

(5.) Rules of Court may be made for regulating the procedure and practice, including fees and costs, in Courts of the United Kingdom, on and incidental to an application for sealing a probate or letters of administration granted in a British possession to which this Act applies. Such rules shall, so far as they relate to probate duty, be made with the consent of the Treasury, and, subject to any exceptions and modifications made by such rules, the enactments for the time being in force in relation to probate duty (including the penal provisions thereof) shall apply as if the person who applies for sealing under this section were a person applying for probate or letters of administration.

Application of Act to British Courts in foreign countries.

3. This Act shall extend to authorise the sealing in the United Kingdom of any probate or letters of administration granted by a British Court in a foreign country, in like manner as it authorises the sealing of a probate or letters of administration granted in a British possession to which this Act applies, and the provisions of this Act shall apply accordingly with the necessary modifications.

Orders in Council.

4.—(1.) Every Order in Council made under this Act shall be laid before both Houses of Parliament as soon as may be after it is made, and shall be published under the authority of her Majesty's Stationery Office.

(2.) Her Majesty the Queen in council may revoke or alter any Order in Council previously made under this Act.

(3.) Where it appears to her Majesty in council that the legislature of part of a British possession has power to make the provision requisite for bringing this Act into operation in that part, it shall be lawful for her Majesty to direct by Order in Council that this Act shall apply to that part as if it were a separate British possession, and thereupon, while the Order is in force, this Act shall apply accordingly.

Application of Act to probates, etc., already granted.

5. This Act when applied by an Order in Council to a British possession shall, subject to the provisions of the Order, apply to probates and letters of administration granted in that possession either before or after the passing of this Act.

Definitions.

6. In this Act—

The expression "Court of Probate" means any Court or authority, by whatever name designated, having jurisdiction in matters of probate, and in Scotland means the Sheriff Court of the County of Edinburgh:

The expressions "probate" and "letters of administration" include confirmation in Scotland, and any instrument having in a British possession the same effect which under English law is given to probate and letters of administration respectively:

The expression "probate duty" includes any duty payable on the value of the estate and effects for which probate or letters of administration is or are granted:

The expression "British Court in a foreign country" means any British Court having jurisdiction out of the Queen's dominions in pursuance of an Order in Council, whether made under any Act or otherwise.

7. This Act may be cited as the Colonial Probates Act, 1892. Short title.

MARRIED WOMEN'S PROPERTY ACT, 1893.

(56 & 57 VICT. C. 63.)

AN Act to amend the Married Women's Property Act, 1882. [5th December, 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Effect of contracts by married women.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

Costs may be ordered to be paid out of property subject to restraint on anticipation.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

Will of married woman.

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

4. Sub-sections (3) and (4) of section one of the Married Woman's Property Act, 1882, are hereby repealed. Repeal.

5. This Act may be cited as the Married Women's Property Act, 1893. Short title.

6. This Act shall not apply to Scotland. Extent.

MERCHANT SHIPPING ACT, 1894.

(57 & 58 Vict. c. 60.)

Sections 150, 176, 177.

Application of deposits of deceased depositor.

150. All sums due from the Board of Trade to the estate of any deceased person on account of any deposit in a seamen's savings bank shall be paid and applied by the Board of Trade as if they were the property of a deceased seaman received by the Board under this Act, and the provisions of this Act respecting that property shall apply accordingly.

Payment over of property of deceased seamen by Board of Trade.

176.—(1.) Where any property of a deceased seaman or apprentice comes into the hands of the Board of Trade, or any agent of that Board, the Board of Trade, after deducting for expenses incurred in respect of that seaman or apprentice or of his property such sum as they think proper to allow, shall, subject to the provisions of this Act, deal with the residue as follows:—

(a) If the property exceeds in value one hundred pounds, they shall pay and deliver the residue to the legal personal representative of the deceased:

(b) If the property do not exceed in value one hundred pounds, the Board may as they think fit either pay or deliver the residue to any claimant who is proved to their satisfaction to be the widow or a child of the deceased, or to be entitled to the personalty of the deceased either under his will (if any) or any statute of distribution or otherwise, or to be a person entitled to take out representation, although no such representation has been taken out, and shall be thereby discharged from all further liability in respect of the residue so paid or delivered; or

(c) They may, if they think fit, require representation to be taken out, and pay and deliver the residue to the legal personal representative of the deceased.

(2.) Every person to whom any such residue is so paid or delivered shall apply the same in due course of administration.

Dealing with deceased seaman's property when he leaves a will.

177.—(1.) Where a deceased seaman or apprentice has left a will the Board of Trade may refuse to pay or deliver the above-mentioned residue—

(a) if the will was made on board ship, to any person claiming under the will, unless the will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first or only mate of the ship, and

(b) if the will was not made on board ship, to any person claiming under the will, and not being related to the testator by blood or marriage, unless the will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, two witnesses, one of whom is a superintendent, or is a minister of religion officiating in the place in which the will is made, or, where there are no such persons, a justice, British consular officer, or an officer of customs.

(2.) Whenever the Board of Trade refuse under this section to pay or deliver the residue to a person claiming under a will the residue shall be dealt with as if no will had been made.

NAVY AND MARINES (WILLS) ACT, 1897.

(60 Vict. c. 15.)

An Act to amend the Navy and Marines (Wills) Act, 1865. [3rd June, 1897.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Amendment of 28 & 29 Vict. c. 72, as to wills of seamen, etc.

1. Section five of the Navy and Marines (Wills) Act, 1865 (which contains regulations as to the wills of persons being or having been seamen or marines with respect to wages, allowances, and other like payments), shall, in its application to the will of any person who dies after the passing of this Act, be amended as follows :—

(1.) The words "or when he has ceased so to serve" shall be repealed :

(2.) After the words "or a notary public" shall be inserted the words "or a solicitor, or in Scotland a law agent."

Short title.

2. This Act may be cited as the Navy and Marines (Wills) Act, 1897, and the Navy and Marines (Wills) Act, 1865, and this Act may be cited together as the Navy and Marines (Wills) Acts, 1865 and 1897.

LAND TRANSFER ACT, 1897.

(60 & 61 Vict. c. 65.)

Sections 1—5, 24—26.

An Act to establish a Real Representative, and to amend the Land Transfer Act, 1875. [6th August, 1897.]

Whereas it is expedient to establish a real representative, and to amend the Land Transfer Act, 1875, in this Act referred to as "the principal Act":

38 & 39 Vict. c. 87.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Part I.

Establishment of a Real Representative.

Devolution of legal interest in real estate on death.

1.—(1.) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2.) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3.) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4.) The expression "real estate," in this Part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(5.) This section applies only in cases of death after the commencement of this Act.

Provisions as to administration.

2.—(1.) Subject to the powers, rights, duties, and liabilities herein-after mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

(2.) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.

(3.) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

(4.) Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

Provision for transfer to heir or devisee.

3.—(1.) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

(2.) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3.) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4.) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the registrar to register the person named in the assent as proprietor of the land.

Appropriation of land in satisfaction of legacy or share in estate.

4.—(1.) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court.

(2.) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorise the registrar to register the person to whom the property is appropriated as proprietor of the land.

Liability for duty.

5. Nothing in this Part of this Act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof.

Interpretation.

24.—(1.) All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal Act and this Act, except that nothing in this Act shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale of the manor as such.

(2.) In this Act the expression "personal representative" means an executor or administrator.

Commencement of Act.

25. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-eight.

Short title and construction.

26. This Act may be cited as the Land Transfer Act, 1897, and shall be construed as one with the principal Act, and that Act and this Act may be cited together as the Land Transfer Acts, 1875 and 1897.

PART II.—STAMP DUTIES.

CUSTOMS AND INLAND REVENUE ACT, 1881.

(44 VICT. C. 12.)

Sections 26—43.

PART III.

STAMPS.

As to Probate and Legacy Duties, and Duties on Accounts.

Stamp duties to be under the care and management of the Commissioners of Inland Revenue.

26.—(1.) The stamp duties hereinafter imposed shall be under the care and management of the Commissioners of Inland Revenue, who by themselves and their officers shall have the same powers and authorities for the collection, recovery, and management thereof as are by law vested in them for the collection, recovery, and management of any stamp duties, and shall have all other powers and authorities requisite for carrying into effect the provisions of this Act in relation to such stamp duties.

(2.) Such stamp duties may be denoted by impressed or adhesive stamps, or partly by impressed stamps and partly by adhesive stamps, as the said Commissioners may think proper.

(3.) As respects the duties imposed on affidavits in substitution for the duties on probates or letters of administration, the several provisions now in force in relation to the last-mentioned duties shall, so far as the same are consistent with the provisions of this Act, be deemed to be applicable to the said duties hereby imposed, and in the application thereof a probate or letters of administration having thereon such a certificate as is hereinafter mentioned shall for all purposes be deemed to have been duly stamped in respect of the value stated in the certificate.

Grant of duties in respect of

27. The duties imposed by the Customs and Inland Revenue Act, 1880, upon probates of wills and letters of administration in probate and letters of administration and on inventories.

England and Ireland shall not be payable upon probates or letters of administration granted on and after the first day of June one thousand eight hundred and eighty-one ; and on and after that day in substitution for such duties, and in lieu of the duties imposed by the said Act upon inventories in Scotland, there shall, save as is hereinafter expressly provided, be charged and paid on the affidavit to be required and received from the person applying for the probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland, the stamp duties hereinafter specified ; (that is to say,)

	DUTY.
Where the estate and effects for or in respect of which the probate or letters of administration is or are to be granted, or whereof the inventory is to be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as trustee, and not beneficially, shall be above the value of £100, and not above the value of £500 - - -	At the rate of one pound for every full sum of £50 and for any fractional part of £50 over any multiple of £50 ;
Where such estate and effects shall be above the value of £500, and not above the value of £1,000 - - -	At the rate of one pound five shillings for every full sum of £50 and for any fractional part of £50 over any multiple of £50 ;
Where such estate and effects shall be above the value of £1,000 (*a*) - - - -	At the rate of three pounds for every full sum of £100 and for any fractional part of £100 over any multiple of £100 ;

Provided that an additional inventory, to be exhibited or recorded in Scotland, of any effects of a deceased person, where a former inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of June one thousand eight hundred and eighty-one, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this Act had not been passed.

Power to deduct debts and funeral expenses

28. On and after the first day of June one thousand eight hundred and eighty-one, in the case of a person dying domiciled in any part of the United Kingdom, it shall be lawful for the person

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(*a*) Where estate over £10,000, see 52 Vict. c. 7, s. 5, *post.* p. 816.

where deceased died domiciled in the United Kingdom.

applying for the probate or letters of administration in England or Ireland, or exhibiting the inventory in Scotland, to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses, and in that case, for the purpose of the charge of duty on the affidavit or inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects as specified in the account delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited.

Debts to be deducted under the power hereby given shall be debts due and owing from the deceased and payable by law out of any part of the estate and effects comprised in the affidavit or inventory, and are not to include voluntary debts expressed to be payable on the death of the deceased, or payable under any instrument which shall not have been bonâ fide delivered to the donee thereof three months before the death of the deceased, or debts in respect whereof any real estate may be primarily liable or a reimbursement may be capable of being claimed from any real estate of the deceased or from any other estate or person.

Funeral expenses to be deducted under the power hereby given shall include only such expenses as are allowable as reasonable funeral expenses according to law.

As to forms of affidavit.

29. The affidavit to be required or received from any person applying for probate or letters of administration in England or Ireland shall extend to the verification of the account of the estate and effects, or to the verification of such account and the schedule of debts and funeral expenses, as the case may be, and shall be in accordance with such form as may be prescribed by the Commissioners of her Majesty's Treasury; and the Commissioners of Inland Revenue shall provide forms of affidavit stamped to denote the duties payable under this Act.

Probate or letters of administration to bear a certificate in lieu of stamp duty.

[See Finance Act, 1894, s. 8 (17).]

30. No probate or letters of administration shall be granted by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, or by the Probate and Matrimonial Division of the High Court of Justice in Ireland, unless the same bear a certificate in writing under the hand of the proper officer of the Court, showing that the affidavit of the Commissioners of Inland Revenue has been delivered, and that such affidavit, if liable to stamp duty, was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account.

Provision for return of duty overpaid.

31. If at any time after the grant of probate or letters of administration, and during the administration of the estate, the value mentioned in the certificate of the officer of the Court shall be found to exceed the true value of the personal estate and effects of the deceased, or if at any time within three years after the grant, or within such further period as the Commissioners of Inland Revenue may allow, it shall appear that no amount or an insufficient amount was deducted on account of debts and funeral expenses, it shall be lawful for the said Commissioners, upon proof of the facts to their satisfaction, to return the amount of stamp duty which shall have been overpaid, and to cause a certificate to be written by an authorised officer on the probate or letters of administration setting forth such true value, or, as the case may be, the amount, or corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the Court.

Provision for payment of further duty. [See 52 Vict. c. 7, s. 5.]

32. If at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery, deliver a further affidavit with an account to the Commissioners of Inland Revenue, duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said Commissioners interest upon such amount at the rate of five pounds per centum per annum from the date of the grant, or from such subsequent date as the said Commissioners may in the circumstances think proper.

The Commissioners of Inland Revenue, upon the receipt of such affidavit duly stamped as aforesaid, shall cause a certificate to be written by an authorised officer on the probate or letters of administration setting forth the true value of the estate and effects as then ascertained, or, as the case may be, the corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the Court.

Provisions as to obtaining probate, etc., where gross value of estate does not exceed £300.

33.—(1.) Where the whole personal estate and effects of any person dying on or after the first day of June one thousand eight hundred and eighty-one (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and effects situate out of the United Kingdom), without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, it shall be lawful for the person intending to apply for probate or letters of administration in England or Ireland, to deliver to the proper officer of the Court or to any officer of inland revenue duly appointed for the purpose, a notice in writing in the prescribed form, setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with him the sum of fifteen shillings for fees of Court and expenses, and also, in case the estate and effects shall exceed the value of one hundred pounds, the further sum of thirty shillings for stamp duty.

(2.) If the officer has good reason to believe that the whole personal estate and effects of the deceased exceeds the value of three hundred pounds, he shall refuse to accept the notice and deposit until he is satisfied of the true value thereof.

(3.) The principal registrars of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, and of the Probate and Matrimonial Division of the High Court of Justice in Ireland, in communication with the Commissioners of Inland Revenue, shall prescribe the form of notice, and make such regulations as may be necessary with respect to the transmission of notices by officers of inland revenue, the steps to be taken for the preparation and filling up of forms and documents, and generally all matters which may be necessary, so as to authorise the grant of probate or letters of administration.

(4.) Officers of inland revenue are hereby empowered to administer all necessary oaths or affirmations, and in the case of letters of administration, to attest the bond and accept the same on behalf of the president or judge of the division.

(5.) Where the estate and effects shall exceed the value of one hundred pounds, the stamp duty payable on the affidavit for the Commissioners of Inland Revenue shall be the fixed duty of thirty shillings, and no more (*a*).

Provision as to inventories where gross value of estate does not exceed £300. 39 & 40 Vict. c. 24. 39 & 40 Vict. c. 70. [Amended 57 & 58 Vict. c. 30, s. 23 (7), *post*, p. 835.]

34.—(1.) The Intestates' Widows and Children (Scotland) Act, 1875, and the Small Testate Estate (Scotland) Act, 1876, as amended by the Sheriffs Court (Scotland) Act, 1876, shall be extended so as to apply to any case where the whole personal estate and effects of a person dying on or after the first day of June one thousand eight hundred and eighty-one, without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds, whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death, and the fees payable under Schedule C. of each of the two first-mentioned Acts shall not exceed the sum of fifteen shillings, inclusive of the fee of two shillings and sixpence, to be paid to the commissary clerk, or sheriff clerk.

(2.) In any such case where the estate and effects shall exceed the value of one hundred pounds, the stamp duty payable on the inventory shall be the fixed duty of thirty shillings, and no more.

Provision in case of subsequent discovery that the value of estate exceeded £300.

35. Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding three hundred pounds, then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum (*b*).

Relief from legacy duty in cases under £300.

36. The payment of the sum of thirty shillings for the fixed duty on the affidavit or inventory in conformity with this Act shall be deemed to be in full satisfaction of any claim to legacy duty or succession duty in respect of the estate or effects to which such affidavit or inventory relates.

Power to Commissioners to require explanations and proof in

37. It shall be lawful for the Commissioners of Inland Revenue at any time and from time to time within three years after the grant of probate or letters of administration or recording of inventory, as they may think necessary, to require the person acting in the administration of the estate and effects of any deceased person,

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(*a*) Provisions of sec. 33 extended. See 57 & 58 Vict. c. 30, s. 16, *post*, p. 830.

(*b*) See 3 Edw. 7, c. 46, s. 14, *post*, p. 844.

to furnish such explanations, and to produce such documentary or other evidence respecting the contents of, or particulars verified by, the affidavit or inventory as the case may seem to them to require.

support of affidavit or inventory.

Grant of duties on accounts of certain property.

[Amended by 52 Vict. c. 7, s. 11, see *post*, p. 818.]

38.—(1.) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

(2.) The personal or moveable property to be included in an account shall be the property of the following descriptions, viz.:—

(a) Any property taken as a donatio mortis causâ made by any person dying on or after the first day of June one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased (*c*).

(b) Any property which a person dying on or after such day having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

(c) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.

(3.) Where an account delivered duly stamped comprises property passing under a voluntary settlement, and, upon the production of the settlement, it shall appear that the stamp duty of five shillings per centum has been paid thereon according to the amount or value of the property so passing, or any part thereof, the amount of such stamp duty shall be returned to the person delivering the account.

Delivery of accounts on oath.

39. Every person who as beneficiary, trustee, or otherwise, acquires possession, or assumes the management, of any personal or moveable property of a description to be included in an account according to the preceding section shall upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property duly stamped as required by this Act. Any officer authorised by the Commissioners for the purpose may administer the oath.

Double duty payable in

40. If any person who ought to obtain probate or letters of administration or deliver a further affidavit or to exhibit an inven-

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(*c*) See Finance (1909–10) Act, 1910, s. 59.

case of default.

tory or who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to her Majesty double the amount of duty chargeable, and the same shall be a debt due from him to the Crown, and be recoverable by any of the ways or means now in force for the recovery of probate, legacy, or succession duties.

Cesser of legacy and succession duties at the rate of one per cent. in certain cases.

41. In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act of the fifty-fifth year of King George the Third chapter one hundred and eighty-four, shall not be payable ;

And in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of one pound per centum imposed by the Succession Duty Act, 1853, shall not be payable.

16 & 17 Vict. c. 51.

Charge of legacy duty on legacies not amounting to £20.

42 Subject to the relief from legacy duty given by section thirteen of the Customs and Inland Revenue Act, 1880, every pecuniary legacy or residue or share of residue under the will or the intestacy of a person dying on or after the first day of June one thousand eight hundred and eighty-one, although not of an amount or value of twenty pounds, shall be chargeable to the duties imposed by the said Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four, as modified by this Act.

Power to Commissioners to accept composition for legacy duty under a will.

43. It shall be lawful for the Commissioners of Inland Revenue, upon the application of the person acting in the execution of the will of any deceased person, and upon the delivery to them of an account showing the amount of the estate and effects in respect whereof legacy duty is payable, together with the names or description of class of the persons entitled thereto and every part thereof, in possession or expectancy, and their degrees of consanguinity to the testator, to assess the duty upon the amount shown by the said account at such a sum by way of composition as, having regard to the circumstances, shall appear to be proper, and to accept payment of the duty so assessed in full discharge of all claims for legacy duty under such will.

If the Commissioners are of opinion that an application should receive the assent of any person, they shall refuse to entertain the application until such assent shall have been given.

CUSTOMS AND INLAND REVENUE ACT, 1889.

(52 Vict. c. 7.)

Sections 5, 11.

PART II.

Stamps.

Estate Duty.

Estate duty on personal

5.—(1.) Where, in the case of any person applying for probate or letters of administration granted in England or Ireland on or after the first day of June one thousand eight hundred and eighty-nine, or in the case of any person exhibiting an inventory in Scotland on or after that day, the value of the estate and effects in respect whereof duty is charged on the affidavit or inventory by section twenty-seven of the Customs and Inland Revenue Act, 1881, exceeds ten thousand pounds, he shall together with such affidavit or inventory deliver a statement of the value of such estate and effects. The statement shall be transmitted with the affidavit or inventory to the Commissioners of Inland Revenue by the proper officer of the High Court of Justice in England or Ireland, or of the proper court in Scotland, and the certificate required under section thirty of the said Act shall extend to, and include the fact of the delivery of the statement.

property passing by will or on intestacy.

(2.) Where the value of the personal or moveable property included in an account delivered according to section thirty-eight of the Customs and Inland Revenue Act, 1881, on or after the first day of June one thousand eight hundred and eighty-nine, exceeds ten thousand pounds, the person delivering the account shall also deliver together therewith a statement of the value of such property.

(3.) Where pursuant to the provisions of section thirty-two of the Customs and Inland Revenue Act, 1881, a further affidavit is required to be delivered by any person, and where any person intromitting with, or entering upon the possession or management of, any personal or moveable estate or effects in Scotland of any person dying, is required by law to exhibit an additional inventory, the following provisions shall apply :—

(a) If the value of the estate and effects in respect whereof duty was charged on the former affidavit or inventory under section twenty-seven of the Customs and Inland Revenue Act, 1881, exceeded ten thousand pounds, the person delivering the further affidavit or exhibiting the additional inventory shall deliver together therewith a statement of the value of the estate and effects included therein or of the increase of value of the estate and effects included in the former affidavit or inventory, as the case may be :

(b) If the value of the estate and effects in respect whereof duty has been charged under the Customs and Inland Revenue Act, 1881, did not exceed ten thousand pounds, and such value together with the value of the estate and effects included in the further affidavit or additional inventory delivered or exhibited or the increased value, as the case may be, exceeds ten thousand pounds, such person delivering the further affidavit or exhibiting the additional inventory shall deliver together therewith a statement of the value of the estate and effects included therein, and in the former affidavit or inventory, or of the value as increased of the estate and effects included in the former affidavit or inventory, as the case may be.

(4.) There shall be charged and paid on every statement to be delivered in conformity with this section a duty of one pound for every full sum of one hundred pounds, and for any fraction of one hundred pounds over any multiple of one hundred pounds of the value of the estate and effects or of the personal or moveable property, as the case may be.

(5.) The duties respectively imposed by this section are to be in addition to the stamp duties charged on the affidavit required from persons applying for probate or letters of administration in England or Ireland, and on the inventory exhibited and recorded in Scotland, and in addition to the stamp duties charged on such accounts of personal and moveable property as are specified in section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by this Act, but are not to be deemed "probate duties" within the meaning assigned to that expression by section twenty-one of the Local Government Act, 1888, or by section five of the Probate Duties (Scotland and Ireland) Act, 1888.

44 & 45 Vict. c. 12.

51 & 52 Vict. c. 41.

51 & 52 Vict. c. 60.

(6.) The provisions contained in section thirty-one of the Customs and Inland Revenue Act, 1881, for the return of stamp duty overpaid, shall apply to the return of duty overpaid on any statement delivered under this section, and in Scotland a return of duty overpaid on any statement so delivered shall be made in like manner as a return is now made of stamp duty overpaid on an additional inventory.

(7.) Where a further affidavit or additional inventory is delivered or exhibited of any estate or effects of a deceased person after a former affidavit or inventory of the estate and effects of the same person has been delivered or exhibited and recorded prior to the first day of June one thousand eight hundred and eighty-nine, it shall not be necessary to deliver any statement of the value of the estate and effects of such person under this section.

Amendment of 44 & 45 Vict. c. 12, s. 38.

[See Finance (1909-10) Act, 1910, s. 59.]

11.—(1.) Sub-section two of section thirty-eight of the Customs and Inland Revenue Act, 1881, is hereby amended, as follows :—

The description of property marked (*a*) shall be read as if the word "twelve" were substituted for the word "three" therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise :

The description of property marked (*b*) shall be construed as if the expression "to be transferred to or vested in himself and any other person" included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement, with any other person :

The description of property marked (*c*) shall be construed as if the expression "voluntary settlement" included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and if the expression "such property," wherever the same occurs, included the proceeds of sale thereof :

The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after the first day of June one thousand eight hundred and eighty-nine, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

(2.) A return of stamp duty shall not be made under sub-section three of the said section thirty-eight by reason of, or in relation to, any account delivered on or after the first day of June one thousand eight hundred and eighty-nine.

FINANCE ACT, 1894.

(57 & 58 VICT. C. 30.)

Sections 1—24, 42.

PART I.

ESTATE DUTY.

Grant of Estate Duty.

Grant of estate duty.

1. In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called "estate duty," at the graduated rates hereinafter mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such estate duty.

What property is deemed to pass.

2.—(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say :—

(a) Property of which the deceased was at the time of his death competent to dispose;

[See Finance Act, 1896, ss. 14, 15; Finance Act, 1900, s. 11.]

(b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole;

44 & 45 Vict. c. 12.
52 & 53 Vict. c. 7.

(c) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom (*a*); and

(d) Any annuity or other interest purchased or provided by the

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(*a*) See Finance (1909—10) Act, 1910, s. 59.

deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

(2.) Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes.

[See Finance (1909-10) Act, 1910, s. 59.]

(3.) Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person, under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death where possession and enjoyment of the property was bona fide assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise.

Exception for transactions for money consideration.

3.—(1.) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.

(2.) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty.

Aggregation of property to form one estate for purpose of duty.

4. For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof:

[Amended, Finance Act, 1900, s. 12.]

Provided that any property so passing, in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof; but if any benefit under a disposition not made by the deceased is reserved or given to the wife or husband or a lineal ancestor or lineal descendant of the deceased, such benefit shall be aggregated with property of the deceased for the purpose of determining the rate of estate duty.

Settled property.

[See Finance Act, 1896, ss. 14, 15, 19.]

5.—(1.) Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

(a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but

(b) during the continuance of the settlement the settlement estate duty shall not be payable more than once.

[Amended, Finance Act, 1898, s. 13; and see Finance (1909-10) Act, 1910, s. 55.]

(2.) If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property.

[See Finance Act, 1898, s. 14.]

(3.) In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.

(4.) Any person paying the settlement estate duty payable under this section upon property comprised in a settlement, may deduct the amount of the *ad valorem* stamp duty (if any) charged on the settlement in respect of that property.

(5.) Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty.

Collection and Recovery of Duty and Value of Property.

Collection and recovery of estate duty.

[See Finance Act, 1896, s. 16.]

6.—(1.) Estate duty shall be a stamp duty, collected and recovered as hereinafter mentioned.

(2.) The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the inland revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment.

(3.) Where the executor does not know the amount or value of any property which has passed on the death, he may state in the inland revenue affidavit that such property exists but he does not know the amount or value thereof, and that he undertakes, as soon as the amount and value are ascertained, to bring in an account thereof, and to pay both the duty for which he is or may be liable, and any further duty payable by reason thereof for which he is or may be liable in respect of the other property mentioned in the affidavit.

(4.) Estate duty, so far as not paid by the executor, shall be collected upon an account setting forth the particulars of the property, and delivered to the Commissioners within six months after the death by the person accountable for the duty, or within such further time as the Commissioners may allow.

(5.) Every estate shall include all income accrued upon the property included therein down to and outstanding at the date of the death of the deceased.

[Amended, Finance Act, 1896, ss. 18, 40.]

(6.) Interest at the rate of three per cent. per annum on the estate duty shall be paid from the date of the death up to the date of the delivery of the inland revenue affidavit or account, or the expiration of six months after the death, whichever first happens, and shall form part of the estate duty.

(7.) The duty which is to be collected upon an inland revenue affidavit or account shall be due on the delivery thereof, or on the expiration of six months from the death, whichever first happens.

[Amended, Finance Act, 1896, s. 18; and see Finance (1909-10) Act, 1910, s. 61.]

(8.) Provided that the duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments, or sixteen half-yearly instalments, with interest at the rate of three per cent. per annum from the date at which the first instalment is due, less income tax, and the first instalment shall be due at the expiration of twelve months from the death, and the interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly; but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and in case the property is sold, shall be paid on completion of the sale, and if not so paid shall be duty in arrear.

Value of property.

[See Finance (1909-10) Act, 1910, s. 62.]

7.—(1.) In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—

(a) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bonâ fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest, nor

(b) for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained, nor

(c) more than once for the same debt or incumbrance charged upon different portions of the estate;

and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto.

(2.) An allowance shall not be made in the first instance for debts due from the deceased to persons resident out of the United Kingdom (unless contracted to be paid in the United Kingdom, or charged on property situate within the United Kingdom), except out of the value of any personal property of the deceased situate out of the United Kingdom in respect of which estate duty is paid; and there shall be no repayment of estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Commissioners, that the personal property of the deceased situate in the foreign country or British possession in which the person to whom such debts are due resides, is insufficient for their payment.

(3.) Where the Commissioners are satisfied that any additional expense in administering or in realising property has been incurred by reason of the property being situate out of the United Kingdom, they may make an allowance from the value of the property on account of such expense not exceeding in any case five per cent. on the value of the property.

(4.) Where any property passing on the death of the deceased is situate in a foreign country, and the Commissioners are satisfied that by reason of such death any duty is payable in that foreign country in respect of that property, they shall make an allowance of the amount of that duty from the value of the property.

(5.) The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased;

Provided that, in the case of any agricultural property, where no part of the principal value is due to the expectation of an increased income from such property, the principal value shall not exceed twenty-five times the annual value as assessed under Schedule A. of the Income Tax Acts, after making such deductions as have not been allowed in that assessment and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding five per cent. of the annual value so assessed.

[See Finance (1909-10) Act, 1910, ss. 60, 61.]

16 & 17 Vict. c. 51.

(6.) Where an estate includes an interest in expectancy, estate duty in respect of that interest shall be paid, at the option of the person accountable for the duty, either with the duty in respect of the rest of the estate or when the interest falls into possession, and if the duty is not paid with the estate duty in respect of the rest of the estate, then—

(a) for the purpose of determining the rate of estate duty in respect of the rest of the estate the value of the interest shall be its value at the date of the death of the deceased; and

(b) the rate of estate duty in respect of the interest when it falls into possession shall be calculated according to its value when it falls into possession, together with the value of the rest of the estate as previously ascertained.

(7.) The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—

(a) if the interest extended to the whole income of the property, be the principal value of that property ; and

(b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended.

(8.) Subject to the provisions of this Act, the value of any property for the purpose of estate duty shall be ascertained by the Commissioners in such manner and by such means as they think fit, and, if they authorise a person to inspect any property and report to them the value thereof for the purposes of this Act, the person having the custody or possession of that property shall permit the person so authorised to inspect it at such reasonable times as the Commissioners consider necessary.

(9.) Where the Commissioners require a valuation to be made by a person named by them, the reasonable costs of such valuation shall be defrayed by the Commissioners.

(10.) Property passing on any death shall not be aggregated more than once, nor shall estate duty in respect thereof be more than once levied on the same death.

Supplemental provisions as to collection, recovery, and repayment of and exemption from estate duty.

8.—(1.) The existing law and practice relating to any of the duties now leviable on or with reference to death shall, subject to the provisions of this Act and so far as the same are applicable, apply for the purposes of the collection, recovery, and repayment of estate duty, and for the exemption of the property of common seamen marines or soldiers who are slain or die in the service of her Majesty, and for the purpose of payment of sums under one hundred pounds without requiring representation, as if such law and practice were in terms made applicable to this part of this Act.

52 & 53 Vict. c. 7.
54 & 55 Vict. c. 66.

(2.) Sections twelve to fourteen of the Customs and Inland Revenue Act, 1889, and section forty-seven of the Local Registration of Title (Ireland) Act, 1891, shall apply as if estate duty were therein mentioned as well as succession duty, and as if an account were not settled within the meaning of any of the above sections until the time for the payment of the duty on such account has arrived.

(3.) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the inland revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received.

(4.) Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property.

(5.) Every person accountable for estate duty, and every person whom the Commissioners believe to have taken possession of or administered any part of the estate in respect of which duty is leviable on the death of the deceased, or of the income of any part of such estate, shall, to the best of his knowledge and belief, if required by the Commissioners, deliver to them and verify a statement of such particulars together with such evidence as they require relating to any property which they have reason to believe to form part of an estate in respect of which estate duty is leviable on the death of the deceased.

(6.) A person who wilfully fails to comply with any of the foregoing provisions of this section shall be liable to pay one hundred pounds, or a sum equal to double the amount of the estate duty, if any, remaining unpaid for which he is accountable, according as the Commissioners elect: Provided that the Commissioners, or in any proceeding for the recovery of such penalty the Court, shall have power to reduce any such penalty.

(7.) Estate duty shall, in the first instance, be calculated at the appropriate rate according to the value of the estate as set forth in the inland revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid, the additional duty shall, unless a certificate of discharge has been delivered under this Act, be payable, and be treated as duty in arrear.

(8.) The Commissioners on application from a person accountable for the duty on any property forming part of an estate shall, where they consider that it can conveniently be done, certify the amount of the valuation accepted by them for any class or description of property forming part of such estate.

(9.) Where the Commissioners are satisfied that the estate duty leviable in respect of any property cannot without excessive sacrifice be raised at once, they may allow payment to be postponed for such period, to such extent, and on payment of such interest not exceeding four per cent. or any higher interest yielded by the property, and on such terms, as the Commissioners think fit.

(10.) *Interest on arrears of estate duty shall be paid as if they were arrears of legacy duty.* [Repealed, Finance Act, 1896, Sched., Pt. III.]

(11.) If after the expiration of twenty years from a death upon which estate duty became leviable any such duty remains unpaid, the Commissioners may, if they think fit, on the application of any person accountable or liable for such duty or interested in the property, remit the payment of such duty or any part thereof or any interest thereon (*a*).

(12.) Where it is proved to the satisfaction of the Commissioners

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(*a*) See Finance Act, 1907, s. 13.

that too much estate duty has been paid, the excess shall be repaid by them, and in cases where the over-payment was due to over-valuation by the Commissioners, with interest at three per cent. per annum.

(13.) Where any proceeding for the recovery of estate duty in respect of any property is instituted, the High Court shall have jurisdiction to appoint a receiver of the property and the rents and profits thereof, and to order a sale of the property.

(14.) All affidavits, accounts, certificates, statements, and forms used for the purpose of this Part of this Act shall be in such form, and contain such particulars, as may be prescribed, and if so required by the Commissioners shall be in duplicate, and accounts and statements shall be delivered and verified on oath and by production of books and documents in the manner prescribed, and any person who wilfully fails to comply with the provisions of this enactment shall be liable to the penalty above in this section mentioned.

(15.) No charge shall be made for any certificate given by the Commissioners under this Act.

(16.) The estate duty may be collected by means of stamps or such other means as the Commissioners prescribe.

44 & 45 Vict. c. 12.

(17.) The form of certificate required to be given by the proper officer of the Court under section thirty of the Customs and Inland Revenue Act, 1881, may be varied by a rule of Court in such manner as may appear necessary for carrying into effect this Act.

(18.) Nothing in this section shall render liable to or accountable for duty a bonâ fide purchaser for valuable consideration without notice.

Charge of estate duty on property, and facilities for raising it.

9.—(1.) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable: Provided that the property shall not be so chargeable as against a bonâ fide purchaser thereof for valuable consideration without notice.

(2.) On an application submitting in the prescribed form the description of the lands or other subjects of property (whether hereditaments, stocks, funds, shares, or securities), and of the debts and incumbrances allowed by the Commissioners in assessing the value of the property for the purposes of estate duty, the Commissioners shall grant a certificate of the estate duty paid in respect of the property, and specify the debts and incumbrances so allowed, as well as the lands or other subjects of property.

(3.) Subject to any repayment of estate duty arising from want of title to the land or other subjects of property, or from the existence of any debt or incumbrance thereon for which under this Act an allowance ought to have been but has not been made, or from any other cause, the certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property after the debts and incumbrances allowed as aforesaid : Provided that any such repayment of duty by the Commissioners shall be made to the person producing to them the said certificate.

(4.) If the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same instalments and with the same interest as are in this Act mentioned.

(5.) A person authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof.

(6.) A person having a limited interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him.

(7.) Any money arising from the sale of property comprised in a settlement, or held upon trust to lay out upon the trusts of a settlement, and capital money arising under the Settled Land Act, 1882, may be expended in paying any estate duty in respect of property comprised in the settlement and held upon the same trusts.

45 & 46 Vict. c. 38.

Appeal from Commissioners.

[Amended, Finance Act, 1896, s. 22; and see Finance (1909-10) Act, 1910, s. 60.]

10.—(1.) Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the Commissioners, whether on the ground of the value of any property or the rate charged or otherwise, may, on payment of, or giving security as hereinafter mentioned for, the duty claimed by the Commissioners or such portion of it as is then payable by him, appeal to the High Court within the time and in the manner and on the conditions directed by rules of Court, and the amount of duty shall be determined by the High Court, and if the duty as determined is less than that paid to the Commissioners the excess shall be repaid.

(2.) No appeal shall be allowed from any order, direction, determination, or decision of the High Court in any appeal under this section except with the leave of the High Court or Court of Appeal.

(3.) The costs of the appeal shall be in the discretion of the Court, and the Court, where it appears to the Court just, may order the Commissioners to pay on any excess of duty repaid by them interest at the rate of three per cent. per annum for such period as appears to the Court just.

(4.) Provided that the High Court, if satisfied that it would impose hardship to require the appellant, as a condition of an appeal, to pay the whole or, as the case may be, any part of the duty claimed by the Commissioners or of such portion of it as is then payable by him, may allow an appeal to be brought on payment of no duty, or of such part only of the duty as to the Court seems reasonable, and on security to the satisfaction of the Court being given for the duty, or so much of the duty as is not so paid, but in such case the Court may order interest at the rate of three per cent. per annum to be paid on the unpaid duty so far as it becomes payable under the decision of the Court.

(5.) Where the value as alleged by the Commissioners of the property in respect of which the dispute arises does not exceed ten thousand pounds, the appeal under this section may be to the county court for the county or place in which the appellant resides or the property is situate, and this section shall for the purpose of the appeal apply as if such county court were the High Court.

(6.) The county council of every county or county borough in Great Britain, shall within twelve months after the commencement of this Act, and may thereafter from time to time, appoint a sufficient number of qualified persons to act as valuers for the purposes of this Act in their respective counties, and shall fix a scale of charges for the remuneration of such persons, and the Court may refer any question of disputed value under this section to the arbitration of any person so appointed for the county in which the appellant resides or the property is situate; and the costs of any such arbitration shall be part of the costs of the appeal.

Discharge from and Apportionment of Duty.

Release of persons paying estate duty.

11.—(1.) The Commissioners on being satisfied that the full estate duty has been or will be paid in respect of an estate or any part thereof shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for estate duty the property shown by the certificate to form the estate or part thereof as the case may be.

[See Finance Act, 1907, s. 14.]

(2.) Where a person accountable for the estate duty in respect of any property passing on a death applies after the lapse of two years from such death to the Commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto, the Commissioners may determine the rate of the estate duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicant so far as regards that property shall be discharged from any further claim for estate duty, and the Commissioners shall give a certificate of such discharge.

(3.) A certificate of the Commissioners under this section shall not discharge any person or property from estate duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value thereof were added to the value of the property in respect of which duty has been already accounted for.

(4.) Provided nevertheless that a certificate purporting to be a discharge of the whole estate duty payable in respect of any property included in the certificate shall exonerate a bonâ fide purchaser for valable consideration without notice from the duty notwithstanding any such fraud or failure.

Commutation of duty on

12. The Commissioners in their discretion, upon application by a person entitled to an interest in expectancy, may commute the estate duty which would or might, but for the commutation, become payable in respect of such interest for a certain sum to be presently paid, and for determining that sum shall cause a present value to be set upon such duty, regard being had to the contingencies affecting the liability to and rate and amount of such duty, and interest being reckoned at three per cent.; and on the receipt of such sum they shall give a certificate of discharge accordingly.

interest in expectancy.

Powers to accept composition for death duties

13.—(1.) Where, by reason of the number of deaths on which property has passed or of the complicated nature of the interests of different persons in property which has passed on death, or from any other cause, it is difficult to ascertain exactly the amount of death duties or any of them payable in respect of any property or any interest therein, or so to ascertain the same without undue expense in proportion to the value of the property or interest, the Commissioners on the application of any person accountable for any duty thereon, and upon his giving to them all the information in his power respecting the amount of the property and the several interests therein, and other circumstances of the case, may by way of composition for all or any of the death duties payable in respect of the property, or interest, and the various interests therein, or any of them, assess such sum on the value of the property, or interest, as having regard to the circumstances appears proper, and may accept payment of the sum so assessed, in full discharge of all claims for death duties in respect of such property or interest, and shall give a certificate of discharge accordingly;

(2.) Provided that the certificate shall not discharge any person from any duty in case of fraud or failure to disclose material facts.

(3.) In this section the expression "death duties" means the estate duty under this Act, the duties mentioned in the First Schedule to this Act and the legacy and succession duties, and the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881.

44 & 45 Vict. c. 12.

Apportionment of duty.

14.—(1.) In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary.

(2.) Any dispute as to the proportion of estate duty to be borne by any property or person, may be determined upon application by any person interested in manner directed by rules of Court, either by the High Court, or, where the amount in dispute is less than fifty pounds, by a county court for the county or place in which the person recovering the same resides, or the property in respect of which the duty is paid is situate.

(3.) Any person from whom a rateable part of estate duty can be recovered under this section shall be bound by the accounts and valuations as settled between the person entitled to recover the same and the Commissioners.

Exemptions from estate duty.
[See Finance Act, 1896, ss. 14, 15.]

15.—(1.) Estate duty shall not be payable in respect of a single annuity not exceeding twenty-five pounds purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person; and if in any case there is more than one such annuity, the annuity first granted shall be alone entitled to the exemption under this section.

(2.) It shall be lawful for the Treasury to remit the estate duty, or any other duty leviable on or with reference to death, in respect of any such pictures, prints, books, manuscripts, works of art or scientific collections, as appear to the Treasury to be of national, scientific, or historic interest, and to be given or bequeathed for national purposes, or to any university, or to any county council or municipal corporation, and no property the duty in respect of which is so remitted shall be aggregated with any other property for the purpose of fixing the rate of estate duty.

(3.) Estate duty shall not be payable in respect of any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government, notwithstanding that the deceased contributed during his lifetime to any fund out of which such pension or annuity is paid.

(4.) Estate duty shall not be payable in respect of any advowson or church patronage which would have been free from succession duty under section twenty-four of the Succession Duty Act, 1853.

16 & 17 Vict. c. 51.

Small Estates.

Provision for estates not exceeding £1,000.
44 & 45 Vict. c. 12.
[See Revenue Act, 1903, s. 14; Finance (1909-10) Act, 1910, s. 61.]

16.—(1.) The provisions of sections thirty-three, thirty-five, and thirty-six of the Customs and Inland Revenue Act, 1881, (relating to the obtaining of representation to the deceased where the gross value of his personal estate does not exceed three hundred pounds,) shall apply with the necessary modifications to the case where the gross value of the property real and personal in respect of which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will of the deceased, does not exceed five hundred pounds, and where the gross value does not exceed three hundred pounds the fixed duty shall be thirty shillings, and where the gross value exceeds three hundred pounds and does not exceed five hundred pounds the fixed duty shall be fifty shillings.

(2.) All such property may be comprised in the notice under the said section thirty-three.

(3.) Where the net value of the property, real and personal, in respect of which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will of the deceased, does not exceed one thousand pounds, such property, for the purpose of estate duty, shall not be aggregated with any other property, but shall form an estate by itself; and where the fixed duty or estate duty has been paid upon the principal value of that estate, the settlement estate duty and the legacy and succession duties shall not be payable under the will or intestacy of the deceased in respect of that estate.

(4.) Where representation granted under this section if granted in England extends to property in Ireland, and if granted in Ireland extends to property in England, the principal registrar of the Probate Division of the High Court in England or Ireland, as the case may be, shall affix the seal of the Court thereto on the same being sent to him for that purpose, with the fee of two shillings and sixpence.

(5.) Where the fixed duty of thirty or fifty shillings is paid within twelve months after the death of the deceased, interest on such duty shall not be payable.

Rates of Estate Duty.

Scale of rates of estate duty.

17. The rates of the estate duty shall be according to the following scale (*a*) :—

Where the Principal Value of the Estate				Estate Duty shall be payable at the Rate per cent. of
	£		£	
Exceeds .	. 100	and does not exceed .	500	One pound.
,, .	. 500	,, ,,	1,000	Two pounds.
,,	1,000	,, ,,	10,000	Three pounds.
,,	10,000	,, ,,	25,000	Four pounds.
,,	25,000	,, ,,	50,000	Four pounds ten shillings.
,,	50,000	,, ,,	75,000	Five pounds.
,,	75,000	,, ,,	100,000	Five pounds ten shillings.
,,	100,000	,, ,,	150,000	Six pounds.
,,	150,000	,, ,,	250,000	Six pounds ten shillings.
,,	250,000	,, ,,	500,000	Seven pounds.
,,	500,000	,, ,,	1,000,000	Seven pounds ten shillings.
,,	1,000,000	. . . . . .		Eight pounds.

The rate of the settlement estate duty where the property is settled shall be one per cent.

[See Finance (1909-10) Act, 1910, s. 54.]

Provided that for any fractional part of ten pounds over ten pounds or any multiple thereof, the estate duty and the settlement estate duty shall be payable at the rate per cent. for the full sum of ten pounds.

[See Finance Act, 1896, s. 17; Finance Act, 1900, s. 13.]

Succession Duty.

Value of real successions for succession duty.

18.—(1.) The value for the purpose of succession duty of a succession to real property arising on the death of a deceased person shall, where the successor is competent to dispose of the property, be the principal value of the property, after deducting the estate duty payable in respect thereof on the said death and the expenses if any properly incurred of raising and paying the same ; and the duty shall be a charge on the property, and shall be payable by the same

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(*a*) This scale repealed, except as respects persons dying before the 19th of April, 1907, by 7 Edw. 7, c. 13, s. 12.

instalments as are authorised by this Act for estate duty on real property, with interest at the rate of three per cent. per annum; and the first instalment shall be payable and the interest shall begin to run at the expiration of twelve months after the date on which the successor became entitled in possession to his succession or to the receipt of the income and profit thereof; and after the expiration of the said twelve months the provisions with respect to discount shall not apply.

(2.) The principal value of real property for the purpose of succession duty shall be ascertained in the same manner as it would be ascertained under the provisions of this Act for the purpose of estate duty; and in the case of any agricultural property where no part of the principal value is due to the expectation of an increased income from such property, the annual value for the purpose of succession duty shall be arrived at in the same manner as under the provisions of this Part of this Act for the purpose of estate duty.

Local Taxation Grant.

Adaptation of law as to probate duty grant.
51 & 52 Vict. cc. 41 and 69.
52 & 53 Vict. c. 50.

19. In substitution for the grant out of the probate duties under the Local Government Act, 1888, the Probate Duty (Scotland and Ireland) Act, 1888, and the Local Government (Scotland) Act, 1889, there shall be paid, out of the proceeds of the estate duty derived from personal property, such sum as the Commissioners, in accordance with regulations made by the Treasury under those Acts, may determine to be an amount equal to one and a half per cent. on the net value of such of the property in respect of which estate duty is leviable as would, if this Act had not been passed, have been chargeable with the duty imposed by section twenty-seven of the Customs and Inland Revenue Act, 1881, on inland revenue affidavits and the first-mentioned Acts shall apply, as if the sum so determined were the probate duty grant or one half of the proceeds of the sums collected in respect of the probate duties (as the case requires) within the meaning of those Acts.

44 & 45 Vict. c. 12.

British Possessions.

Exception as to property in British possessions.

20.—(1.) Where the Commissioners are satisfied, that in a British possession to which this section applies, duty is payable by reason of a death in respect of any property situate in such possession and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the estate duty payable in respect of that property on the same death.

(2.) Nothing in this Act shall be held to create a charge for estate duty on any property situate in a British possession, while so situate, or to authorise the Commissioners to take any proceedings in a British possession for the recovery of any estate duty.

(3.) Her Majesty the Queen may, by Order in Council, apply this section to any British possession (*a*), where her Majesty is satisfied that, by the law of such possession, either no duty is leviable in respect of property situate in the United Kingdom when passing on death, or that the law of such possession as respects any duty so leviable is to the like effect as the foregoing provisions of this section.

(*a*) For list of British possessions to which the section has been applied, see *post*, p. 864.

(4.) Her Majesty in Council may revoke any such Order, where it appears that the law of the British possession has been so altered that it would not authorise the making of an Order under this section.

Savings and Definitions.

Savings. [See Finance Act, 1896, ss. 14, 15; Finance Act, 1907, s. 15; Finance (1909-10) Act, 1910, s. 55.]

21.—(1.) Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this Part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the First Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property.

44 & 45 Vict c. 12.

(2.) Where a person died before the commencement of this Part of this Act, the duties mentioned in the First Schedule to this Act shall continue to be payable in like manner in all respects as if this Act had not passed.

(3.) Where an interest in expectancy in any property has, before the commencement of this Part of this Act, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession, than would have been payable if this Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

(4.) The settlement estate duty of one per cent. shall not be payable in respect of property settled by a disposition which has taken effect before the commencement of this Part of this Act.

(5.) Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the commencement of this Part of this Act, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor.

Definitions.

22.—(1.) In this Part of this Act, unless the context otherwise requires:—

(a) The expressions "deceased person" and "the deceased" mean a person dying after the commencement of this Part of this Act:

(b) The expression "will" includes any testamentary instrument:

(c) The expression "representation" means probate of a will or letters of administration:

(d) The expression "executor" means the executor or administrator of a deceased person, and includes, as regards any obligation under this Part of this Act, any person who takes possession of or intermeddles with the personal property of a deceased person:

(e) The expression "estate duty" means estate duty under this Act:

(f) The expression "property" includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale:

(g) The expression "agricultural property" means agricultural land, pasture and woodland, and also includes such cottages, farm buildings, farm houses, and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property:

(h) The expression "settled property" means property comprised in a settlement:

(i) The expression "settlement" means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of section two of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust:

45 & 46 Vict. c. 38.

(j) The expression "interest in expectancy" includes an estate in remainder or reversion and every other future interest whether vested or contingent, but does not include reversions expectant upon the determination of leases:

(k) The expression "incumbrances" includes mortgages and terminable charges:

(l) The expression "property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and the expression "on the death" includes "at a period ascertainable only by reference to the death";

(m) The expression "the Commissioners" means the Commissioners of Inland Revenue:

(n) The expression "inland revenue affidavit" means an affidavit made under the enactments specified in the Second Schedule to this Act with the account and schedule annexed thereto:

(o) The expression "prescribed" means prescribed by the Commissioners.

(2.) For the purposes of this Part of this Act—

(a) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exerciseable by instrument inter vivos or by will, or both, but exclusive of any power exerciseable in a fiduciary capacity under a disposition not made by himself, or exerciseable as tenant for life under the Settled Land Act, 1882, or as mortgagee:

45 & 46 Vict. c. 38.

(b) A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required :

(c) Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose.

(3.) This Part of this Act shall apply to property in which the wife or husband of the deceased takes an estate in dower or by the curtesy or any other like estate, in like manner as it applies to property settled by the will of the deceased.

Application to Scotland.

Application of Part of Act to Scotland.

23. In the application of this Part of this Act to Scotland unless the context otherwise requires :—

(1.) The Court of Session shall be substituted for the High Court :

(2.) "Sheriff Court" shall be substituted for "County Court" :

(3.) "Confirmation" shall be substituted for "representation" :

(4.) The expression "receiver of the property and of the rents and profits thereof," means a judicial factor upon the property :

(5.) The expression "inland revenue affidavit," means the inventory of the personal estate of a deceased now required by law, and includes an additional inventory :

(6.) The expression "on delivering the inland revenue affidavit" means on exhibiting and recording a duly stamped inventory as provided by section thirty-eight of the Act of the forty-eighth year of the reign of King George the Third, chapter one hundred and forty-nine :

44 & 45 Vict. c. 12.

(7.) Section thirty-four of the Customs and Inland Revenue Act, 1881, shall be substituted for section thirty-three of that Act, and the Acts referred to in such section thirty-four shall extend to an estate of a gross value not exceeding five hundred pounds, and an application under the said Acts may be made to any commissary clerk, and any commissary clerk shall affix the seal of the Court to any representation granted in England or Ireland upon the same being sent to him for that purpose, enclosing a fee of two shillings and sixpence :

(8.) The expression "personal property" means moveable property :

(9.) The expression "real property" includes heritable property :

(10.) The expression "incumbrance" includes any heritable security, or other debt or payment secured upon heritage :

(11.) The expression "executor" means every person who as executor, nearest of kin, or creditor, or otherwise, intromits with or enters upon the possession or management of any personal property of a deceased person :

(12.) The property comprised in any special assignation or disposition taking effect on death shall be deemed to pass on death within the meaning of this Act :

(13.) The expression "trustee" includes a tutor, curator, and judicial factor :

(14.) The expression "settled property" shall not include property held under entail :

(15.) An institute or heir of entail in possession of an entailed estate shall whether sui juris or not be deemed for the purposes of this Act to be a person competent to dispose of such estate :

(16.) Where an entailed estate passes on the death of the deceased to an institute or heir of entail, who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail or having the consent of such one or more subsequent heirs valued and dispensed with, settlement estate duty as well as estate duty shall be paid in respect of such estate, but neither estate duty nor settlement estate duty shall be payable again in respect of such estate, until such estate is disentailed or until an heir of entail to whom it passes on or subsequent to the death of the institute or heir first mentioned, and who is entitled to disentail it without obtaining the consent of any subsequent heir or heirs or having the consent of any subsequent heir or heirs valued and dispensed with, dies :

(17.) Where an institute or heir of entail in possession of an entailed estate, who is not entitled to disentail such estate without either obtaining the consent of one or more subsequent heirs of entail or having the consent of such one or more subsequent heirs valued and dispensed with, has paid estate duty in respect of such estate, and afterwards disentails such estate, he shall be entitled to deduct from the value in money of the expectancy or interest in such estate of such one or more subsequent heirs, payable by him to them in respect of their consents having been granted or dispensed with, a proper rateable part of the estate duty paid by him as aforesaid :

(18.) Where any person who pays estate duty on any property, and in whom the property is not vested, is by this Act authorised to raise such duty by the sale or mortgage of that property, or any part thereof, it shall be competent for such person to apply to the Court of Session—

(a) for an order of sale of the property or part of it, and in the event of the Court granting such order, it shall provide for the payment out of the price of the amount of the estate duty which has been paid by such person, and the Court shall thereafter make such order as to the disposal of the surplus, if any, of the price, by way of investment or otherwise, as to the Court shall seem proper ; the Court may in such order specify the time and place at which, the person by whom, and the advertisement or notice after which the sale shall be made, and may ordain the person in whom the property is vested to grant a disposition thereof in favour of the purchaser, and if the person in whom the property is vested refuses or fails to do so, the Court shall grant authority to the clerk of Court to execute such disposition, and such disposition so executed shall be as valid as if it had been executed by the person in whom the property is vested ; or

(b) for an order ordaining the person in whom the property is vested to grant a bond and disposition in security over the property in favour of the person who has paid the estate duty, for the amount of the said duty, and if the person in whom the property is vested refuses, or fails to do so, the Court shall grant authority to the clerk of Court to execute such a bond and disposition in security, and such bond and disposition in security so executed shall be as valid as if it had been executed by the person in whom the property is vested, and shall be a first charge upon the property after any debt or incumbrance for which an allowance is directed to be made under this Act in determining the value of the property for the purpose of estate duty;

Provided also that summary diligence shall not be competent thereupon, and that nothing herein contained shall make the duty to be recovered by the methods of these subsections (a) and (b) recoverable at any earlier time than if it had been recovered by direct action against the person ultimately liable for the duty:

(19.) This Part of this Act shall apply to property in which the wife or husband of the deceased takes an estate of terce or curtesy or any other like estate in like manner as it applies to property settled by the will of the deceased.

Commencement.

24. This Part of this Act shall come into operation on the expiration of the first day of August one thousand eight hundred and ninety-four, in this Part of this Act referred to as the commencement of this Part of this Act. Commencement of Part of Act.

Short Title.

42. This Act may be cited as the Finance Act, 1894. Short title.

SCHEDULES.

FIRST SCHEDULE.

EXISTING DUTIES REFERRED TO.

1. The stamp duties imposed by the Customs and Inland Revenue Act, 1881, on the affidavit to be required and received from the person applying for probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland. Sections 1, 5, 13, 21. 44 & 45 Vict. c. 12.

2. The stamp duties imposed by section 38 of the Customs and Inland Revenue Act, 1881, as amended and extended by section 11 of the Customs and Inland Revenue Act, 1889, on the value of personal or moveable property to be included in accounts thereby directed to be delivered. 52 & 53 Vict. c. 7.

3. The additional succession duties imposed by section 21 of the Customs and Inland Revenue Act, 1888. 51 & 52 Vict. c. 8.

4. The temporary estate duties imposed by sections 5 and 6 of the Customs and Inland Revenue Act, 1889.

5. The duty at the rate of one pound per cent. which would by virtue of the Acts in force relating to legacy duty or succession duty have been payable under the will or intestacy of the deceased, or under his disposition or any devolution from him under which respectively estate duty has been paid, or under any other disposition under which estate duty has been paid.

SECOND SCHEDULE.

ACTS REFERRED TO.

Section 22 (1) n.).

Session and Chapter.	Title or Short Title.	Section referred to.
55 Geo. 3, c. 184 .	The Stamp Act, 1815 . . .	Section thirty-eight.
56 Geo. 3, c. 56 . .	An Act the title of which begins with the words "An Act to repeal the several stamp duties" and ends with the words "managing the said duties."	Section one hundred and seventeen.
43 Vict. c. 14 . .	The Customs and Inland Revenue Act, 1880.	Section ten.
44 & 45 Vict. c. 12 .	The Customs and Inland Revenue Act, 1881.	Sections twenty-nine and thirty-two.

FINANCE ACT, 1896.

(59 & 60 VICT. c. 28.)

Sections 14—24, 39—41.

PART IV.

DEATH DUTIES.

Estate Duty.

Exception to passing of property on enlargement of interest of settlor.

14. Where property is settled by a person on himself for life, and after his death on any other persons with an ultimate reversion of an absolute interest or absolute power of disposition to the settlor, the property shall not be deemed for the purpose of the principal Act to pass to the settlor on the death of any such other person after the commencement of this Part of this Act, by reason only that the settlor, being then in possession of the property as tenant for life, becomes, in consequence of such death, entitled to the immediate reversion, or acquires an absolute power to dispose of the whole property.

Reverter of property to disponer.

15.—(1.) Where by a disposition of any property an interest is conferred on any person other than the disponer for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponer or of any benefit to him by contract or otherwise, and the only benefit which the disponer retains in the said property is subject to such life or determinable interest, and no other interest is created by the said disposition, then, on the death of such person after the commencement of this Part of this Act, the property shall not be deemed for the purpose of the principal

Act to pass by reason only of its reverter to the disponer in his lifetime.

(2.) Where by a disposition of any property any such interest as above in this section mentioned is conferred on two or more persons, either severally or jointly, or in succession, this section shall apply in like manner as where the interest is conferred on one person.

(3.) Provided that the foregoing sub-sections shall not apply where such person or persons taking the said life or determinable interest had at any time prior to the disposition been himself or themselves competent to dispose of the said property.

(4.) Where the deceased person was entitled by law to the rents and profits of real property (as defined by section one of the Succession Duty Act, 1853) of his wife, and has died in her lifetime, such property shall not be deemed for the purpose of the principal Act to pass on his death by reason of her then becoming entitled to the property in virtue of her former interest.

16 & 17 Vict. c. 51.

Estate duty on annuities.

16. The estate duty due in respect of any annuity or other definite annual sum, whether terminable or perpetual, referred to in section two (1) (d) of the principal Act, may, at the option of the person delivering the account, be paid by four equal yearly instalments, the first of which shall be due at the end of twelve months from the date of the death, and after the end of those twelve months interest on the unpaid portion of the duty shall be added to each instalment and paid accordingly, but the duty for the time being unpaid, with interest to the date of payment, may be paid at any time.

Estate duty on fractions of one hundred pounds.

[Amended, Finance Act, 1900, s. 13.]

17. Section seventeen of the principal Act shall have effect as if there were added at the end thereof the following proviso in substitution for the existing proviso as to fractional parts of ten pounds :—

Provided that where the principal value of an estate comprises a fraction of one hundred pounds in excess of one hundred pounds, or of any multiple of one hundred pounds, such fraction shall be excluded from the value of the estate for the purpose of determining both the rate and the amount of duty, except that where the principal value of the estate exceeds one hundred pounds and does not exceed two hundred pounds the duty shall be one pound.

Interest upon estate duty and other death duties.

18.—(1.) Simple interest at the rate of three per cent. per annum without deduction for income tax shall be payable upon all estate duty from the date of the death of the deceased, or, where the duty is payable by instalments, or becomes due at any date later than six months after the death, from the date at which the first instalment or the duty becomes due, and shall be recoverable in the same manner as if it were part of the duty.

(2.) The foregoing provision shall apply to the interest on all death duties as defined by section thirteen of the principal Act in like manner as if it were herein re-enacted and made applicable to those duties.

(3.) The Commissioners of Inland Revenue may remit the interest on any of such death duties where the amount appears to them to be so small as not to repay the expense and trouble of calculation and account.

Incidence of settlement estate duty.

19.—(1.) The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate.

(2.) The settlement estate duty leviable in respect of any such legacy or property shall be collected upon an account setting forth the particulars of the legacy or property, and delivered to the Commissioners by the executor within six months after the death, or within such further time as the Commissioners may allow.

Objects of national, scientific, or historic interest.

[See Finance (1909-10) Act, 1910, s. 63.]

20.—(1.) Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income as appear to the Treasury to be of national, scientific, or historic interest, *and is settled so as to be enjoyed in kind in succession by different persons* (*a*), such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself, and, while enjoyed in kind *by a person not competent to dispose of the same* (*a*), be exempt from estate duty, but if it is sold *or is in the possession of some person who is then competent to dispose of the same* (*a*), shall become liable to estate duty.

(2.) The person selling the same, or for whose benefit the same is sold, and also the person being in possession and competent to dispose of the same, shall be accountable for the duty, and shall deliver an account, in accordance with section eight of the principal Act, *in the case of a sale within one month after the sale, and in the case of a person coming into possession, or if in possession becoming competent to dispose, within six months after he so comes into possession, or becomes competent to dispose* (*a*).

Allowance of succession duty, etc., paid out of capital before commencement of 57 & 58 Vict. c. 30.

21. Where on the death of a deceased person estate duty becomes payable by a person in respect of any property passing under a settlement made by a will or disposition which took effect before the commencement of the principal Act, and before that commencement any duty mentioned in paragraphs three to five of the First Schedule to the principal Act has been paid or is payable under the same will or disposition on the capital value of the property, the Commissioners of Inland Revenue shall allow the duty so paid or payable as a deduction from the estate duty to the extent to which it has been paid or is payable in respect of the property on which estate duty is payable.

Appeal from County Court under 57 & 58 Vict. c. 30, s. 10.

22. There shall be added to sub-section five of section ten of the principal Act the following proviso: Provided that in every such case any party shall have a right of appeal to her Majesty's Court of Appeal.

Amendment of 57 & 58 Vict. c. 30, as to certain heirs of entail in Scotland.

23. The Finance Act, 1894, shall be construed as if there were added in section twenty-three thereof, after sub-section fifteen, the following enactment:

Provided that for the purposes of section eighteen of this Act such institute or heir of entail shall not be deemed to be a person competent to dispose of such estate, unless he is entitled to disentail it without obtaining the consent of any subsequent heir of entail, or having the consent of any subsequent heir valued and dispensed with.

(*a*) Repealed by 10 Edw. 7, c. 8 (Finance (1909-10) Act, 1910), except as respects persons dying before the 13th of April, 1909.

24.—(1.) Unless the context otherwise requires— Commencement and construction of Part of Act.

(a) This Part of this Act shall come into operation on the first day of July, one thousand eight hundred and ninety-six, which day is in this Part of this Act referred to as the commencement of this Part of this Act; and

(b) The expression "deceased person" means a person dying after the commencement of this Part of this Act.

(2.) Part one of the Finance Act, 1894, is in this Act referred to as "the principal Act."

39. Part one of this Act, so far as it amends the Customs Consolidation Act, 1876, shall be construed together with that Act. Construction of Act. 39 & 40 Vict. c. 36.

Part two of this Act shall be construed together with the Acts relating to the duties on beer.

Part three of this Act shall be construed together with the Stamp Act, 1891. 54 & 55 Vict. c. 39.

Part four of this Act shall be construed together with Part one of the Finance Act, 1894. 57 & 58 Vict. c. 30.

Part five of this Act shall be construed together with the Income Tax Act, 1842, and the Income Tax Act, 1853. 5 & 6 Vict. c. 35.

Part six of this Act shall be construed together with the Land Tax Acts as defined in that Part. 16 & 17 Vict. c. 34.

40. The Acts mentioned in the Schedule to this Act are hereby repealed to the extent in the third column of that Schedule mentioned. Repeal of Acts.

41. This Act may be cited as the Finance Act, 1896. Short title.

PART III.

DEATH DUTIES.

Session and Chapter.	Short Title.	Extent of Repeal.
31 & 32 Vict. c. 124.	An Act to amend the laws relating to the inland revenue.	In section nine, from "at the rate of four pounds," to "as part thereof."
57 & 58 Vict. c. 30.	The Finance Act, 1894 .	Section six, in sub-section six, the words "at the rate of three per cent. per annum," and the words "and shall form part of the estate duty," and in sub-section eight, the words "less income tax." Section eight, sub-section ten. Section seventeen, from "provided that" to the end of the section.

FINANCE ACT, 1898.

(61 & 62 VICT. C. 10.)

Sections 13, 14, 17.

PART V.

ESTATE DUTIES.

Persons not sui juris not to be deemed competent to dispose for the purpose of breaking settlements.

13. Section five, sub-section two, of the Finance Act, 1894, shall be read and have effect as if the following words had been inserted at the end thereof, "and who if on his death subsequent limitations under the settlement take effect in respect of such property was sui juris at the time of his death or had been sui juris at any time while so competent to dispose of the property."

Settlement estate duty repayment.

14. Where in the case of a death occurring after the commencement of this Act settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid.

Short title.

17. This Act may be cited as the Finance Act, 1898.

FINANCE ACT, 1900.

(63 VICT. C. 7.)

Sections 11—14, 18, 19.

PART III.

DEATH DUTIES.

Amendment of 57 & 58 Vict. c. 30 as to property passing on death.

[See Finance (1909-10) Act, 1910, s. 59.]

11.—(1.) In the case of every person dying after the thirty-first day of March nineteen hundred, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was bonâ fide made or effected twelve months before the death of the deceased, and bonâ fide possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise.

(2.) This section shall inter alia apply in Scotland to the conveyance or discharge of any life rent in favour of the fiar, or to the propulsion of the fee under any simple or tailzied destination.

Amendment of 57 & 58 Vict. c. 30, s. 4, as to aggregation.

12.—(1.) The exclusion enacted by the proviso to section four of the Finance Act, 1894, of property from aggregation shall in the case of every person dying after the passing of this Act cease to have effect, except as regards property in which the deceased never had an interest.

Provided that where an interest in expectancy (within the meaning of Part I. of the Finance Act, 1894) in any property has before the passing of this Act been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this section had not passed; and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

[See Finance Act, 1907, s. 16.]

(2.) Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and such property would, if the disponer had died after the commencement of the said Part, have been liable to estate duty upon his death, the aggregation of such property, with other property passing upon the first-mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself.

Amendment of 59 & 60 Vict. c. 28, s. 17, as to exclusion of fractions from value.

13.—(1.) For the purpose of determining the rate and the amount of duty, the exclusion under section seventeen of the Finance Act, 1896, of any fraction from the principal value of the estate shall in the case of every person dying after the passing of this Act cease to have effect.

(2.) The Commissioners of Inland Revenue may, if they think fit, accept a statement by or on behalf of any accountable person as a correction of any inland revenue affidavit or account within the meaning of Part I. of the Finance Act, 1894, for the purposes of that Act and the Acts amending that Act, without requiring that statement to be verified on oath.

Remission of death duties in case of persons killed in war.

14.—(1.) Where any person dies from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was, when the wounds were inflicted, the accident occurred, or the disease was contracted, either subject to the Naval Discipline Act or subject to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act, the Treasury may, if they think fit, on the recommendation of the Secretary of State or of the Admiralty, as the case requires, remit, or in the case of duty already paid repay, up to an amount not exceeding one hundred and fifty pounds in any one case, the whole or any part of the death duties (within the meaning of subsection three of section thirteen of the Finance Act, 1894), leviable in respect of property passing upon the death of the deceased to his widow or lineal descendants if the total value for the purpose

57 & 58 Vict. c. 30.

of estate duty of the property so passing does not exceed five thousand pounds.

(2.) This section shall take effect in the case of any person dying since the eleventh day of October one thousand eight hundred and ninety-nine.

PART VI.

GENERAL.

Repeal.

18. The Acts specified in the Second Schedule to this Act are hereby repealed to the extent mentioned in the third column of that Schedule.

Short title.

19. This Act may be cited as the Finance Act, 1900.

SECOND SCHEDULE.

REPEALS.

Session and Chapter.	Short Title.	Extent of Repeal.
57 & 58 Vict. c. 30 .	The Finance Act, 1894 .	Section four, from "or which under a disposition" to "descendant of the deceased," and from "but if any benefit" to the end of the section. As respects persons dying after the passing of this Act.
59 & 60 Vict. c. 28 .	The Finance Act, 1896 .	Section seventeen as respects persons dying after the passing of this Act.

REVENUE ACT, 1903.

(3 EDW. 7, C. 46.)

Section 14.

PART IV.

MISCELLANEOUS.

Provision as to fixed duty on small estates.
57 & 58 Vict. c. 30.

44 & 45 Vict. c. 12.

14. Where, in the case of a person dying after the commencement of this Act, the fixed duty of thirty shillings or fifty shillings has been deposited or paid under section sixteen of the Finance Act, 1894 (which relates to the estate duty on small estates), and it is afterwards found that the gross value of the property on which estate duty is payable exceeds three hundred or five hundred pounds, as the case may be, the Commissioners of Inland Revenue, if they are satisfied that there were reasonable grounds for the original estimate of the value of the property, may (notwithstanding anything in section thirty-five of the Customs and Inland

Revenue Act, 1881) allow an amount equal to the fixed duty deposited or paid to be deducted from the estate duty payable in respect of the property.

FINANCE ACT, 1907.

(7 Edw. 7, c. 13.)

Sections 12—16.

Part III.

Death Duties.

Amended rates of estate duty.

57 & 58 Vict. c. 30.

12. The scale set out in the First Schedule to this Act shall, in the case of persons dying on or after the nineteenth day of April nineteen hundred and seven, be substituted for the scale of rates of estate duty set out in section seventeen of the Finance Act, 1894 (in this Part of this Act referred to as the principal Act):

Provided that where an interest in expectancy (within the meaning of Part I. of the principal Act) in any property has before the nineteenth day of April nineteen hundred and seven been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on that property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this section had not passed; and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

Extension of power to remit death duties.

13. The power of the Commissioners under sub-section (11) of section eight of the principal Act to remit the payment of estate duty or interest thereon shall apply to the other duties which are included in the definition of death duties in sub-section (3) of section thirteen of that Act as well as to estate duty.

Power to entertain application for discharge from claims for estate duty made at any time.

14. The Commissioners may, if they think fit, entertain any application made for the purpose of sub-section (2) of section eleven of the principal Act (which relates to discharge from claims for estate duty), at whatever time the application is made; and, as respects any application so entertained, the provisions of that sub-section shall have effect notwithstanding that the application is made before the lapse of the two years mentioned in that sub-section.

Calculation of the allowance to be made in respect of duty paid before the commencement of the Finance Act, 1894.

59 & 60 Vict. c. 28.

15. The deduction to be allowed under section twenty-one of the Finance Act, 1896, in respect of death duties previously paid on property on which estate duty is payable shall, instead of being the amount of the duty paid or payable, be the amount which would have been payable on account of the duty if the duty were calculated on the value of the property on which estate duty is payable: Provided that, if as respects any such deduction the person by whom the duty is payable requires the Commissioners, on the first delivery of his account, to calculate the deduction as if this section had not passed, the deduction shall be so calculated.

Limited aggregation of certain settled property abolished. 63 & 64 Vict. c. 7.

16. In the case of persons dying on or after the nineteenth day of April nineteen hundred and seven, any settled property which would, under sub-section (2) of section twelve of the Finance Act, 1900, be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, shall, for the purposes of the principal Act, instead of being so aggregated, be treated as an estate by itself.

FIRST SCHEDULE.

SCALE OF RATES OF ESTATE DUTY (*a*).

Where the Principal Value of the Estate				Estate Duty shall be payable at the Rate per cent. of
	£		£	
Exceeds	100	and does not exceed	500	One pound.
„	500	„ „	1,000	Two pounds.
„	1,000	„ „	10,000	Three pounds.
„	10,000	„ „	25,000	Four pounds.
„	25,000	„ „	50,000	Four pounds ten shillings.
„	50,000	„ „	75,000	Five pounds.
„	75,000	„ „	100,000	Five pounds ten shillings.
„	100,000	„ „	150,000	Six pounds.
„	150,000	„ „	250,000	Seven pounds.
„	250,000	„ „	500,000	Eight pounds.
„	500,000	„ „	750,000	Nine pounds.
„	750,000	„ „	1,000,000	Ten pounds.
„	1,000,000	„ „	1,500,000	Ten pounds on one million, and eleven pounds on the remainder.
„	1,500,000	„ „	2,000,000	Ten pounds on one million, and twelve pounds on the remainder.
„	2,000,000	„ „	2,500,000	Ten pounds on one million, and thirteen pounds on the remainder.
„	2,500,000	„ „	3,000,000	Ten pounds on one million, and fourteen pounds on the remainder.
„	3,000,000	. . . . . .		Ten pounds on one million, and fifteen pounds on the remainder.

FINANCE (1909-10) ACT, 1910.

(10 EDW. 7, c. 8.)

Sections 54—64.

PART III.

DEATH DUTIES.

Amended rates of estate duty and settlement

54. The scale set out in the Second Schedule to this Act shall, in the case of persons dying on or after the thirtieth day of April nineteen hundred and nine, be substituted for the scale set out in the First Schedule to the Finance Act, 1907, as the scale of rates of

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(*a*) This scale repealed, as respects persons dying on or after April 30th, 1909, by Finance (1909-10) Act, 1910, s. 54.

estate duty, and two per cent. shall be substituted for one per cent. in section seventeen of the Finance Act, 1894 (in this Part of this Act referred to as the principal Act), as the rate of settlement estate duty.

estate duty.
7 Edw. 7, c. 13.
57 & 58 Vict. c. 30.

Limitation of relief from estate duty in respect of settled property.

55. For the purpose of any claim to relief from estate duty under sub-section (2) of section five or sub-section (1) of section twenty-one of the principal Act, in the case of persons dying on or after the thirtieth day of April nineteen hundred and nine, payment of or liability to duty, whether the payment was made or the liability attached before, on, or after that date, shall not be deemed to be a payment of or liability to duty in respect of settled property if the payment was made or the liability attached in respect of an interest in expectancy in any property on the death of a person other than the settlor.

Power to transfer land in satisfaction of estate duty, settlement estate duty, or succession duty.

56.—(1.) The Commissioners may, if they think fit, on the application of any person liable to pay estate duty or settlement estate duty or succession duty in respect of any real (including leasehold) property, accept in satisfaction of the whole or any part of such duty such part of the property as may be agreed upon between the Commissioners and that person.

(2.) No stamp duty shall be payable on any conveyance or transfer of land to the Commissioners under this section.

(3.) The Commissioners may hold any property transferred to them under this section and shall deal with it in such manner as Parliament may hereafter determine.

Limitation on debts deductible from value of estate.

57. Where a debt or incumbrance has been incurred or created in whole or in part for the purpose of or in consideration for the purchase or acquisition or extinction, whether by operation of law or otherwise, of any interest in expectancy within the meaning of the principal Act in any property passing or deemed to pass on the death of a person dying after the passing of this Act, and any person whose interest in expectancy is so purchased, acquired or extinguished becomes (under any disposition made by, or through devolution of law from, or under the intestacy of, the deceased) entitled to any interest in that property, then in determining the value of the estate of the deceased for the purpose of estate duty no allowance shall be made in respect of such debt or incumbrance, and any property charged with any such debt or incumbrance shall be deemed to pass freed from that debt or incumbrance:

Provided that—

(a) If part only of such debt or incumbrance was incurred or created for such purpose or as such consideration as aforesaid, this provision shall apply to that part of such debt or incumbrance only; and

(b) If a person whose interest in expectancy in the property so purchased, acquired, or extinguished becomes entitled to an interest in part only of that property, this provision shall apply only to such part of the debt or incumbrance as bears the same proportion to the whole debt or incumbrance as the value of the part of the property to an interest in which he becomes entitled bears to the value of the whole of that property.

Amendment of rates of legacy duty and succession duty.
55 Geo. 3, c. 184.
16 & 17 Vict. c. 51.

58.—(1.) Any legacy or succession duty which under the Stamp Act, 1815, or the Succession Duty Act, 1853, or any other Act, is payable at the rate of three per cent. shall be payable at the rate of five per cent., and any legacy or succession duty which under the said Acts is payable at the rate of five per cent. or six per cent. shall be payable at the rate of ten per cent. on the amount or value of the legacy or succession.

(2.) The legacy and succession duty payable at the rate of one per cent. on the amount or value of any legacy or succession under the Stamp Act, 1815, and the Succession Duty Act, 1853, or any other Act, shall be levied and paid notwithstanding any repeal effected by or anything contained in the principal Act (except sub-section (3) of section sixteen thereof) or any other Act, and the duty shall also be levied and paid in cases where the person taking the legacy or succession is the husband or wife of the testator, intestate, or predecessor as in cases where the person taking the legacy or succession is a lineal ancestor or descendant of the testator, intestate, or predecessor:

Provided that the duty shall not be levied—

(a) Where the principal value of the property passing on the death of the deceased in respect of which estate duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose and which on his death passes to persons other than the husband or wife or a lineal ancestor or descendant of the deceased) does not exceed fifteen thousand pounds, whatever may be the value of the legacy or succession ; or

(b) Where the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate, or predecessor does not exceed one thousand pounds, whatever may be the principal value of such property ; or

(c) Where the person taking the legacy or succession is the widow or a child under the age of twenty-one years of the testator, intestate, or predecessor, and the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate, or predecessor, does not exceed two thousand pounds, whatever may be the principal value of such property.

(3.) In this section, the expression "deceased" means, in the case of a legacy, the testator (including a person making a donation mortis causâ) or intestate, and, in the case of a succession arising through devolution by law, the person on whose death the succession arises, and, in the case of a succession arising under a disposition, the person on whose death the first succession thereunder arises ; and the expression "legacy" includes residue and share of residue.

(4.) This section shall take effect in the case of legacy duty only where the testator by whose will the legacy is given or the intestate on whose death the legacy duty is payable, dies on or after the thirtieth day of April nineteen hundred and nine, and, in the case of a succession arising through devolution by law, only where the succession arises on or after that date, and, in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date.

Provision as to gifts and dispositions inter vivos.

59.—(1.) In the case of a person dying on or after the thirtieth day of April nineteen hundred and nine, the period preceding the death of the deceased before which a disposition purporting to operate as an immediate gift inter vivos must have been made, or a surrender, assurance, divesting, or disposition must have been made or effected, in order that the property taken under the disposition, or affected by the surrender, assurance, divesting, or disposition, may not be included as property passing on the death of the deceased, shall be three years instead of twelve months before the death, and accordingly paragraph (a) of sub-section (2) of section thirty-eight of the Customs and Inland Revenue Act, 1881 (as amended by section eleven of the Customs and Inland Revenue Act, 1889, and applied by paragraph (c) of sub-section (1) of section two of the principal Act), sub-section (3) of section two of the principal Act, and section eleven of the Finance Act, 1900, shall be read as if three years were substituted for twelve months:

44 & 45 Vict. c. 12.

52 & 53 Vict. c. 7.

63 & 64 Vict. c. 7.

Provided that this section shall not apply to any gift inter vivos, surrender, assurance, divesting, or disposition made or effected before the thirtieth day of April nineteen hundred and eight, or made or effected for public or charitable purposes.

(2.) So much of paragraph (c) of sub-section (1) of section two of the principal Act and this section as makes gifts inter vivos property which is deemed to pass on the death of the deceased, shall not apply to gifts which are made in consideration of marriage, or which are proved to the satisfaction of the Commissioners to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income, or to the circumstances, or which, in the case of any donee, do not exceed in the aggregate one hundred pounds in value or amount.

(3.) Where property taken under such a disposition or affected by such a surrender, assurance, divesting, or disposition as aforesaid is deemed to be property passing on the death of the deceased by reason only that the property was not, as from the date of the disposition, surrender, assurance, or divesting, retained to the entire exclusion of the deceased or a person who had an estate or interest limited to cease on the death of the deceased, and of any benefit to him by contract or otherwise, the property shall not be deemed to pass on the death of the deceased if subsequently, by means of the surrender of the benefit reserved or otherwise, it is enjoyed to the entire exclusion of the deceased or such other person as aforesaid, and of any benefit to him by contract or otherwise, for such period preceding the death of the deceased as is provided by this section.

Amendment as to value of property.

60.—(1.) In the case of any person dying on or after the thirtieth day of April nineteen hundred and nine, the proviso to sub-section (5) of section seven of the principal Act (which relates to the estimation of the principal value of property for the purposes of estate duty) shall cease to have effect.

(2.) In estimating the principal value of any property under sub-section (5) of section seven of the principal Act, in the case of any person dying on or after the thirtieth day of April nineteen hundred and nine, the Commissioners shall fix the price of the property according to the market price at the time of the death of the deceased, and shall not make any reduction in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time:

Provided that where it is proved to the Commissioners that the value of the property has been depreciated by reason of the death of the deceased, the Commissioners in fixing the price shall take such depreciation into account.

(3.) An appeal shall not lie under section ten of the principal Act, whether as originally enacted or as applied by any other enactment, where the question in dispute is a question of the value of any real (including leasehold) property, but, if any person is aggrieved by the decision of the Commissioners as to the value of any such property, he may appeal against the decision in manner prescribed by Part I. of this Act, and the provisions as to appeals under that Part of this Act shall apply accordingly.

Special provisions with respect to certain classes of property.

61.—(1.) Notwithstanding anything in the last preceding section, the proviso to sub-section (5) of section seven of the principal Act shall continue to apply to the valuation of property consisting of a tenancy from year to year, including any tenancy which is, or is deemed to be, subject to statutory conditions under the Land Law (Ireland) Acts, and for determining the gross value or the net value of property for the purpose of section sixteen of the principal Act.

(2.) Where it is claimed that a fixed duty is payable in respect of any property under sub-section (1) of section sixteen of the principal Act as being property of a gross value not exceeding three hundred pounds or five hundred pounds, as the case may be, and such property includes property which is proved to the satisfaction of the Commissioners to be subject to a charge created for the purpose of securing unpaid purchase-money, or money borrowed for the purpose of paying purchase-money, or to be subject to or liable to be made subject to a charge for securing an advance made or to be made for the purpose of the purchase thereof, the value thereof for the purpose of determining the gross value of the property under the said section shall be taken to be its value subject to such charge or liability as aforesaid.

(3.) Land subject to an annuity under the Land Purchase (Ireland) Acts shall be treated as real property for the purposes of sub-section (8) of section six of the principal Act (relating to the payment of estate duty by instalments).

(4.) Where the property passing on the death of a person dying after the passing of this Act comprises the purchase-money of land agreed to be sold under the Land Purchase (Ireland) Acts, but the purchase-money has not been paid, the estate duty payable in respect of that purchase-money may, at the option of the person liable to pay the same, be postponed until the purchase-money is actually paid, and shall then become payable, but the person liable to pay the duty shall in the meantime pay annually interest on the amount of the duty payable at the rate of three per cent. per annum.

(5.) Where an estate, in respect of which estate duty is payable on the death of a person dying after the passing of this Act, comprises land on which timber, trees, or wood are growing, the value of such timber, trees, or wood shall be aggregated with the other property passing on the death of the deceased for the purpose of determining the value of the estate and the rate of estate duty, but the estate duty which, but for this sub-section, would be payable on the principal value of the timber, trees, or wood shall not be payable thereon, but shall, at the rate so ascertained, be payable on the net moneys (if any), after deducting all necessary outgoings since the death of the deceased, which may from time to time be received from the sale of the timber, trees, or wood, when felled, during the period which may elapse until the land on the death of some other person again becomes liable or would, but for this sub-section, have become liable to estate duty, and the owners or trustees of such land shall account for and pay the same accordingly as and when such moneys are received, with interest at the rate of three cent. per annum from the date when such moneys are received :

Provided that if at any time the timber, trees, or wood are sold, either with or apart from the land on which they are growing, the amount of estate duty on the principal value thereof which, but for this sub-section, would have been payable on the death of the deceased, after deducting the amount (if any) of estate duty paid in respect of the timber, trees, or wood under this sub-section since that date, shall become payable.

This sub-section shall apply to succession duty payable in respect of woodlands in like manner as it applies to estate duty, except that nothing in this sub-section shall affect the rate of succession duty.

Deduction of amount paid for increment value duty from value of estate for purposes of estate duty.

62. Where increment value duty is to be collected on the occasion of the death of any person in respect of the fee simple of any land or any interest in land comprised in the property passing on the death of that person, allowance shall be made in determining the value of the estate for the purposes of estate duty under sub-section (1) of section seven of the principal Act, for the amount of increment value duty so to be collected as if it were a debt.

Extension of exemption of objects of national, scientific, or historic interest. 59 & 60 Vict. c. 28.

63. In the case of any person dying on or after the thirtieth day of April nineteen hundred and nine, section twenty of the Finance Act, 1896 (which gives an exemption for objects of national, scientific, or historic interest), shall be extended so as to give an exemption from legacy and succession duty as well as from estate duty, and as so extended shall take effect whether the property in respect of which the exemption is given is settled or not, and as if the reference therein to national, scientific, or historic interest included a reference to artistic interest, and duty shall only become chargeable when the property is sold, and then only in respect of the last death on which the property passed.

Protection of purchasers and mortgagees of interests in expectancy.

64. Where an interest in expectancy within the meaning of Part I. of the principal Act in any property has, before the thirtieth day of April nineteen hundred and nine, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on that property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this Part of this Act had not passed, and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

Section 54.

SECOND SCHEDULE.

SCALE OF RATES OF ESTATE DUTY.

Where the Principal Value of the Estate				Estate Duty shall be payable at the rate per cent. of
	£		£	
Exceeds	100	and does not exceed	500	1
"	500	" "	1,000	2
"	1,000	" "	5,000	3
"	5,000	" "	10,000	4
"	10,000	" "	20,000	5
"	20,000	" "	40,000	6
"	40,000	" "	70,000	7
"	70,000	" "	100,000	8
"	100,000	" "	150,000	9
"	150,000	" "	200,000	10
"	200,000	" "	400,000	11
"	400,000	" "	600,000	12
"	600,000	" "	800,000	13
"	800,000	" "	1,000,000	14
"	1,000,000			15

SIXTH SCHEDULE (*a*).

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. 3, c. 52.	The Legacy Duty Act, 1796.	In section fourteen, so far as it applies to objects which appear to the Treasury to be of national, scientific, historic, or artistic interest, the words from "and given to" to "persons in succession"; the word "so," where it secondly occurs; the words from "not having any power" to "property yielding an income"; the words from "or shall come" to "having an absolute interest therein"; the word "same," where it fifthly occurs; the words from "as if the same had been" to "or dispose thereof"; and the words from "or who shall have" to "an absolute interest therein."

(*a*) Note.—Only the statutes which deal with the Stamp Duties on Probates, etc., are included in this Schedule.

SIXTH SCHEDULE—*continued.*

Session and Chapter.	Title or Short Title.	Extent of Repeal.
54 Geo. 3, c. 92.	The Probate and Legacy Duties (Ireland) Act, 1814.	In section fifteen, so far as it applies to objects which appear to the Treasury to be of national, scientific, historic, or artistic interest, the words from "and given to" to "persons in succession"; the word "so," where it secondly occurs; the words from "not having any power" to "property yielding an income"; the words from "or shall come" to "having an absolute interest therein"; the word "same," where it fifthly occurs; the words from "as if the same had been" to "or dispose thereof"; and the words from "or who shall have" to "an absolute interest therein."
16 & 17 Vict. c. 51.	The Succession Duty Act, 1853.	Section twenty-three, except as respects persons dying before the passing of this Act.
59 & 60 Vict. c. 28.	The Finance Act, 1896.	In section twenty, the words from "and is settled" to "by different persons"; the words "by a person not competent to dispose of the same"; the words "or is in the possession of some person who is then competent to dispose of the same"; the words "and also the person being in possession and competent to dispose of the same"; and the words from "and in the case" to the end of the section, except as respects persons dying before the thirtieth day of April nineteen hundred and nine.
7 Edw. 7, c. 13.	The Finance Act, 1907.	Section twelve, and the First Schedule, except as respects persons dying before the thirtieth day of April nineteen hundred and nine.

APPENDIX II.

STAMP DUTIES

PAYABLE ON OBTAINING GRANTS OF PROBATE AND ADMINISTRATION AND FORMS OF INLAND REVENUE AFFIDAVITS.

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1. Instructions as to estate duty in respect of persons dying after the 1st August, 1894 854
2. Alterations in estate duty occasioned by the Finance (1909-10) Act, 1910 871

NOTE.—*The following instructions are issued by the Commissioners of Inland Revenue. The statutes which contain enactments with reference to stamp duties are collected in a separate division of the Appendix of Statutes—vide ante, App. I., Part II.*, 810-853.

INLAND REVENUE.

INSTRUCTIONS AS TO ESTATE DUTY IN RESPECT OF PROPERTY PASSING ON THE DEATHS OF PERSONS DYING AFTER THE 1ST AUGUST, 1894: FINANCE ACTS, 1894, 1896, 1898, 1900, AND 1907 (57 & 58 VICT. c. 30; 59 & 60 VICT. c. 28; 61 & 62 VICT. c. 10; 63 VICT. c. 7; AND 7 EDW. 7, c. 13), AND REVENUE ACT, 1903 (3 EDW. 7, c. 46).

OBSERVE.—The references in these instructions are to the Finance Act, 1894, unless it is otherwise stated.

CHARGE OF DUTY.

1. Estate duty, except as expressly provided, is leviable upon the principal value of all property, real or personal, settled or not settled, which passes on the death of a person who dies after the 1st August, 1894. [See secs. 1 and 24.]

PROPERTY LIABLE.

2. Property so passing includes (inter alia) the following [see sec. 2]:—

Competent to dispose.

3. Property of which the deceased was *competent to dispose* [see sec. 22 (2) (a)] at his death, whether he actually disposed of it by his will or not.

Donations.

4. Donations mortis causâ.

5. Inter vivos gifts of property made by the deceased within a year of his death without reservation. Gifts.

6. Inter vivos gifts made by the deceased at any time, whereof bonâ fide possession was not immediately taken and thenceforth retained to the entire exclusion of the deceased, but a benefit, either charged upon the property or not, was reserved or secured to the deceased by contract or otherwise, or a power or authority was reserved to the deceased to restore to himself or to reclaim the absolute interest in such property or in some part of it. Gifts with reservation.

7. Property which the deceased, having been absolutely entitled thereto, either by himself alone or by arrangement with some other person, caused to be transferred to or vested in himself and some other person jointly, either by disposition, purchase, investment, or otherwise, so that the beneficial interest in such property, or in some part thereof, passed or accrued by survivorship on his death to such other person. Joint investments.

8. The deceased's severable share of property of which he was joint tenant or joint owner with another or with others. Joint ownerships.

9.—(1.) Property which the deceased had an enjoyment of or interest in for life, or for some period determinable by reference to death under an express or an implied trust in a settlement made by the deceased by instrument inter vivos, or under an express or implied trust, created by the deceased in writing or otherwise. Life interests.

(2.) Where the deceased died after the 31st March, 1900, and he or any other person had an interest in property limited to cease on the deceased's death, and that interest was disposed of, whether for value or not, to or for the benefit of any person entitled to an interest in remainder or reversion in such property, then the property is nevertheless to be deemed to pass on the deceased's death, unless the disposition was bonâ fide made twelve months before the deceased's death, and bonâ fide possession and enjoyment was immediately assumed thereunder, and thenceforward retained to the entire exclusion of the person who had the interest so limited to cease, and of any benefit to him by contract or otherwise. [See Finance Act, 1900, sec. 11 (1).]

10. Policies which the deceased effected on his life, and kept up wholly or partially for the benefit of a donee, whether nominee or assignee. Policies.

11. Annuities (other than [see sec. 15 (1)] a single annuity not exceeding £25, or the first granted of two or more such annuities), or other interests, which the deceased, either by himself alone, or in concert or by arrangement with some other person, purchased or provided so that a benefit arose or accrued by survivorship or otherwise, on the death of the deceased. Annuities.

12. Property not comprised in any of the foregoing classes in which the deceased or some other person had an interest which ceased on the death of the deceased, to the extent to which a benefit accrued or arose by the cesser of such interest, but exclusive of property the interest in which, of the deceased or other person, was only an interest as holder of an office or recipient of the benefits of a charity, or as a corporation sole. Other property.

13. The expression "property" includes real property and Definition of "property."

personal property, and the proceeds of sale thereof respectively, and any money or investment for the time being representing the proceeds of sale. [See sec. 22 (1) (f).]

14. Property passing on the death includes property passing either immediately on the death, or after any interval, or at a period ascertainable only by reference to death, either certainly or contingently, and either originally or by way of substitutive limitation. [See sec. 22 (1) (l).]

Competent to dispose.

15. A person is deemed *competent to dispose* of property if he has such an estate or interest therein, or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exerciseable by instrument, inter vivos or by will, or both, but exclusive of any power exerciseable in a fiduciary capacity under a disposition not made by himself, or exerciseable as tenant for life under the Settled Land Act, 1882, or as mortgagee. [See sec. 22 (2) (a).]

16. Money which a person has a general power to charge on property is deemed to be property of which he has power to dispose. [See sec. 22 (2) (c).]

Foreign property.

17. Immoveable property situate out of the United Kingdom is not chargeable with estate duty. [See sec. 2 (2).]

18. Moveable property situate out of the United Kingdom is not chargeable with estate duty where the deceased was the owner and was domiciled *out* of the United Kingdom at the time of his death. It is chargeable where the deceased was the owner and was domiciled *in* the United Kingdom at the time of his death. It is also, speaking generally, chargeable where the deceased was only interested for life, and at his death the property formed the subject of a British trust or was vested in a British trustee. [See sec. 2 (2).]

EXCEPTIONS. Trust property.

19. Estate duty is not payable on property held by the deceased as trustee for another person under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death, where possession and enjoyment of the property was bonâ fide assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased, or of any benefit to him by contract or otherwise. [See sec. 2 (3).]

Purchase

20. Estate duty is not payable on property passing on the death of the deceased by reason only of a bonâ fide purchase from the person under whose disposition the property passes, or the falling into possession of the reversion on any lease for lives, or the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee. [See sec. 3 (1).] When any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration is allowed as a deduction from the value of the property. [See sec. 3 (2).]

Seamen, etc.

21.—(1.) Estate duty is not payable on the property of common seamen, marines, or soldiers who are slain or die in his Majesty's service. [See sec. 8 (1).]

(2.) Where the deceased died since the 11th October, 1899, from wounds inflicted, accident occurring, or disease contracted, within twelve months before death, while on active service against an enemy, whether on sea or land, and was, when the wounds were inflicted, the accident occurred, or the disease was contracted, either subject to the Naval Discipline Act or subject to military law, whether as an officer, non-commissioned officer, or soldier, under Part V. of the Army Act, the Treasury may, if they think fit, on the recommendation of the Secretary for War or of the Admiralty, as the case requires, remit, or in the case of duty already paid, repay, up to an amount not exceeding £150 in any one case, the whole or any part of the estate or other death duties leviable in respect of property passing upon the death of the deceased *to his widow or lineal descendants*, if the total value for the purpose of estate duty of the property so passing does not exceed £5,000. [See Finance Act, 1900, sec. 14.]

☞ *Any application for the remission of duty must in the first instance be made to the War Office or the Admiralty as the case requires.*

Indian pensions.

22. Estate duty is not payable on any pension or annuity payable by the Government of British India to the widow or child of any deceased officer of such Government, notwithstanding that the deceased contributed during his lifetime to any fund out of which such pension or annuity is paid. [See sec. 15 (3).]

Where probate or account duty paid.

23. Estate duty is not payable on the deceased's death in respect of personal property settled by a will or disposition made by a person dying before the 2nd August, 1894, in respect of which property probate, inventory, or account duty has been paid, or is payable, unless in either case the deceased, at the time of his death, or at any time since the will or disposition took effect, had been competent to dispose of the property. [See sec. 21 (1).]

Church patronage.

24. Estate duty is not payable upon any advowson or church patronage unless and until the same is sold. [See sec. 15 (4).]

Enlargement of interest.

25. Estate duty is not payable where a settlor, who is tenant for life, acquires by the death, on or after the 1st July, 1896, in his own lifetime, of a subsequent limited owner under the settlement, the immediate reversion, or an absolute power to dispose of the whole property. [See Finance Act, 1896, s. 14.]

Reverter to settlor.

26. Estate duty is not payable where property reverts to a settlor in his lifetime on the death, on or after the 1st July, 1896, of a limited owner under the settlement, and no other interest is created by the settlement, unless the limited owner had, prior to the disposition, been competent to dispose of the property. [See Finance Act, 1896, sec. 15 (1), (2), and (3).]

Husband and wife.

27. Estate duty is not payable where the deceased was entitled in right of his wife to the rents of her real estate, and by his death, on or after the 1st July, 1896, she becomes entitled to the property in virtue of her former interest. [See Finance Act, 1896, sec. 15 (4).]

Gifts to nation, etc. [See also clause 35.]

28. The Treasury may remit the duty on such pictures, prints, books, manuscripts, works of art, or scientific collections, as appear to them to be of national, scientific, or historic interest, and given for national purposes, or to any university, or to any county council, or municipal corporation. [See sec. 15 (2).]

Objects of national interest. [See also clause 36.]

29. Objects of national, scientific, or historic interest, admitted by the Treasury to be such, passing on a death on or after the 1st July, 1896, and settled so as to be enjoyed in succession in kind only, are not to be charged with estate duty until they are actually sold, or are in the possession of some person competent to dispose of them. [See Finance Act, 1896, sec. 20 (1).]

30. Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the 2nd August, 1894, and on his or her death the survivor becomes entitled to the *income* (as distinguished from the capital) of the property settled by such survivor, the estate duty is not payable in respect of that property until the death of the survivor. [See sec. 21 (5).]

Estate duty not twice payable under same settlement.

31. If the estate duty has already been paid in respect of the settled property since the date of the settlement, neither it nor the settlement estate duty is again payable in respect thereof, unless the deceased was, at the time of his death, or had been at any time during the continuance of the settlement, *competent to dispose* [see sec. 22 (2) (a)] thereof [see sec. 5 (2)], and unless the deceased, if on his death subsequent limitations under the settlement take effect in respect of such property, was sui juris at the time of his death, or had been sui juris at any time while so competent to dispose of the property. [See Finance Act, 1898, sec. 13.]

Where interest fails before possession and settlement continues.

32. In the case of settled property where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property is not deemed to pass on his death. [See sec. 5 (3).]

Aggregation.

33.—(1.) For determining the rate of estate duty to be paid in respect of any property passing on the deceased's death, all property so passing, in respect of which estate duty is leviable, is to be aggregated so as to form one estate, and the duty is to be levied at the proper rate on the principal value thereof. Provided that any property so passing in which the deceased never had an interest, or which, under a disposition not made by the deceased, passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or descendant of the deceased, is not to be aggregated with any other property, but is to be an estate by itself, and the estate duty is to be levied at the proper rate on the principal value thereof; but if any benefit under such a disposition is reserved or given to the wife or husband or a lineal ancestor or descendant of the deceased, such benefit is to be aggregated with property of the deceased for the purpose of determining the rate of estate duty. [See sec. 4.]

(2.) But where the deceased died on or after the 9th April, 1900, the exclusion of property from aggregation under sec. 4 of the Finance Act, 1894, no longer has effect, except as regards property in which the deceased never had an interest. [See Finance Act, 1900, sec. 12 (1).]

(3.) *Settled* property, however, where the disponer died on or before the 1st August, 1894, and such property, if he had died after that date, would have been chargeable with estate duty on *his* death, is only to be aggregated on a death after the 8th April, 1900, and prior to the 19th April, 1907, to a limited extent. The rate of duty upon such settled property, treated as an "estate by itself," or upon any other property aggregable therewith, by force of sec. 4 of the Finance Act, 1894, as amended, is not to be enhanced, by reason of such aggregation, more than one-half per cent. [See Finance Act, 1900, sec. 12 (2).] For a definition of "settled property" see clause 37 (3) below. Property over which the deceased had, and exercised, an absolute power of appointment, is considered to be liable to full, and not limited, aggregation. In the case of persons dying on or after the 19th April, 1907, any *settled* property which would, under sub-sec. (2) of sec. 12 of the Finance Act, 1900, be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, is, for the purposes of the principal Act, instead of being so aggregated, to be treated as an estate by itself. [See Finance Act, 1907, sec. 16.]

(4) Where an interest in expectancy in settled property has, before the 9th April, 1900, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on such property is to be payable by the purchaser or mortgagee, when the interest falls into possession on a death on or after the 9th April, 1900, than would have been payable if the law as to aggregation had not been amended. [See Finance Act, 1900, sec. 12 (1) (proviso).]

Small estate.

34. Where the net value of the property, real and personal, on which estate duty is payable on the death of the deceased, where the death occurs *at any time after* the 1st August, 1894, including property over which the deceased had and exercised by will a general power of appointment, and property which by default of exercise of the power of appointment belonged to the deceased absolutely, but exclusive of other property settled otherwise than by the will of the deceased, does not exceed £1,000, such property is not to be aggregated with any other property, but is to form an estate by itself. [See sec. 16 (3).]

Gifts to nation. [See also clause 28.]

35. Gifts of pictures, prints, books, manuscripts, works of art and scientific collections, of national, scientific, or historic importance, given for national purposes, or to any university, or to any county council or municipal corporation, the estate duty whereon has been remitted by the Treasury, are not to be aggregated with any other property. [See sec. 15 (2).]

Objects of national interest. [See also clause 29.]

36. Objects of national, scientific, or historic interest, admitted by the Treasury to be such, as passing on a death on or after the 1st July, 1896, and settled so as to be enjoyed in succession in kind only, are to form an "Estate by itself." [See Finance Act, 1896, sec. 20 (1).]

SETTLEMENT ESTATE DUTY.

37.—(1.) Where property, in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not *competent to dispose* [see sec. 22 (2) (a)] of the property, a further estate duty called "settlement estate duty" is leviable upon the principal value of the settled property, except where the only life interest in such property, after the deceased's death, is that of the husband or wife of the deceased [see sec. 5 (1) (a)], or where the disposition took effect before the 2nd August, 1894 [see sec. 21 (1), (4)], or, under the deceased's will, where the net value of the property in respect of which estate duty is leviable on the death of the deceased, exclusive of property settled otherwise than by the deceased's will, does not exceed £1,000. [See sec. 16 (3).]

(2.) Where on a death on or after the 1st July, 1898, settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property is to be repaid. [See Finance Act, 1898, sec. 14.]

(3.) "Settled property" is property comprised in a "settlement" [see sec. 22 (1) (h)], and a "settlement" is any instrument which is a settlement within the meaning of sec. 2 of the Settled Land Act, 1882, *or* if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parol trust. [See sec. 22 (1) (i).]

38. Settlement estate duty leviable in respect of personal property settled by the deceased's will (unless the will contains an express provision to the contrary), is, *where the deceased died on or after the 1st July*, 1896, to be payable out of the settled property in exoneration of the rest of the deceased's estate. [See Finance Act, 1896, sec. 19 (1).]

Crown entails.

39. Where lands or chattels are so settled by Act of Parliament or royal grant that no one of the persons successively entitled can alienate the same, the settlement estate duty is not payable. [See sec. 5 (5).]

Deduction of stamp duty paid on settlement.

40. The ad valorem stamp duty (if any) charged on a settlement may be deducted from the settlement estate duty payable thereunder [see sec. 5 (4)], but the settlement must be produced in support of the deduction.

ACCOUNTABLE PERSONS.

Executor.

41. The executor of the deceased is to pay the estate duty in respect of all personal property, wheresoever situate, of which the deceased was *competent to dispose* [see sec. 22 (2) (a)] at his death, except [see Finance Act, 1896, sec. 20 (2)] such objects of national, etc., interest as are within clause 29 above, on delivering the inland revenue affidavit, and may pay in like manner the estate duty on any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty thereon request him to make such payment. [See secs. 6 (2) and 8 (3).] The executor is not liable for any estate duty in excess of the assets which he has received as executor, or might, but for his own neglect or default, have received.

[See sec. 8 (3).] Settlement estate duty leviable in respect of personal property, settled by the deceased's will, is to be collected upon an account to be delivered by the executor within six months after the death. [See Finance Act, 1896, sec. 19 (2).]

Other persons accountable.

42. Where property passes on the death of the deceased, and his executor is not accountable for the estate duty thereon, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, is accountable for the estate duty on the property. [See sec. 8 (4).] Such objects of national, etc., interest as are within clause 29 above are to be accounted for by the person who sells them or becomes competent to dispose of them. [See Finance Act, 1896, sec. 20 (2).]

Purchaser without notice.

43. A bonâ fide purchaser for valuable consideration without notice is not liable to or accountable for duty. [See sec. 8 (18).]

An account to be delivered.

44. Estate duty, so far as not paid by the executor, is collected upon an account setting forth the particulars of the property. It is to be delivered to the Commissioners of Inland Revenue within six months after the death by the person accountable for the duty [see sec. 6 (4)]; except in the case of such objects of national, etc., interest as are within clause 29 above, the account whereof is to be delivered within one month of a sale, or within six months of their coming into possession of some one competent to dispose of them. [See Finance Act, 1896, sec. 20 (2).]

PRINCIPAL VALUE.

45. The principal value of any property is the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the deceased's death. [See sec. 7 (5).] Provided that in the case of any agricultural property, where no part of the principal value is due to the expectation of an increased income from such property, the principal value shall not exceed twenty-five times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding five per cent. of the annual value so assessed. [See sec. 7 (5).]

Agricultural property.

46. The expression, "agricultural property," means agricultural land, pastures, and woodland, and also includes such cottages, farm buildings, farm houses, and mansion houses (together with the lands occupied therewith) as are of a character appropriate to the property. [See sec. 22 (1) (g).]

Cesser of an interest.

47. The value of the benefit accruing or arising on the death of a deceased person from the cesser of an interest in any property is the principal value of the property where the interest extended to the whole income of the property, but where it extended to less than the whole income it is the principal value of an addition to the property equal to the income to which the interest extended. [See sec. 7 (7).]

Crown entails.

48. Where lands or chattels are so settled by Act of Parliament or royal grant that no one of the persons successively entitled can alienate the same, the property passing on the death of any person in possession thereof is the interest of his successor, and the value is the life interest value as for succession duty. [See sec. 5 (5), and the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), sec. 21.]

Administration expenses of property out of the United Kingdom.

49. Where the Commissioners are satisfied that any additional expense in administering or in realising foreign property has been incurred by reason of the property being situate out of the United Kingdom, an allowance for such expense not exceeding five per cent. on the value of the property is made. [See sec. 7 (3).]

Foreign duty.

50. Where the Commissioners are satisfied that by reason of the deceased's death any duty in respect of foreign property is payable in the country where the property is situate, an allowance of the amount of the duty is made from the value of the property. [See sec. 7 (4).]

Income and interest.

51. Every estate is to include all income upon the property included therein down to and outstanding at the date of the deceased's death. [See sec. 6 (5).]

Funeral expenses and debts.

52. Allowance against the gross principal value of an estate is made for reasonable funeral expenses and for debts and incumbrances (including mortgages or terminable charges [see sec. 22 (1) (k)]) incurred or created by the deceased bonâ fide for full consideration in money or money's worth wholly for his own use and benefit, and which take effect out of his interest. [See sec. 7 (1) (a).]

Debts in respect whereof reimbursement claimable.

53. No allowance can be made for any debt in respect whereof there is a right to reimbursement from any other estate or person unless such reimbursement cannot be obtained. [See sec. 7 (1) (b).]

Foreign debts.

54. An allowance is not made in the first instance for debts due from the deceased to persons resident out of the United Kingdom, unless contracted to be paid in the United Kingdom or charged on property situate within the United Kingdom, except out of the value of any personal property of the deceased situate out of the United Kingdom on which estate duty is paid. No repayment of estate duty is made in respect of any such debts except to the extent to which the personal property of the deceased situate out of the United Kingdom is shown to be insufficient for their payment. [See sec. 7 (2).]

INTERESTS IN EXPECTANCY.

55. Where an estate includes an interest in expectancy (and this expression covers an estate in remainder or reversion, and every other future interest, whether vested or contingent, but does not include reversions expectant upon the determination of leases [see sec. 22 (1) (j)]) estate duty in respect of that interest is to be paid, at the option of the person accountable for the duty, either with the duty on the rest of the estate or when the interest falls into possession. [See sec. 7 (6).] If the duty is not paid with the estate duty on the rest of the estate, then for the purpose of determining the rate of estate duty in respect of the rest of the estate, the value of the interest is to be its value at the date of the death of the deceased. [See sec. 7 (6) (a).] The rate of estate duty upon the interest when it falls into possession is to be calculated according to its value at that time, together with the value of the rest of the estate as previously ascertained. [See sec. 7 (6) (b).]

56. The Commissioners, in their discretion, upon application by a person entitled to an interest in expectancy, may commute the estate duty which would or might, but for the commutation, become payable in respect of such interest for a certain sum to be presently paid, and for determining that sum they will put a present value upon that duty, regard being had to the contingencies affecting the liability to, and rate and amount of, such duty. [See sec. 12.]

Commutation on interests in expectancy.

57.—(1.) Where an interest in expectancy has, before the 2nd August, 1894, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on such property is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the Finance Act, 1894, had not passed. In the case of a mortgage, any higher duty payable by the mortgagor is to rank as a charge subsequent to that of the mortgagee. [See sec. 21 (3).]

Where interest in expectancy sold or mortgaged.

(2.) Where the sale or mortgage was after the 1st August, 1894, but before the 9th April, 1900, then no other duty on such property is to be payable by the purchaser or mortgagee when the interest falls into possession, on a death on or after the 9th April, 1900, than would have been payable if the law as to aggregation had not been amended by the Finance Act, 1900. [See that Act, sec. 12 (1) (proviso).]

(3.) Where an interest in expectancy in settled property has before the 19th April, 1907, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on that property is to be payable by the purchaser or mortgagee when the interest falls into possession on a death on or after the 19th April, 1907, than would have been payable if the scale of rates of estate duty set out in sec. 17 of the Finance Act, 1894, had not been altered. [See Finance Act, 1907, sec. 12 (proviso).]

58. The duty, which is to be collected upon an inland revenue affidavit or account, is due on the delivery thereof, or at the expiration of six months from the death, whichever first happens [see sec. 6 (7)], except in the case of such objects of national, etc., interest as are within clause 29 above, where the duty is due one month after the date of sale, or six months after their coming into possession of a person competent to dispose of them, as the case may be, or on delivery of the account, whichever first happens. [See Finance Act, 1896, sec. 20 (2).]

WHEN DUTY IS DUE.

59. Estate duty is, in the first instance, calculated at the appropriate rate according to the value of the estate, as set forth in the inland revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid, the additional duty is payable, and is treated as duty in arrear. [See sec. 8 (7).]

Payment of additional duty.

60. Simple interest at three per cent. per annum, without deduction for income tax, is payable upon all estate duty from the date of the deceased's death, or, where the duty is payable by instalments, or becomes due at any later date than six months after the death, from the date at which the first instalment or the duty becomes due, and is recoverable in the same manner as if it were part of the duty. [See Finance Act, 1896, sec. 18 (1).]

Interest on duty.

Interest on fixed duty.

61. When the fixed duty of 30*s*. or 50*s*. under sec. 16 is paid within twelve months after the death of the deceased, interest is not charged. [See sec. 16 (5).]

Instalments on real property.

62. The estate duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments or sixteen half-yearly instalments, with interest at the rate of three per cent. per annum from the date at which the first instalment is due, and the first instalment is to be due at the expiration of twelve months from the death, and the interest on the unpaid portion of the duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and, in case the property is sold, is to be paid on completion of the sale, and if not so paid, is to be duty in arrear. [See sec. 6 (8).]

Instalments on annuities.

63. The estate duty in respect of any annuity or other definite annual sum referred to in sec. 2 (1) (d) of the Finance Act, 1894, may be paid by four equal yearly instalments, the first to be due twelve months after the death. Interest on the whole unpaid duty is to be added to the second and subsequent instalments. [See Finance Act, 1896, sec. 16.]

Deduction of Colonial duty.

64.—(1.) In the case of moveable property situate in a British possession, and passing on the death of a person dying domiciled in the United Kingdom, if any duty in respect thereof is payable in the British possession, a sum equal to the amount of that duty is to be deducted from the estate duty payable in respect of that property on the same death ; but only where by the law of such possession either no duty is chargeable in respect of property situate in the United Kingdom when passing on death, or a like allowance as against the duty chargeable in such possession is made in respect of any duty payable in the United Kingdom. The provision only applies to such British possessions as are from time to time brought within its scope by Order in Council. [See sec. 20.]

(2.) The section has been applied to the following possessions :—Australia (South), Australia (Western), Bahamas, Barbadoes, Bermudas, British Columbia, British Guiana, Ceylon, Falkland Islands, Fiji, Gambia, Gibraltar, Gold Coast, Hong Kong, India (not including the Feudatory Native States), Jamaica, Labuan, Lagos, Leeward Islands, Manitoba, Natal, New Brunswick, Newfoundland, New South Wales, New Zealand, Nova Scotia, Ontario, Quebec, Sierra Leone, Straits Settlements, Tasmania, Trinidad and Tobago, and Victoria.

Deduction in respect of prior duties.

65. Deduction against the estate duty payable on a death, on or after the 1st July, 1896, in respect of settled property, may be taken in respect of any of the following duties, which, prior to the 2nd August, 1894, had been paid or were payable, under the settlement, upon the capital of the property in respect of which the estate duty is payable, viz. :—the additional succession duties under sec. 21 of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), the temporary estate duties under secs. 5 and 6 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), and the one per cent. legacy and succession duties. [See Finance Act, 1896, sec. 21.]

But sec. 15 of the Finance Act, 1907, enacts that the deduction, instead of being the amount of the duty paid or payable, is to be the amount which would have been payable on account of the duty if the duty were calculated on the value of the property on which estate duty is payable : Provided that, if as respects any such deduction the person by whom the duty is payable requires the Commissioners, *on the first delivery of his account*, to calculate the deduction as if this section had not passed, the deduction is to be so calculated.

MISCELLANEOUS.

Executor to disclose estate.

66. The executor of the deceased is, to the best of his knowledge and belief, to specify in appropriate accounts annexed to the inland revenue affidavit *all* the property in respect of which estate duty is payable upon the death of the deceased, whether he is or is not accountable for the duty thereon. [See sec. 8 (3).]

Production of books, etc.

67. Accounts and statements are to be verified on oath, and by production of all necessary books and documents. [See sec. 8 (14).]

Power of Commissioners to call for accounts.

68. Every person accountable for estate duty, and every person whom the Commissioners believe to have taken possession of or administered any part of the estate of the deceased or of the income thereof, is, to the best of his knowledge and belief, if required by the Commissioners, to deliver to them and verify a statement of such particulars and evidence as they require, relating to any property which they have reason to believe to form part of an estate, in respect of which estate duty is leviable on the death of the deceased. [See sec. 8 (5).]

Penalties.

69. Penalties are provided for the wilful failure to deliver accounts or to comply with the requirements which the Commissioners are empowered to make. [See sec. 8 (6), (14).]

RATES OF ESTATE DUTY.

70.—(1.) In the case of persons dying after the 1st August, 1894, and before the 19th April, 1907, the rates of estate duty are according to the following scale. [See sec. 17.]

Principal Value of the Estate.				Rate per cent.
	£		£	£
		Not above	100	0
Above	100	but not above	500	1
„	500	„ „	1,000	2
„	1,000	„ „	10,000	3
„	10,000	„ „	25,000	4
„	25,000	„ „	50,000	4½
„	50,000	„ „	75,000	5
„	75,000	„ „	100,000	5½
„	100,000	„ „	150,000	6
„	150,000	„ „	250,000	6½
„	250,000	„ „	500,000	7
„	500,000	„ „	1,000,000	7½
„	1,000,000	. . . . .		8

(2.) In the case of settled property passing on a death after the 8th April, 1900, and prior to the 19th April, 1907, where the disponer died on or before the 1st August, 1894, and such property, if he had died after that date, would have been chargeable with estate duty on his death, the amended law as to aggregation, stated in clause 33 (3) above, may result in the rates of duty on the settled property, treated as an "estate by itself," and on property aggregable therewith, being raised one-half per cent., except in the case of the 8 per cent. rate.

(3.) In the case of persons dying on or after the 19th April, 1907, the rates of estate duty are according to the following scale. [See Finance Act, 1907, sec. 12, and the First Schedule to that Act.]

Principal Value of the Estate.				Rate per cent.
	£		£	£
		Not above	100	0
Above	100	but not above	500	1
,,	500	,, ,,	1,000	2
,,	1,000	,, ,,	10,000	3
,,	10,000	,, ,,	25,000	4
,,	25,000	,, ,,	50,000	4½
,,	50,000	,, ,,	75,000	5
,,	75,000	,, ,,	100,000	5½
,,	100,000	,, ,,	150,000	6
,,	150,000	,, ,,	250,000	7
,,	250,000	,, ,,	500,000	8
,,	500,000	,, ,,	750,000	9
,,	750,000	,, ,,	1,000,000	10
,,	1,000,000	,, ,,	1,500,000	£10 on 1 million and £11 on the remainder.
,,	1,500,000	,, ,,	2,000,000	£10 on 1 million and £12 on the remainder.
,,	2,000,000	,, ,,	2,500,000	£10 on 1 million and £13 on the remainder.
,,	2,500,000	,, ,,	3,000,000	£10 on 1 million and £14 on the remainder.
,,	3,000,000	. . . . .		£10 on 1 million and £15 on the remainder.

(4.) Where an interest in expectancy in settled property has before the 19th April, 1907, been bonâ fide sold or mortgaged for full consideration in money or money's worth, then no other duty on that property is to be payable by the purchaser or mortgagee when the interest falls into possession on a death on or after the 19th April, 1907, than would have been payable if the scale of rates of estate duty set out in sec. 17 of the Finance Act, 1894, had not been altered [Finance Act, 1907, sec. 12 (proviso)].

Rates of settlement estate duty.

71. The rate of the settlement estate duty is one per cent. [See sec. 17.]

Fraction of £100 capital.

72.—(1.) In ascertaining the value of an estate, whether an aggregated "one estate" or an "estate by itself," as the case may be, for the purpose of determining under sec. 4 of the Act of 1894 the rate of estate duty chargeable, and the principal value upon which the duty at such rate is to be charged, the following adjustments are, WHERE THE DECEASED DIED BEFORE THE 9TH APRIL, 1900, to be made :—

(2.) *Where the deceased died* BEFORE *the* 1*st July*, 1896 :—Any fraction of £10 in excess of £10, or of any multiple thereof, in the aggregated "one estate" or "estate by itself," as the case may be, is to be increased to £10. [See sec. 17.] So that an estate of £10,099 would be treated as £10,100, and the rate of duty would be 4 per cent., and the amount £404. An estate of £199 would be treated as £200, and would pay £2.

(3.) Where duty is paid in respect of real property as well as personal property, on one affidavit or account, and there is an odd fraction of £10 in the respective capitals, and the two fractions together exceed £10, *each* class of property should be increased to the next multiple of £10. Thus personal £1,482 and real £929 (aggregate £2,411) should be treated as personal £1,490 and real £930, and personal £1,489 and real £922 (aggregate £2,411) should also be treated as personal £1,490 and real £930. Where, however, the two fractions together do *not* exceed £10, whichever of the two classes of property has the larger fraction of £10 should be increased to the next multiple of £10, whilst in the other class of property the fraction should be disregarded. Thus, personal £1,482 and real £926 (aggregate £2,408) should be treated as personal £1,480 and real £930, whilst personal £1,486 and real £922 (aggregate £2,408) should be treated as personal £1,490 and real £920.

(4.) *Where the deceased died* ON OR AFTER *the* 1*st July*, 1896, *but before the* 9*th April*, 1900 :—Any fraction of £100 in excess of £100, or of any multiple thereof, in the aggregated "one estate" or "estate by itself," as the case may be, is to be disregarded, except that where the principal value of the estate exceeds £100, but does not exceed £200, the estate duty is to be £1. [See Finance Act, 1896, sec. 17.] So that an estate of £10,099 would be treated as £10,000, and the estate duty would be at 3 per cent., and would amount to £300. An estate of £10,100 would, however, be treated as £10,100, and the rate of duty would be 4 per cent., and the amount £404. An estate of £199 would by this rule be treated as £100, but it does not thereby acquire exemption from estate duty as *not exceeding* £100, but pays £1 as stated above.

(5.) Where duty is paid in respect of real property as well as personal property, on one affidavit or account, and there is an odd fraction of £100 in the respective capitals, and the two fractions together do not amount to £100, each fraction is to be disregarded. Thus personal £1,422 and real £929 (aggregate £2,351) should be treated as personal £1,400 and real £900. Where, however, the two fractions together amount to or exceed £100, whichever of the two classes of property has the larger fraction of £100 should be raised to the next multiple of £100, whilst in the other class of property the fraction should be disregarded. Thus personal £1,482 and real £929 (aggregate £2,411) should be treated as personal £1,500 and real £900, whilst personal £1,429 and real £982 (aggregate £2,411) should be treated as personal £1,400 and real £1,000.

(6). WHERE, HOWEVER, THE DECEASED DIED ON OR AFTER THE 9TH APRIL, 1900, the estate duty is to be levied on the exact net principal value of the estate, both as regards rate and amount of duty, without the exclusion of any fraction of that value. [See Finance Act, 1900, sec. 13 (1).] So that an estate of £10,099 15*s.* would be treated as £10,099 15*s.*, and the estate duty would be at 4 per cent., and would amount to £403 19*s.* 9*d.*

Estates not above £500 gross.

73. Where the GROSS value of the property real and personal on which estate duty is payable on the death of the deceased exclusive of property settled otherwise than by the will of the deceased exceeds £100, but does not exceed £300, a fixed duty of 30*s.* *may be* paid, and where it exceeds £300, but does not exceed £500, a fixed duty of 50*s.* *may be* paid. [See sec. 16 (1).] Where the fixed duty of 30*s.* or 50*s.* has been paid, and it is afterwards discovered that the gross value of the property exceeds £500, the ad valorem duty according to the true value is payable, and no allowance can be made for the duty paid at first. But where 30*s.* has been paid and it is discovered that 50*s.* should have been paid, the difference only is payable. [See sec. 16 (1), embodying and extending the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), sec. 35.] Where, however, the deceased died on or after the 1st September, 1903, and the Commissioners are satisfied that there were reasonable grounds for the original estimate of the value of the property, an allowance may be made for the duty paid at first. [See Revenue Act, 1903, sec. 14.]

Option.

74. Where the assistance of the local officer of customs and excise is not required, the ad valorem duty according to the scale may be paid instead of the fixed duty of 30*s.* or 50*s.* [See sec. 16 (1), and sec. 16 (2), embodying and extending the Customs and Inland Revenue Act, 1881, sec. 33.] Where the net estate is small it may be found that the ad valorem duty is less in amount than the fixed duty.

EXEMPTION FROM OTHER DUTIES in cases not over £1,000 net.

75. Where the NET value of the property real and personal, on which estate duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will, if any, of the deceased, does not exceed £1,000, and the fixed duty or ad valorem estate duty has been paid upon the principal value of that estate, the settlement estate duty and the legacy and succession duties are not payable under the will or intestacy of the deceased in respect of that estate. [See sec. 16 (3).]

FORMS IN USE.

76. The forms in use are :—

AFFIDAVITS :—

B—2. Inland revenue affidavit for probate or administration where there is *no* settled property, and the GROSS principal value of the free and other unsettled property, real and personal (including property over which the deceased had and exercised by will a general power of appointment, and property which by default of exercise of the power of appointment belonged to the deceased absolutely), in respect of which estate duty is leviable on the death of the deceased, does not exceed £500 (except where the *gross* value exceeds £100, but the *net* value does not exceed £100), *and,* if any estate duty is payable thereon, it is desired to pay the fixed duty of 30*s.* or 50*s.*

NOTE.—Where, in the circumstances of the case, the ad valorem duty in respect of the *net* estate is less than the fixed duty [see clauses 70 and 72], and it is desired to pay the smaller duty, the Form A—3, A—4, A—6, or A—7, whichever is appropriate, should be used, and not the Form B—2.

B—3. Inland revenue affidavit for probate or administration, similar to B—2, but to be used *where the deceased died after the* 1*st August*, 1894, *and prior to the* 19*th April*, 1907, and where there *is* settled property (not being property over which the deceased had and exercised by will a general power of appointment or property which, by default of exercise of the power of appointment, belonged to the deceased absolutely), in addition.

No. 24. Summary of duty and interest: To accompany Form B—3.

B—4. Inland revenue affidavit for probate or administration, similar to B—3, but to be used *where the deceased died on or after the* 19*th April*, 1907.

No. 27. Summary of duty and interest: To accompany Form B—4.

A—4. Inland revenue affidavit for probate or administration, where the property in respect of which estate duty is payable on the death of the deceased consists *exclusively* of FREE *personal property* situate *in the United Kingdom*, and *passing under the deceased's will or intestacy; except* where the net value exceeds £100, but the *gross* value does not exceed £500, *and* the fixed duty of 30*s*. or 50*s*. is to be paid.

No. 16. Summary of duty and interest: To accompany Form A—4.

A—6. Inland revenue affidavit for probate or administration, where the property in respect of which estate duty is payable on the death of the deceased consists *exclusively* of FREE *personal* AND REAL *property* situate *in the United Kingdom*, and *passing under the deceased's will or intestacy; except* where the net value exceeds £100, but the *gross* value does not exceed £500, *and* the fixed duty of 30*s*. or 50*s*. is to be paid.

No. 17. Summary of duty and interest: To accompany Form A—6.

A—5. Inland revenue affidavit for second or subsequent grants, where the property was within the operation of a prior grant. Where it was not so, the same form as for an original grant should be used.

A—3. Inland revenue affidavit for probate or administration, to be used *where the deceased died after the* 1*st August*, 1894, *and prior to the* 19*th April*, 1907, except where B—2, B—3, A—4, A—6, or A—5, is applicable.

No. 15. Summary of duty and interest: To accompany Form A—3.

A—7. Inland revenue affidavit for probate or administration *where the deceased died on or after the* 19*th April*, 1907, except where B—2, B—4, A—4, A—6, or A—5, is applicable.

No. 28. Summary of duty and interest: To accompany Form A—7.

D—1. (In duplicate.) Corrective affidavit.

ACCOUNTS:—

C—1. (In duplicate.) Account of property which passed on the death, but the estate duty whereon was not paid on the inland revenue affidavit.

C—2. (In duplicate.) Account for settlement estate duty.

C—3. Account for instalments of estate duty and settlement estate duty.

D—2. (In duplicate.) Corrective account.

Where forms obtainable.

77. All the forms can be obtained of any collector of customs and excise, or by application to the Secretary, Estate Duty Office, Somerset House, London, W.C.

78. All the forms except A—5, can be obtained at any money order post office outside the metropolitan postal district.

DEATHS ON OR BEFORE 1ST AUGUST, 1894.

79. Where a person died on or before the 1st August, 1894, duties in force immediately prior to the commencement of the Finance Act, 1894, continue to be payable [see sec. 21 (2)], and the above forms are not applicable.

DELIVERY OF AFFIDAVITS AND ACCOUNTS.

80. The inland revenue affidavit is to be delivered to the probate registrar on application for probate or administration.

81. The payment of estate duty on inland revenue affidavits for probate, etc., may be made in any of the following ways:—

(1.) Personally in Room 25, Accountant-General's Department, Inland Revenue, Somerset House, London, W.C.

(2.) Through the post to the Accountant-General (Cashier), Inland Revenue, Somerset House, London, W.C.:—

(A) By cheque drawn in favour of the "Commissioners of Inland Revenue," and crossed "Bank of England—Inland Revenue."

(B) Where the duty does not exceed £40, by money order (which can be obtained free of commission) drawn in favour of the "Commissioners of Inland Revenue" and crossed "Bank of England—Inland Revenue." These money orders can be obtained on production of the affidavit at any money order post office. Postmasters are restricted, in the receipt of estate duty, to the issue of money orders; they must not otherwise receive the duty, nor may they accept affidavits for the purpose of having them stamped.

(3.) At the office of any collector of customs and excise.

In every case the affidavit *and warrant* must accompany the payment.

Where payment of the fixed duty of 30*s.* or 50*s.* is made (see paragraphs 73 and 74) the appropriate estate duty stamp must be used and affixed to the first page of the affidavit. These stamps can be purchased at any post office or at the office of any distributor of stamps.

82. Accounts and corrective affidavits are to be TRANSMITTED BY POST to the Secretary, Estate Duty Office, Somerset House, London, W.C. If preferred, they may be left at the office by hand. In suitable cases an appointment will be arranged. The envelope should be legibly marked "ACCOUNT." They will be examined, and instructions as to the amount of duty and how to pay it will be issued. *Where duty is to be returned* the corrective affidavit or account should be accompanied by evidence in support of the claim. In corrective affidavit cases, the probate or letters of administration should be forwarded, and in corrective account cases where a return of duty is claimed the original stamped account should be sent.

83. The Commissioners may, if they think fit, dispense with an oath in corrections of estate duty. [See Finance Act, 1900, sec. 13 (2).] Where duty is *to be paid*, the affidavit may, if desired, be transmitted unsworn in the first instance.

ALTERATIONS IN ESTATE DUTY.

FINANCE (1909–10) ACT, 1910 (ss. 54–57, 59–64).

INLAND REVENUE.

Instructions as to Estate Duty, supplemental to those in the Form A—2, consequent upon the Finance (1909–10) Act, 1910.

Observe.—Unless otherwise stated, the references in these instructions are to the Finance (1909–10) Act, 1910.

Note.—Part III. of the Finance (1909–10) Act, 1910, is to be construed with the Finance Act, 1894 [sec. 96 (3) of Finance (1909–10) Act, 1910].

Estate Duty.—The following instructions apply only where the death occurred on or after the 30th April, 1909:—

In the case of persons dying on or after the 30th April, 1909, the rates of estate duty are according to the following scale. [See Finance (1909–10) Act, 1910, s. 54, and the Second Schedule to that Act.]

Rates of estate duty [sec. 54 and Second Schedule].

Principal Value of the Estate.				Rate per cent.
	£		£	£
		Not above	100	0
Above	100	but not above	500	1
„	500	„ „	1,000	2
„	1,500	„ „	5,000	3
„	5,000	„ „	10,000	4
„	10,000	„ „	20,000	5
„	20,000	„ „	40,000	6
„	40,000	„ „	70,000	7
„	70,000	„ „	100,000	8
„	100,000	„ „	150,000	9
„	150,000	„ „	200,000	10
„	200,000	„ „	400,000	11
„	400,000	„ „	600,000	12
„	600,000	„ „	800,000	13
„	800,000	„ „	1,000,000	14
„	1,000,000	. . . . . .		15

Estate duty is leviable upon the principal value of all inter vivos gifts of property made by the deceased within three years of his

Gifts [sec. 59].

death without reservation, unless any such gifts (1) were made before the 30th April, 1908, (2) were made for public or charitable purposes more than twelve months before the death, (3) were made in consideration of marriage, or (4) are proved to the satisfaction of the Commissioners to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income, or to the circumstances, or which, in the case of any donee, do not exceed in the aggregate £100 in value or amount [sec. 59].

Life interest [sec. 59 (1)].

Where the deceased or any other person had an interest in property limited to cease on the deceased's death, and that interest was disposed of, whether for value or not, to or for the benefit of any person entitled to an interest in remainder or reversion in such property, then the property is nevertheless to be deemed to pass on the deceased's death, unless the disposition was bonâ fide made three years before the deceased's death, and bonâ fide possession and enjoyment was immediately assumed thereunder, and thenceforward retained to the entire exclusion of the person who had the interest so limited to cease, and of any benefit to him by contract or otherwise [sec. 59 (1)].

[Sec. 59 (1) (proviso).]

This section does not apply where the interest was disposed of before the 30th April, 1908 [sec. 59 (1) (proviso)].

Trust property [sec. 59 (1) (proviso)].

Estate duty is not payable on property held by the deceased as trustee for another person under a disposition made by the deceased more than three years before his death, where possession and enjoyment of the property was bonâ fide assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained to the entire exclusion of the deceased, or of any benefit to him by contract or otherwise [sec. 59 (1), amending sec. 2 (3) of the Finance Act, 1894].

[Sec. 59 (1) (proviso).]

This section does not apply where the trust was created before the 30th April, 1908 [sec. 59 (1) (proviso)].

Gifts with reservation.

Inter vivos gifts made by the deceased at any time, whereof bonâ fide possession was not immediately taken and thenceforth retained to the entire exclusion of the deceased, but a benefit, either charged upon the property or not, was reserved or secured to the deceased by contract or otherwise, or a power or authority was reserved to the deceased, to restore to himself or to reclaim the absolute interest in such property, or in some part of it, are deemed to pass on his death [Finance Act, 1894, s. 2 (1) (c), incorporating sec. 38 (2) (c) of Customs and Inland Revenue Act, 1881, and sec. 11 (1) of Customs and Inland Revenue Act, 1889].

[Sec. 59 (3).]

If, however, the benefit reserved or secured to the deceased is afterwards surrendered by him, so that the property forming the subject-matter of the gift is, subsequent to the date of such surrender, enjoyed to the entire exclusion of the deceased and of any benefit to him by contract or otherwise for three years before his death, such property is not to be deemed to pass on his death [sec. 59 (3)].

Limitation of relief from estate duty in

In the case of persons dying on or after the 30th April, 1909, the payment of or liability to duty in respect of an interest in expectancy in any settled property, whether the payment was made or the respect of settled property [sec. 55].

liability attached before, on, or after that date, is not to be deemed to be a payment of or liability to duty in respect of the settled property itself, so as to obtain the relief from estate duty conferred by sec. 5 (2) or 21 (1) of the Finance Act, 1894, unless the owner of the expectant interest was himself the settlor of the property [sec. 55].

Principal value.

The principal value of any property is the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the deceased's death [Finance Act, 1894, s. 7 (5)].

[Sec. 60.]

In estimating such value, the Commissioners are to fix the price of the property according to the market price at the time of the death, without allowing any reduction on the ground that the whole property is to be placed on the market at one and the same time, unless it is proved to the Commissioners that the value of the property has been depreciated by reason of the death of the deceased, in which case, such depreciation is to be taken into account [Finance (1909–10) Act, 1910, s. 60].

Exception as to value of agricultural property in small estates [sec. 61 (1)].

Where, however, it is necessary to determine the gross or net value of any agricultural property for the purpose of sec. 16 of the Act of 1894, the principal value of such property—where no part of the value is due to the expectation of an increased income from the property—is not to exceed twenty-five times the annual value, as assessed under Schedule A of the Income Tax Acts, after making such deductions as have not been allowed in that assessment, and are allowed under the Succession Duty Act, 1853, and making a deduction for expenses of management not exceeding 5 per cent. of the annual value so assessed [sec. 61 (1) of Finance (1909–10) Act, 1910, incorporating proviso to sec. 7 (5) of Finance Act, 1894].

Estates not above £500 gross.

Where the gross value of the property real and personal on which estate duty is payable on the death of the deceased exclusive of property settled otherwise than by the will of the deceased exceeds £100, but does not exceed £300, a fixed duty of 30*s. may be* paid, and where it exceeds £300, but does not exceed £500, a fixed duty of 50*s. may be* paid. [See sec. 16 (1) of Finance Act, 1894.]

Net value after deduction of certain charges may be considered gross value in determining whether estate exceeds £500 gross [sec. 61 (2)].

Provided that where any property is proved to the satisfaction of the Commissioners to be subject to a charge created for the purpose of securing unpaid purchase-money, or money borrowed to pay purchase-money, or to be subject to or liable to be made subject to a charge for securing an advance obtained for the purchase thereof, the *gross* value of such property for the purpose of this section is the principal value after deducting any such charge or liability to which the property is so subject [Finance (1909–10) Act, 1910, sec. 61 (2)].

Objects of national, etc., interest [sec. 63].

Any property—settled or not—passing on the death of the deceased which consists of such pictures, prints, books, etc., not yielding income as appear to the Treasury to be of national, scientific, historic, or artistic interest is not to be aggregated with other property, but is to form an estate by itself, and estate duty is only chargeable thereon when the property is sold, and then only in respect of the last death on which the property passed [sec. 63].

Where interest in

When an interest in expectancy in any property has, since 18th April, 1907, and before the 30th April, 1909, been bonâ fide sold expectancy sold or mortgaged [sec. 64].

or mortgaged for full consideration in money or money's worth, then no other duty on that property is to be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the scale of rates set out in the First Schedule to the Finance Act, 1907, had not been altered [sec. 64].

Power to transfer land in satisfaction of estate duty [sec. 56 (1)].

The Commissioners may, if they think fit, on the application of any person liable to pay estate duty in respect of any real (including leasehold) property, accept, in satisfaction of the whole or any part of such duty, such part of the property as may be agreed upon between the Commissioners and that person [sec. 56 (1)].

The following instructions apply only where the death occurred on or after the 29th April, 1910, *the date of the passing of the Finance* (1909–10) *Act*, 1910.

Limitation on debts deductible from value of estate [sec. 57].

Where a debt or incumbrance has been incurred or created in whole or in part for the purpose of or in consideration for the purchase or acquisition or extinction, whether by operation of law or otherwise, of any interest in expectancy in any property passing or deemed to pass on death, and any person whose interest in expectancy is so purchased, acquired or extinguished becomes entitled to any interest in such property, either under any disposition made by the deceased, or under his intestacy or through devolution of law from him, the value of the estate of the deceased for the purpose of estate duty is to be determined without allowance in respect of such debt or incumbrance, and any property charged therewith is to be deemed to pass freed therefrom.

Provided that—

(a) If part only of the debt or incumbrance was incurred or created for the purpose or consideration stated, this section is to apply only to that part, and

(b) If a person whose interest in expectancy in the property so purchased, acquired or extinguished becomes entitled to an interest in a part only of that property, this section is to apply only to the same fractional part of the debt or incumbrance as the value of the part of the property to an interest in which he becomes entitled bears to the value of the whole of that property [sec. 57].

Estate duty to be paid on timber, trees and wood when same are felled or sold [sec. 61 (5)].

Where an estate in respect of which estate duty is payable comprises land on which timber, trees, or wood are growing, the value thereof is to be aggregated with any other property passing on the death for the purpose of determining the value of the estate and the rate of estate duty, but the estate duty, instead of being payable upon the principal value of the timber, trees, or wood, is payable, at the rate so ascertained, on the net moneys, after deduction of all necessary outgoings since the death of the deceased, received from the sale of any timber, trees, or wood which may be felled before the land again passes on death and again becomes liable to estate duty [sec. 61 (5)].

Persons liable [sec. 61 (5)].

The owners or trustees of the land are to account for and pay the duty as and when the moneys are received, together with interest at the rate of 3 per cent. per annum from the date of receipt [sec. 61 (5)].

If, however, the timber, trees, or wood are sold at any time, either with or apart from the land on which they are growing, estate duty is payable upon the principal value thereof, as at the death of the deceased, after deducting any estate duty already paid upon the proceeds of the sale of any timber felled and sold since that date [sec. 61 (5) (proviso)].

Duty payable on principal value if timber, etc., sold [sec. 61 (5) (proviso)].

Where increment value duty is to be collected on the occasion of the death of any person in respect of the fee simple of any land or any interest in land comprised in the property passing on his death, the amount of such duty is to be allowed as a debt in determining the value of the estate for the purpose of estate duty [sec. 62].

Increment value duty to be allowed as a debt [sec. 62].

ALTERATIONS IN SETTLEMENT ESTATE DUTY.

In the case of persons dying on or after the 30th April, 1909, the rate of settlement estate duty leviable in respect of settled property is 2 per cent. [sec. 54].

Rate of settlement estate duty [sec. 54].

The Commissioners may, if they think fit, on the application of any person liable to pay settlement estate duty in respect of any real (including leasehold) property, accept, in satisfaction of the whole or any part of such duty, such part of the property as may be agreed upon between the Commissioners and that person [sec. 56 (1)].

Land may be taken by Commissioners in satisfaction of claim for settlement estate duty [sec. 56 (1)].

APPENDIX III.

RULES.

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PART I.—NON-CONTENTIOUS BUSINESS.

RULES, ORDERS, AND INSTRUCTIONS

FOR THE REGISTRARS OF

THE PRINCIPAL REGISTRY

OF HER MAJESTY'S COURT OF PROBATE,

Made under the provisions of the Statutes 20 *&* 21 *Vict. c.* 77, *and* 21 *&* 22 *Vict. c.* 95,

IN RESPECT OF

NON-CONTENTIOUS BUSINESS.

NOTE.—These are the rules and orders of 1862, together with subsequent emendations and additions.

All rules, orders, and instructions heretofore made and issued for the registrars of the principal registry of her Majesty's Court of Probate in respect of non-contentious business shall be repealed, on and after the first day of September, 1862, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules, orders, and instructions in respect of non-contentious business shall take effect on and after the first day of September, 1862.

NON-CONTENTIOUS BUSINESS shall include all common form business as defined by the "Court of Probate Act, 1857," and the warning of caveats.

1. APPLICATION FOR PROBATE OR LETTERS OF ADMINISTRATION may be made at the principal registry in all cases.

2. Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and parties entitled to grants of administration; but these latter applications will not be received by letter, nor through the medium of any agent.

3. The registrars are not to allow probate or letters of administration to issue until all the inquiries which they may see fit to institute have been answered to their satisfaction. The registrars are notwithstanding to afford as great facility for the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud.

AS TO PROBATE OF WILLS AND CODICILS AND LETTERS OF ADMINISTRATION WITH THE WILL [OR WILL AND CODICILS] ANNEXED, WHERE THE WILLS AND CODICILS ARE DATED AFTER 31ST DECEMBER, 1837.

Execution of a Will.

Amended rules 4 and 4A of 14th January, 1871.

4. If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution, were in fact complied with.

4a. The practice of registering affidavits shall be discontinued, and, in lieu thereof, a note signed by a registrar shall be inserted on the engrossed copy will or codicil annexed to the probate or letters of administration, and registered, to the effect that affidavits of due execution, of domicil, or as the case may be, have been filed: Provided that in cases presenting difficulty the affidavits themselves may still be registered by direction of a registrar (*a*).

[Rule 4 of 1862 read: *If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the registrars must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of* 1 *Vict. c.* 26, *s.* 9, *and* 15 *Vict. c.* 24, *in reference to the execution were in fact complied with; and such affidavit must be engrossed and form part of the probate.*]

5. If on perusing the affidavits of both the subscribing witnesses it appear that the requirements of the statute were not complied with, the registrars must refuse probate.

(*a*) Forms of notes to be used in the principal registry when applicable :—

"Affidavits of due execution filed.
A. B.,
Registrar."

"Affidavits of identity of will (*or* codicil *or* memorandum) filed.
A. B.,
Registrar."

"Affidavits of domicil and law filed.
A. B.,
Registrar."

6. If on perusing the affidavit or affidavits setting forth the facts of the case, it appear doubtful whether the will or codicil has been duly executed, the registrars may require the parties to bring the matter before the judge on motion.

7. If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil ; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution.

Interlineations and Alterations.

8. Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.

9. When interlineations or alterations appear in the will (unless duly executed, or recited in, or otherwise identified by, the attestation clause), an affidavit or affidavits in proof of their having existed in the will before its execution, must be filed, except when the alterations are merely verbal, or when they are of but small importance and are evidenced by the initials of the attesting witnesses.

Erasures and Obliterations.

10. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate.

11. In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.

Deeds, etc., referred to in a Will or Codicil.

12. If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such deed, paper, memorandum, or other document must be required, with a view to ascertain whether it be entitled to probate ; and, if not produced, its non-production must be accounted for.

13. No deed, paper, memorandum, or other document can form part of a will unless it was in existence at the time when the will was executed.

Appearance of the Paper.

14. If there are any vestiges of sealing wax or wafers or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum, or other document must be required; and, if not produced, its non-production must be accounted for.

Married Woman's Will.

Amended rule of 19th April, 1887.

15. In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed without any exception or limitation, and issue to an executor or other person authorised in usual course to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin in case of a partial intestacy.

[The rule of 1862 read as follows: *In granting probate of a married woman's will made by virtue of a power or administration with such will annexed, the power under which the will purports to have been made must be specified in the grant.*]

Codicils.

16. The above rules and orders respecting wills apply equally to codicils.

AS TO PROBATE OF WILLS, CODICILS, AND TESTAMENTARY PAPERS RELATING TO PERSONALTY, AND DATED BEFORE THE 1ST JANUARY, 1838.

Execution of a Will.

17. It is not necessary that a will, codicil, or testamentary paper dated before 1st January, 1838, should be signed by the testator or attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his will, codicil, or testamentary disposition must be clearly proved by circumstances.

18. A will, codicil, or testamentary paper, signed at the end of it by the testator and attested by two disinterested witnesses (although there be no clause of attestation) is primâ facie entitled to probate.

19. In cases where a will, codicil, or testamentary paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark to the paper in the presence of one attesting witness, or produced it with his name already subscribed, or his mark already made, to one attesting witness, and afterwards produced it to the other attesting witness, provided that on each occasion he declared it to be his will, codicil, or testamentary disposition, or otherwise notified his intention that it should operate as such.

20. If the will, codicil, or testamentary paper is signed at the end of it by the testator but is unattested, and there is nothing to show an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

21. If the will, codicil, or testamentary paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to show the testator's intention that it should be attested by a second witness, the affidavit of one disinterested person to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

22. The circumstance of a person being named as an executor in the will, codicil, or testamentary paper, or being interested as a legatee or as the husband or wife of a legatee under such will, codicil, or testamentary paper, rendered him or her incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the will, codicil, or testamentary paper, the same, so far as regards his or her attestation, must be considered as unattested, and his or her evidence in support thereof will be inadmissible, unless he or she shall first release his or her interest thereunder.

23. If an attestation clause, or the word "witnesses," appear written at the foot of the paper, the same being unattested, or if the paper purport on the face of it to be a draft of a will, the copy of a will, or instructions for a will, it must primâ facie be considered as an incomplete paper, and not, save under special circumstances, entitled to probate.

Appearance of Paper.

24. Any appearance of an attempted cancellation of a paper by burning, tearing, obliteration, or otherwise, and every circumstance leading to a presumption of abandonment or revocation of a paper on the part of the testator must be accounted for.

Alterations and Interlineations.

25. Alterations and interlineations made by the testator, if unattested, are to be proved by the affidavits of two persons as to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to prove by affidavit that such alterations and interlineations were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death may, under circumstances, suffice. Alterations and interlineations made since the 31st December, 1837, are subject to the provisions of 1 Vict. c. 26.

Deeds, etc., referred to in a Will or annexed to a Will.

26. With respect to deeds, papers, memoranda, or other documents mentioned in a testamentary paper, or appearing to have been annexed or attached thereto, the foregoing rules, orders, and instructions as to wills bearing date since the 31st December, 1837, will apply.

Republication by Codicil.

27. A will made before the 1st January, 1838, is republished by a subsequent codicil thereto duly executed.

AS TO LETTERS OF ADMINISTRATION.

Notice to other Next of Kin.

28. Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the registrars may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin.

Limited Administrations.

29. Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge.

30. No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant, except under the direction of the judge.

Administrations under Sec. 73.

31. Whenever the Court under sec. 73 appoints an administrator other than the person who, prior to the "Court of Probate Act, 1857," would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

Grants to an Attorney.

32. In the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney, acting under a power of attorney.

Grants of Administration to Guardians.

33. Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by minors of their next of kin or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with.

34. In cases of infants (*i.e.*, under the age of seven years) not having a testamentary guardian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the judge or one of the registrars; the registrar's order is to be founded on an affidavit showing that the proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship.

35. Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them by order of the judge or a registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge or of a registrar.

36. In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants.

Administrator's Oath.

37. The oath of administrators, and of administrators with the will, is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off, and the oath is to set forth, when the fact is so, that the party applying is the only next of kin, or one of the next of kin, of the deceased. In all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case.

Administration Bonds.

38. Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95, but in no case are they to be attested by the proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix.

39. In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant. The alleged value of such property is to be verified by affidavit if required.

40. The administration bond is in all cases of limited or special administrations to be prepared in the registry.

41. The registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons.

Justification of Sureties.

42. When any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the registry, and the sureties to the administration bond must justify.

General Rules and Orders for the Registrars of the Principal Registry.

Time of issuing Grant.

43. No probate or letters of administration with the will annexed shall issue until after the lapse of seven days from the death of the deceased unless under the direction of the judge, or by order of two of the registrars.

44. No letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars.

45. In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit.

Filling up Grants.

46. All probates or letters of administration issued from the principal registry are to be filled up there.

Oath of Executors and Administrators.

47. The usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the registry.

Identity of Parties.

48. The registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant.

Testamentary Papers to be Marked.

49. Every will, copy of a will, or other testamentary paper, to which an executor or administrator with the will is sworn, must be marked by such executor or administrator and by the person before whom he is sworn.

Renunciations.

50. No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character.

Affidavits.

51. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent making it is to be inserted therein.

Amended rules 52 and 53 of 26th May, 1882.

52. In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

53. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall, without leave of the Court or of one of the registrars, be filed or made use of in any matter depending in the Probate Court or registry, unless the interlineation or alteration other than by erasure is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

[Rules 52 and 53 of 1862 read as follows :—*In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat. No affidavit will be admitted in any matter in the Court of Probate of which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure.*]

54. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the person making the same, and that such person seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature, in the presence of the registrar, commissioner, or other authority before whom the affidavit was made.

55. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a partner or clerk of his proctor, solicitor, or attorney.

56. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

57. In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose as to the mode in which the said will or codicil was executed and attested.

58. The registrars are not to allow any affidavit to be filed (unless by leave of the judge) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the Commissioner, or other person before whom it was sworn.

Caveats.

59. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the principal registry, or in a district registry ; if in the principal registry, the person entering the caveat must also insert the name of the deceased in the index to the caveat book.

60. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and then expire and be of no effect ; but caveats may be renewed from time to time.

61. The registrars shall, immediately upon a caveat being entered, send notice thereof to the district registrar of any district in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death.

62. No caveat shall affect any grant made on the day on which the caveat is entered, or on the day on which notice is received of a caveat having been entered in a district registry.

63. All caveats shall be warned from the principal registry. The warning is to be left at the place mentioned in the caveat as the address of the person who entered it.

64. It shall be sufficient for the warning of a caveat that a registrar send by the public post a warning signed by himself, and directed to the person who entered the caveat, at the address mentioned in it.

65. The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil, and is to contain an address within three miles of the General Post Office, at which any notice requiring service may be left. The form of warning will be supplied in the registry.

66. Before any citation is signed by a registrar, a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates, and notice thereof shall be sent to the district registrar of any district in which the deceased appears to have resided at the time of his death.

67. In order to clear off a caveat when no appearance has been entered to a warning duly served, an affidavit of the service of the warning, stating the manner of service, and an affidavit of search for appearance and of non-appearance, must be filed.

Citations.

68. No citation is to issue under seal of the Court until an affidavit, in verification of the averments it contains, has been filed in the registry.

69. Citations are to be served personally when that can be done. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing him the original, if required by him so to do.

70. Citations and other instruments which cannot be personally served, are to be served by the insertion of the same, or of an abstract thereof, settled and signed by one of the registrars, as an advertisement in such morning and evening London newspapers, and such local newspapers, and at such intervals as the judge or one of the registrars may direct.

Blind and Illiterate Testators.

71. The registrars are not to allow probate of the will, or administration with the will annexed, of any blind or obviously illiterate or ignorant person, to issue, unless they have previously satisfied themselves that the said will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents.

Alterations in Grants, etc.

Amended rule of 26th May, 1882.

72. When any alteration is made in a grant of probate or letters of administration which has issued from a district probate registry, or when any such grant is revoked and the volume of the printed calendar containing the entry of the grant has been forwarded to the district registrars, notice of such alteration or revocation is without delay to be forwarded by the registrars of the principal registry to the district probate registrar from whose registry the altered or revoked grant issued.

[The rule of 1862 read as follows:—*Whenever the value of the personal estate and effects of a deceased person is re-sworn under a different amount, or any alteration is made in a grant, or a grant is revoked, and the volume of the printed calendar containing the entry of such grant has been forwarded to the district registrars, notice of such re-swearing, alteration, or revocation is without delay to be forwarded by the registrars of the principal registry to all the district registrars.*]

Irish Grants.

See also Rule 107.

73. The seal is not to be affixed to any probate or letters of administration granted in Ireland, so as to give operation thereto as if the grant had been made by the Court of Probate in England, unless it appear from a certificate of the Commissioners of Inland Revenue, or their proper officer, that such probate or letters of administration is duly stamped in respect of the personal estate and effects of which the deceased died possessed in England. In respect to letters of administration, the provisions of statute 21 & 22 Vict. c. 95, s. 29, must also be complied with.

Grants for Property in the United Kingdom.

74. Whenever a grant of probate or of letters of administration is made under statute 21 & 22 Vict. c. 56, for the whole personal estate and effects of a deceased within the United Kingdom, it must appear by the affidavit made for the Inland Revenue Office, that the testator or intestate died domiciled in England, and that he was possessed of personal estate in Scotland, other than that excluded by 22 & 23 Vict. c. 80, and the value of such personal estate must be separately stated in such affidavit. *In case any portion of the personal estate be in Ireland, a separate affidavit and schedule must also be filed* (*a*). Upon all such grants a note or memorandum must also be written and signed by one of the registrars to the effect that the testator or intestate died domiciled in England.

Notices to Queen's Proctor.

75. In all cases where application is made for letters of administration (either with or without a will annexed) of the goods of a bastard dying a bachelor or a spinster, or a widower or widow without issue, or of a person dying without known relation, notice of such application is to be given to her Majesty's Procurator General (or in case the deceased died domiciled within the Duchy of Lancaster, to the solicitor for the Duchy in London), in order that he may determine whether he will interfere on the part of the Crown ; and no grant is to be issued until the officer of the Crown has signified the course which he thinks proper to take.

76. In the case of persons dying intestate without any known relation, a citation must be issued against the next of kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased, and the service thereof upon them shall be effected as required by Rule 70. Such citation must also be served upon the Queen's Proctor, or upon the solicitor for the Duchy of Lancaster, as the case may require.

Transmission of Papers.

77. After motions have been made before the judge in Court, the registrars are, on the application of the parties (unless the judge shall otherwise direct), to transmit to a district registrar the original papers and documents, in order that the grant of probate or administration may be completed in a district registry.

78. Papers and other documents may be transmitted by the registrars of the principal registry to the district registrars through the post office. Such letters or packets are to be superscribed with the words, " On Her Majesty's Service," and may be registered, if thought necessary.

Probate Copies of Wills.

Amended rule of 29th December, 1865.

79. The registrars are to take care that the copies of wills and affidavits to be annexed to the probates or letters of administration are fairly and properly written, and are to reject those which are

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(*a*) No longer required.

otherwise; but it shall not be necessary that such copies be written in the engrossing hand heretofore in use.

[The rule of 1862 read as follows: *The registrars are to take care that the copies of wills and affidavits to be annexed to the probate or letters of administration are fairly and properly written in the engrossing hand heretofore in use in the Prerogative Court, and are to reject those which are otherwise.*]

Office Copies.

80. Office copies of wills, and other documents furnished in the principal registry, will not be collated with the original will or other document, unless specially required. Every copy so required to be examined, shall be certified under the hand of one of the registrars of the principal registry, to be an examined copy.

81. The seal of the Court is not to be affixed to any office copy of a will, or other document, unless the same has been certified to be an examined copy.

Attendances with Documents.

82. If a will or other document filed in the registry is required to be produced at any place within three miles of the principal registry, application must be made for that purpose not later than the day previously to that named for its production.

83. If a will or other document filed in the registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place, and in every case such notice must be given (except by special leave of the judge or registrars) at least twenty-four hours before the clerk in whose charge the will or other document is to be placed will be required to set off.

Subpœnas to bring in Testamentary Papers.

84. Any person bringing in a will or testamentary paper, in obedience to a subpœna, is to take it in the first instance to the clerk of the papers, who will prepare a minute to be signed by the registrar to whom the will or paper brought in is to be delivered, and the registrar will sign the minute recording the delivery thereof.

85. The minute is to be entered in the book of registrar's minutes in the usual manner; and the fees for the entry, and a further fee for filing each testamentary paper, will then be payable. If these fees should not be paid by the person bringing in the will or paper, the same are to be charged to the person who may first apply to the clerk of the papers to make use of the will or paper so brought in. In case the person bringing in a will or testamentary paper may desire to have a voucher for its delivery into the registry, he may take an office copy of the minute on paying the usual fee for the same.

86. Any person served with a subpœna to bring in a testamentary paper is at liberty to enter an appearance on payment of the usual fees, if he thinks fit to do so.

Time allowed for appearing to a Warning, Citation, or Subpœna.

87. The time fixed by a warning or citation for entering an appearance, or by a subpœna to bring in a testamentary paper, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

Taxing Bills of Costs.

88. Any bill of costs may be referred to the registrars of the principal registry for taxation, and no special order shall hereafter be required for the purpose.

89. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner, and the registrar shall decide in each case what may be a sufficient notice.

90. When an appointment has been made by a registrar to tax a bill, the registrar may proceed to tax the same after the expiration of a quarter of an hour, notwithstanding the absence of either party, or his agent, provided he be satisfied that the absent party has had due notice of the appointment for taxation.

91. If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.

For carrying out the Provisions of the Colonial Probates Act, 1892 (*ante*, p. 803).

Additional rules of 7th December, 1892.

92. Application to seal a grant of probate or letters of administration or copy thereof under the Colonial Probates Act, 1892, may be made in the Principal Probate Registry by the executor or administrator or the attorney [lawfully authorised for the purpose] of such executor or administrator, either in person or through a solicitor (*a*).

93. Such application must be accompanied by an oath of the executor, administrator, or attorney in the form in the Appendix or as nearly thereto as the circumstances of the case will allow (*a*).

94. The registrars are to be satisfied that notice of such application has been duly advertised. (Form of advertisement, App. VII., Form 1) (*a*).

95. On application to seal letters of administration the administrator or his attorney shall give bond (in the form set out in App. VII., Forms 68, 69) to cover the personal estate of the deceased within the jurisdiction of the Court. The same practice as to sureties and amount of penalty in bond is to be observed as on application for letters of administration (*a*).

96. Application by a creditor under sec. 2, sub-sec. 3, of the Colonial Probates Act is to be made by summons before one of the registrars, supported by an affidavit setting out particulars of the claim (*a*).

(*a*) Additional rule of 7th December, 1892.

97. In every case, and especially when the domicile of the deceased at the time of death as sworn to in the affidavit differs from that suggested by the description in the grant, the registrars may require further evidence as to domicile (*a*).

98. If it should appear that the deceased was not at the time of death domiciled within the jurisdiction of the Court from which the grant issued, the seal is not to be affixed unless the grant is such as would have been made by the High Court of Justice in England (*a*).

99. The grant [or copy grant] to be sealed and the copy to be deposited in the registry must include copies of all testamentary papers admitted to probate (*a*).

100. When application to seal a probate or letters of administration is made after the lapse of three years from the death of the deceased the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory the registrars are to require such proof of the alleged cause of delay as they may think fit (*a*).

101. Special or limited or temporary grants are not to be sealed without an order of one of the registrars (*a*).

102. Notice of the sealing in England of a grant is to be sent to the Court from which the grant issued (*a*).

103. When intimation has been received of the re-sealing of an English grant, notice of the revocation of, or any alteration in such grant is to be sent to the Court by whose authority such grant was re-sealed (*a*).

104. The affidavit for inland revenue pursuant to the Customs and Inland Revenue Acts, 1880 and 1881, shall be transmitted to the Commissioners of Inland Revenue as if the person who applied for sealing under the Colonial Probates Act, 1892, were a person applying for probate or letters of administration (*a*).

105. The affidavit for inland revenue and accounts and schedules forming part thereof shall be in such form as may be prescribed by the Commissioners of her Majesty's Treasury (*a*).

[NOTE.—The forms printed in the Appendix to these rules will be found under their proper headings in App. VII. of this book, viz.: Oath, Form 235; Advertisement, Form 1; Bond, Forms 68, 69.]

Certificate under Customs and Inland Revenue Act, 1881, *s.* 30.

Additional rule of 1st August, 1894.

106. The certificate required to be given by the proper officer of the Court under sec. 30 of the Customs and Inland Revenue Act, 1881, shall for the purposes of the Finance Act, 1894, and subject to any necessary variations and modifications, which the officer of the Court is hereby authorised at his discretion to make, be in the form following :—

> And it is hereby certified that an affidavit for inland revenue has been delivered, wherein it is shown that the gross value of the personal estate of the said deceased within the United Kingdom (exclusive of what the deceased may have been possessed of or entitled to as a trustee and not beneficially)

(*a*) Additional rule of 7th December, 1892.

amounts to £ , and that it appears by a receipt signed by an inland revenue officer on the said affidavit that £ for estate duty and interest thereon has been paid, the duty being charged at the rate of £ per cent.

Re-sealing English Grants in Ireland.

107. In any case in which it is intended to apply for the re-sealing in Ireland of any grant of probate or letters of administration made in the Probate Division of the High Court of Justice in England, the executor or administrator may deposit in the Principal or District Probate Registry where the grant has been made a copy of such grant of probate or letters of administration, together with the original and any certificate or certificates that may be required, and the fees payable in Ireland in respect of such re-sealing, and the Registrar shall transmit by post the documents so deposited, together with such fees, to the Registrar of the Principal Probate Registry in Ireland, for the purpose of such grant being re-sealed under the provisions of 20 & 21 Vict. c. 79, s. 94 (*a*).

Additional rules of 11th December, 1896.

Re-sealing Irish Grants in England.

108. The Registrar of the Principal Probate Registry in England shall, upon receiving by post from a probate registry in Ireland any grant of probate or letters of administration made in the Probate and Matrimonial Division of the High Court of Justice in Ireland, together with a copy thereof, and any certificate or certificates that may be required, and the fees payable in England in respect of the re-sealing of an Irish grant, cause such grant to be re-sealed in conformity with the provisions of 20 & 21 Vict. c. 79, s. 95, and shall transmit the grant so re-sealed to the registrar of the probate registry in Ireland from whom it was received (*a*).

Land Transfer Act, 1897.

109. All rules, orders and instructions and the existing practice of the Court with respect to non-contentious business shall so far as the circumstances of each case will allow be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897.

Additional rule of 20th November, 1897.

(*a*) Additional rule of 11th December, 1896.

RULES, ORDERS, AND INSTRUCTIONS
FOR THE DISTRICT REGISTRARS
OF HER MAJESTY'S COURT OF PROBATE,

Made under the Provisions of the Statutes 20 *&* 21 *Vict. c.* 77, *and* 21 *&* 22 *Vict. c.* 95,

IN RESPECT OF

NON-CONTENTIOUS BUSINESS.

[**NOTE.—These are the Rules and Orders of 1863 with subsequent emendations and additions.**]

All rules, orders, and instructions heretofore made and issued for the district registrars of her Majesty's Court of Probate in respect of non-contentious business shall be repealed, on and after the second day of March, 1863, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules, orders, and instructions in respect of non-contentious business shall take effect on and after the second day of March, 1863.

NON-CONTENTIOUS BUSINESS shall include all common form business as defined by the "Court of Probate Act, 1857," and the warning of caveats.

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1. APPLICATION FOR PROBATE OR LETTERS OF ADMINISTRATION may be made at the principal registry in all cases. Application may also be made at a district registry in cases where the deceased, at the time of his death, had a fixed place of abode within the district in which the application is made, and not otherwise.

2. Such applications may be made through a proctor, solicitor, or attorney, or in person by executors and parties entitled to grants of administration.

3. The district registrar, before he entertains any application for probate or letters of administration, must ascertain that the deceased had, at the time of his death, a fixed place of abode within his district.

4. The district registrar is not to allow probate or letters of administration to issue until all the inquiries which he may see fit to institute have been answered to his satisfaction, and this refers more particularly to applications made in person by executors and others. The district registrar is notwithstanding to afford as great facility for the obtaining grants of probate or administration as is consistent with a due regard to the prevention of error or fraud.

5. No district registrar or clerk in a district registry shall directly or indirectly transact business for himself or as the proctor or solicitor of any other person in the district registry to which he has been appointed.

AS TO PROBATE OF WILLS AND CODICILS AND LETTERS OF ADMINISTRATION, WITH THE WILL [OR WILL AND CODICILS] ANNEXED, WHERE THE WILLS AND CODICILS ARE DATED AFTER 31ST DECEMBER, 1837.

Execution of a Will.

6. Upon receiving an application for probate or letters of administration with the will annexed, the district registrar must inspect the will and each codicil, and see whether by the terms of the attestation clause (if any) it is shown that the same have been executed in accordance with the provisions of statutes 1 Vict. c. 26 and 15 Vict. c. 24.

7. If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the district registrar must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 Vict. c. 26, s. 9, and 15 Vict. c. 24, in reference to the execution, were in fact complied with.

Amended rule of 14th January, 1871.

7A. The practice of registering affidavits shall be discontinued, and, in lieu thereof, a note signed by the district registrar shall be inserted on the engrossed copy will or codicil annexed to the probate or letters of administration, and registered, to the effect that affidavits of due execution, of domicil, or as the case may be, have been filed: Provided, that in cases presenting difficulty the affidavits themselves may still be registered with the consent of a registrar of the principal registry.

[The rule of 1863 read as follows :—

If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the district registrar must require an affidavit from at least one of the subscribing witnesses, if they or either of them be living, to prove that the provisions of 1 *Vict. c.* 26, *s.* 9, *and* 15 *Vict. c.* 24, *in reference to the execution were in fact complied with; and such affidavit must be engrossed and form part of the probate.*]

8. If on perusing the affidavits of both the subscribing witnesses it appear that the requirements of the statute were not complied with, the district registrar must refuse probate.

9. If on perusing the affidavit or affidavits setting forth the facts of the case, it appear doubtful whether the will or codicil has been duly executed, the district registrar must transmit a statement of the matter to the registrars of the principal registry, who may require the parties to bring the matter before the judge on motion.

10. If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution.

Interlineations and Alterations.

11. Interlineations and alterations are invalid unless they existed in the will at the time of its execution, or, if made afterwards, unless they have been executed and attested in the mode required by the statute, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto.

12. When interlineations or alterations appear in the will (unless duly executed, or recited in or otherwise identified by the attestation clause), an affidavit or affidavits in proof of their having existed in the will before its execution must be filed, except when the alterations are merely verbal, or when they are of but small importance and are evidenced by the initials of the attesting witnesses.

Erasures and Obliterations.

13. Erasures and obliterations are not to prevail unless proved to have existed in the will at the time of its execution, or unless the alterations thereby effected in the will are duly executed and attested, or unless they have been rendered valid by the re-execution of the will, or by the subsequent execution of a codicil thereto. If no satisfactory evidence can be adduced as to the time when such erasures and obliterations were made, and the words erased or obliterated be not entirely effaced, but can upon inspection of the paper be ascertained, they must form part of the probate.

14. In every case of words having been erased or obliterated which might have been of importance, an affidavit must be required.

Deeds, etc., referred to in a Will.

15. If a will contain a reference to any deed, paper, memorandum, or other document, of such a nature as to raise a question whether it ought or ought not to form a constituent part of the will, the production of such deed, paper, memorandum, or other document must be required, with a view to ascertain whether it be entitled to probate; and, if not produced, its non-production must be accounted for.

16. No deed, paper, memorandum, or other document can form part of a will unless it was in existence at the time when the will was executed.

Appearance of the Paper.

17. If there are any vestiges of sealing wax or wafers or other marks upon the testamentary papers, leading to the inference that a paper, memorandum, or other document has been annexed or attached to the same, they must be satisfactorily accounted for, or the production of such paper, memorandum, or other document must be required; and, if not produced, its non-production must be accounted for.

Married Woman's Will.

18. In a grant of probate of the will of a married woman, or the will of a widow made during coverture, or letters of administration with such will annexed, it shall not be necessary to recite in the grant or in the oath to lead to the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with the will annexed, in such cases shall take the form of ordinary grants of probate or letters of administration with the will annexed without any exception or limitation and issue to an executor or other person authorised in the usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin in case of a partial intestacy.

Amended rule of 19th April, 1887.

[The rule of 1863 read as follows:—

In granting probate of a married woman's will made by virtue of a power or administration with such will annexed, the power under which the will purports to have been made must be specified in the grant.]

Codicils.

19. The above rules and orders respecting wills apply equally to codicils.

Doubtful Cases.

20. If it be doubtful whether any will or codicil be entitled to probate, or whether any interlineation, alteration, erasure, or obliteration ought to prevail, or whether any deed, paper, memorandum, or other document ought to form part of a will or codicil, or if any doubt arise in consequence of the appearance of the paper, or on any other point, the district registrar must communicate with the registrars of the principal registry.

Letters of Administration with Will annexed.

21. The right of parties to letters of administration with the will annexed, and letters of administration with the will annexed de bonis non, depends so entirely upon the circumstances of each particular case taken in connection with the wording of the will, that no general rules, other than those which have obtained a judicial sanction, can be laid down for the guidance of the district registrars. Whenever the right of the party applying is at all questionable, a statement of the case, accompanied by a copy of the will, must be transmitted to the registrars of the principal registry, who will advise thereon.

AS TO PROBATE OF WILLS, CODICILS, AND TESTAMENTARY PAPERS RELATING TO PERSONALTY, AND DATED BEFORE THE 1ST JANUARY, 1838.

Execution of a Will.

22. It is not necessary that a will, codicil, or testamentary paper dated before 1st January, 1838, should be signed by the testator or attested by witnesses to constitute it a valid disposition of a testator's personal property. Although neither signed by the testator nor attested by witnesses, it may nevertheless be valid; but in such cases the testator's intention that it should operate as his will, codicil, or testamentary disposition must be clearly proved by circumstances.

23. A will, codicil, or testamentary paper, signed at the end of it by the testator and attested by two disinterested witnesses (although there be no clause of attestation) is primâ facie entitled to probate.

24. In cases where a will, codicil, or testamentary paper is attested by two witnesses, such witnesses are not required to have been present with the testator at the same time. It is sufficient if the testator subscribed his name or made his mark to it in the presence of one attesting witness, or produced it with his name already written or his mark already made, to one attesting witness, and afterwards produced it to the other attesting witness, provided that on each occasion he declared it to be his will, codicil, or testamentary disposition, or otherwise notified his intention that it should operate as such.

25. If the will, codicil, or testamentary paper is signed at the end of it by the testator but is unattested, and there is nothing to show an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

26. If the will, codicil, or testamentary paper is signed at the end of it by the testator, and attested by one witness only, and there is nothing to show the testator's intention that it should be attested by a second witness, the affidavit of one disinterested person to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate.

27. The circumstance of a person being named as an executor in the will, codicil, or testamentary paper, or being interested as a legatee or as the husband or wife of a legatee under such will, codicil, or testamentary paper, rendered him or her incompetent to become an attesting witness to it, so that if the name of a person so interested appears as that of a subscribing witness to the will, codicil, or testamentary paper, the same, so far as regards his or her attestation, must be considered as unattested, and his or her evidence in support thereof will be inadmissible, unless he or she shall first release his or her interest thereunder.

28. The will, codicil, or testamentary paper shall appear on the face of it to be a complete document; if an attestation clause or the word "witnesses" appear written at the foot of the paper, the same being unattested, or if the paper purport on the face of it to be a draft of a will, the copy of a will, or instructions for a will, it must primâ facie be considered as an incomplete paper, and not, save under special circumstances, entitled to probate.

Appearance of Paper.

29. Any appearance of an attempted cancellation of a testamentary paper by burning, tearing, obliteration, or otherwise, and every circumstance leading to a presumption of abandonment or revocation of such a paper on the part of the testator, must be accounted for or explained by affidavits. In such cases the testamentary paper and the evidence taken in support of it should be transmitted to the registrars of the principal registry.

Alterations and Interlineations.

30. Alterations and interlineations made by the testator, if unattested, are to be proved by the affidavits of two persons as to his handwriting. If the same are in the handwriting of any person other than the testator, it will suffice to prove by affidavit that such alterations and interlineations were known to and approved of by the testator. Proof by affidavit that they existed in the paper at the time it was found in the repositories of the testator recently after his death may, under circumstances, suffice. Alterations and interlineations made since the 31st December, 1837, are subject to the provisions of 1 Vict. c. 26.

Deeds, etc., referred to in a Will or annexed to a Will.

31. With respect to deeds, papers, memoranda, or other documents, mentioned in a testamentary paper, or appearing to have been annexed or attached thereto, the foregoing rules, orders, and instructions as to wills bearing date since the 31st December, 1837, will apply.

Re-publication by Codicil.

32. A will made before the 1st January, 1838, is republished by a subsequent codicil thereto duly executed.

As to Letters of Administration.

33. The duties of the district registrar in granting letters of administration are in many respects the same as in cases of probate. In both cases he must ascertain the time and place of the deceased's death, and the value of the property to be covered by the grant, and see that the applicant has been sworn as required by statute 55 Geo. 3, c. 184.

Notice to other Next of Kin.

34. Where administration is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the district registrar may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin.

Limited Administrations.

35. Limited Administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge.

36. No person entitled to a general grant of administration of the personal estate and effects of the deceased, will be permitted to take a limited grant, except under the direction of the judge.

Administrations under Section 73.

37. Whenever the Court under sec. 73 appoints an administrator other than the person who, prior to the Court of Probate Act, 1857, would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration, and in the administration bond.

Grants to an Attorney.

38. In the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney, acting under a power of attorney.

Grants of Administration to Guardians.

39. Grants of administration may be made to guardians of minors and infants for their own use and benefit, and elections by minors of their next of kin or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with.

40. In all cases of infants (*i.e.*, under the age of seven years) a guardian must be assigned by order of the judge or of one of the registrars of the principal registry; the registrar's order is to be founded on an affidavit showing that the proposed guardian is either de facto next of kin of the infants, or that their next of kin de facto has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship.

41. Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them, by order of the judge or a registrar of the principal registry, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge or of a registrar of the principal registry.

42. In all cases where grants of administration are to be made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the High Court of Chancery, or other competent Court, or are the testamentary guardians of the minors or infants.

Administrator's Oath.

43. The oath of administrators, and of administrators with the will, is to be so worded as to clear off all persons having a prior right to the grant, and the grant is to show on the face of it how the prior interests have been cleared off, and is to set forth, when the fact is so, that the party applying is the only next of kin, or one of the next of kin, of the deceased. In all administrations of a special character the recitals in the oath and in the letters of administration must be framed in accordance with the facts of the case.

Administration Bonds.

44. Administration bonds are to be attested by an officer of the principal registry, by a district registrar or his chief clerk, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95 ; but in no case are they to be attested by the proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal or district registry, must be attested by the same person who administers the oath to such administrator or administratrix.

45. In ordinary cases two sureties are to be required, but when the property is bonâ fide under the value of fifty pounds one surety only may be taken to the administration bond.

46. In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant. The alleged value of such property is to be verified by affidavit if required.

47. The administration bond is, in all cases of limited or special administrations, to be prepared in the district registry.

48. The district registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons.

Justification of Sureties.

49. When any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the registry, and the sureties to the administration bond must justify.

GENERAL RULES AND ORDERS FOR THE DISTRICT REGISTRARS.

Last Wills.

50. The district registrar is not, in any case in which a will apparently duly executed has been produced to him for probate or for administration with the will annexed, to grant probate of any former will, or administration with any former will annexed, or administration to the deceased, as having died intestate, without an order of the judge or of one of the registrars of the principal registry, showing that the last will is not entitled to probate. In the absence of such order the district registrar is to communicate with the registrars of the principal registry.

Time of Issuing Grant.

51. No probate or letters of administration, with the will annexed, shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of one of the registrars of the principal registry.

52. No letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the judge, or by order of one of the registrars of the principal registry.

53. In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified by the practitioner to the district registrar. Should the certificate be unsatisfactory, or the case be one of personal application, the district registrar is to require an affidavit, or to communicate with the registrars of the principal registry.

Filling up Grant.

54. Every grant of probate or of letters of administration issued from a district registry is to be filled up therein, and any former grant which has been revoked or has ceased is to be cleared off therein.

Notices of Applications.

55. Notices of applications for grants of probate or administration, with the will annexed, transmitted by the district registrar to the registrars of the principal registry, are to contain (in addition to the particulars specified in sec. 49 of the Court of Probate Act, 1857), an extract of the words of the will or codicil by which the applicant has been appointed executor, or of the words (if any) upon which he founds his claim to such administration.

56. Notices of application are to set forth the names and interests of all persons who, according to the practice of the Court, would have a prior right to the applicant, and to show how such prior right is cleared off. In case the persons or any of them have renounced, the date of his or her renunciation must be stated. If the applicant claims as the representative of another person, the date and particulars of the grant to him must appear.

Oath of Executors and Administrators.

57. The usual oath of administrators, as well as that of executors and administrators with the will, is to be subscribed and sworn by them as an affidavit, and then filed in the registry.

58. The draft oaths to lead grants of special or limited probate or administration with or without the will annexed are to be transmitted by the district registrar to the registrars of the principal registry, in order to their being settled, and no special or limited grant is to issue until the draft oath to lead the same has been settled by a registrar of the principal registry.

Identity of Parties.

59. The district registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant.

Testamentary Papers to be marked.

60. Every will, copy of a will, or other testamentary paper, to which an executor or administrator with the will is sworn, must be marked by such executor or administrator and by the person before whom he is sworn.

Renunciations.

61. No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character.

Revocation and Alteration of Grants.

62. Grants of probate or letters of administration can only be revoked by order of the judge or of one of the registrars of the principal registry.

63. No grant of probate or letters of administration is to be altered by a district registrar, without an order of a registrar of the principal registry having been previously obtained. In case the name of the testator or intestate requires alteration, the notice of application must be renewed, and the alteration ordered is not to be made by the district registrar until the usual certificate on such notice has been received from the principal registry.

Affidavits.

64. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent making it is to be inserted therein.

65. In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

Amend rule of 26th May, 1882.

66. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure shall be filed or made use of, unless the interlineation or alteration other than by erasure is authenticated by the initials of the officer taking the affidavit, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialled in the margin of the affidavit by the officer taking it.

[Rules 65 and 66 of 1863 read as follows :—

In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

No affidavit will be admitted in any matter in the Court of Probate by which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure.]

67. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the district registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the person making the same and that such person seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature, in the presence of the district registrar, commissioner, or other authority before whom the affidavit was made.

68. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before a partner or clerk of his proctor, solicitor, or attorney.

69. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

70. In every case where an affidavit is made by a subscribing witness to a will or codicil, such subscribing witness shall depose as to the mode in which the said will or codicil was executed and attested.

71. The district registrars are not to allow any affidavit to be filed (unless with the concurrence of the registrars of the principal registry) which is not fairly and legibly written, or in which there is any interlineation, the extent of which at the time the affidavit was made is not clearly shown by the initials of the commissioner or other person before whom it was sworn.

Caveats.

72. Any person intending to oppose the issuing of a grant of probate or letters of administration must, either personally or by his proctor, solicitor, or attorney, enter a caveat in the principal registry, or in the proper district registry.

73. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months only, and then expire and be of no effect ; but caveats may be renewed from time to time.

74. The district registrar shall, immediately upon a caveat being entered, send a copy thereof to the registrars of the principal registry, and also to the registrar of any other district in which it is alleged the deceased resided at the time of his death, or in which he is known to have had a fixed place of abode at the time of his death.

75. No caveat shall affect any grant made on the day on which the caveat is entered, or on the day on which notice is received of a caveat having been entered in the principal registry.

76. Caveats shall be warned from the principal registry only.

77. After a caveat has been entered, the district registrar is not to proceed with the grant of probate or administration to which it relates until it has expired or been subducted, or until he has received notice from the principal registry that the caveat has been warned and no appearance given, or that the contentious proceedings consequent on the caveat have terminated.

78. The further rules in respect to caveats will be found in the "Rules, Orders, and Instructions for the Registrars of the Principal Registry."

Citations and Subpœnas.

79. Citations and subpœnas can be issued from the principal registry only, and the rules applicable to them will be found in the "Rules, Orders, and Instructions for the Registrars of the Principal Registry."

80. No grants are to issue from a district registry after a citation without the production of an office copy of the decree or order of the judge or of one of the registrars of the principal registry authorising the same.

Blind and Illiterate Testators.

81. The district registrars are not to allow probate of the will, or administration with the will annexed, of any blind or obviously illiterate or ignorant person, to issue unless they have previously satisfied themselves that the said will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents. When such information is not forthcoming, the district registrars are to communicate with the registrars of the principal registry.

Alterations in Grants, etc.

82. Whenever the value of the personal estate and effects of a deceased person is re-sworn under a different amount, or any alteration is made in a grant, or a renunciation is filed, notice of such re-swearing, alteration, or renunciation is without delay to be forwarded by the district registrar to the registrars of the principal registry, but no fee shall be payable in respect of any such notice.

Lists of Grants.

83. The lists of grants of probate and administration required to be furnished by the district registrars under sec. 51 of the "Court of Probate Act, 1857," are to be furnished on the first and every other Thursday in the month, and are to contain the name of the registry in which each grant was made; and the Christian and surname of each testator and intestate.

84. Every such list of grants furnished by the district registrar is to be accompanied by a copy of the record of each grant mentioned in it. The record, besides stating that the necessary particulars of the grant to which it refers, is to contain the place and time of death of the testator or intestate ; the names and description of each executor or administrator ; the date of each grant ; and the sum under which the value of the personal estate and effects is sworn, and in cases of administrations the names and descriptions of the sureties.

85. Within four days from the end of each month each district registrar is to forward to the principal registry a return, arranged alphabetically, of all grants of probate or letters of administration passed at his district registry during the preceding month.

Grants for Property in the United Kingdom, etc.

86. Whenever a grant of probate or of letters of administration is made under statute 21 & 22 Vict. c. 56, for the whole personal estate and effects of a deceased within the United Kingdom, it must appear by the affidavit made for the inland revenue office that the testator, or intestate, died domiciled in England, and that he was possessed of personal estate in Scotland other than that excluded by 22 & 23 Vict. c. 80, and the value of such personal estate must be separately stated in such affidavit. In case any portion of the personal estate be in Ireland, a separate affidavit and schedule must also be filed. Upon all such grants a note or memorandum must also be written and signed by the district registrar to the effect that the testator or intestate died domiciled in England.

87. Grants of probate and administration made in Ireland and confirmations granted in Scotland must be taken to the principal registry, and not to a district registry, to be sealed with the seal of the Court of Probate, in order to the same having force and effect in England.

Notices to Queen's Proctor.

88. In all cases where application is made for letters of administration (with or without a will annexed) of the goods of a bastard dying a bachelor or a spinster, or a widower or widow without issue, notice of such application is to be given to her Majesty's Procurator-General (or, in case the deceased died domiciled within the Duchy of Lancaster, to the solicitor for the Duchy in London), in order that he may determine whether he will interfere on the part of the Crown ; and no grant is to be issued until the officer of the Crown has signified the course which he thinks proper to take.

89. In the case of persons dying intestate without any known relation, a citation must be issued from the principal registry against the next of kin, if any, and all persons having or pretending to have any interest in the personal estate of the deceased. See the "Rules, Orders, and Instructions for the Registrars of the Principal Registry."

Transmission of Papers.

90. When motions are to be made before the judge in Court, with regard to any application for probate or administration at a district registry, the district registrar is to transmit all original papers and documents to the principal registry, and the same, after the directions of the Court have been taken, will, on the application of the parties, be returned to the district registrar together with an office copy of the decree of the judge.

91. Original papers are also to be forwarded to the principal registry whenever an inspection of them is necessary, in order to enable the registrars to answer the questions submitted to them by the district registrar.

92. Original papers and documents may be transmitted by the district registrars to the registrars of the principal registry through the post office. Such letters or packets are to be superscribed with the words, "On Her Majesty's Service," and may be registered, if thought necessary.

Probate Copies of Wills.

93. The district registrar is to take care that the copies of wills and affidavits to be annexed to the probate or letters of administration are fairly and properly written, and is to reject those which are otherwise.

Office Copies.

94. Office copies of wills, and other documents furnished in a district registry, will not be collated with the original will or other document, unless specially required. Every copy so required to be examined, shall be certified under the hand of the district registrar to be an examined copy.

95. The seal of the Court is not to be affixed to any office copy of a will, or other document, unless the same has been certified to be an examined copy.

Attendances with Documents.

96. If a will or other document filed in a district registry is required to be produced at any place within three miles of that registry, application must be made for that purpose not later than the day previously to that named for its production.

97. If a will or other document filed in a district registry is required to be produced at any place beyond the above distance, application must be made for that purpose in sufficient time to allow for making and examining a copy of such will or other document to be deposited in its place.

Doubtful and Difficult Cases.

98. The district registrars are in every case of doubt or difficulty to communicate with the registrars of the principal registry.

TAXING BILLS OF COSTS.

99. All bills of costs are to be referred to the registrars of the principal registry for taxation, and no special order shall be required for the purpose.

100. The rules in respect of taxing bills of costs will be found in the "Rules, Orders, and Instructions for the Registrars of the Principal Registry."

Certificate under Customs and Inland Revenue Act, 1881, *s.* 30.

Additional rule of 1st August, 1894.

101. The certificate required to be given by the proper officer of the Court under sec. 30 of the Customs and Inland Revenue Act, 1881, shall for the purposes of the Finance Act, 1894, and subject to any necessary variations and modifications, which the officer of the Court is hereby authorised at his discretion to make, be in the form following:—

> And it is hereby certified that an affidavit for inland revenue has been delivered, wherein it is shown that the gross value of the personal estate of the said deceased within the United Kingdom (exclusive of what the deceased may have been possessed of or entitled to as a trustee and not beneficially) amounts to £ , and that it appears by a receipt signed by an inland revenue officer on the said affidavit that £ for estate duty and interest thereon has been paid, the duty being charged at the rate of £ per cent.

Re-sealing English Grants in Ireland.

Additional rule of 4th December, 1896.

102. "In any case in which it is intended to apply for the resealing in Ireland of any grant of probate or letters of administration made in the Probate Division of the High Court of Justice in England, the executor or administrator may deposit in the principal or district probate registry where the grant has been made a copy of such grant of probate or letters of administration, together with the original and any certificate or certificates that may be required, and the fees payable in Ireland in respect of such re-sealing, and the registrar shall transmit by post the documents so deposited, together with such fees to the registrar of the principal probate registry in Ireland, for the purpose of such grant being re-sealed under the provisions of 20 & 21 Vict. c. 79, sec. 94."

Land Transfer Act, 1897.

Additional rule of 20th November, 1897.

103. "All rules, orders, and instructions and the existing practice of the Court with respect to non-contentious business shall so far as the circumstances of each case will allow be applicable to grants of each probate and administration made under the authority of the Land Transfer Act, 1897."

RULES, ORDERS, AND INSTRUCTIONS

AS TO

PERSONAL APPLICATIONS

FOR GRANTS OF PROBATE OR LETTERS OF ADMINISTRATION.

1. Persons wishing to obtain grants of probate or letters of administration without the intervention of a proctor, solicitor, or attorney, must apply in person at the department for personal applications, and not by letter.

2. No such application will be received through an agent of any kind (whether paid or unpaid).

3. The applications of parties who are attended by a person acting or appearing to act as their adviser in the matter will not be entertained.

4. All fees are to be paid in advance in Probate Court stamps.

5. Applications which have in the first instance been made through a proctor, solicitor, or attorney at the principal registry, or at a district registry, cannot be transferred to this department.

6. Applications for grants of probate or administration in cases which have already been before the Court (on motion or otherwise) will not be entertained at this department, but must be made through a proctor, solicitor, or attorney.

7. Whenever it becomes necessary, in the course of proceeding with an application which has been entertained at this department, to obtain the directions of the Court, the application will not be proceeded with, but must be placed in the hands of a proctor, solicitor, or attorney.

8. The papers necessary to lead the grant applied for will be prepared in this department. An applicant is, however, at liberty to bring such papers, or any of them, filled up, but not sworn to, and the same, if correct, may be received (the usual fee for perusal being charged). All further papers which may be required will be drawn in this department. Testamentary papers once deposited in this department will not be given out unless under special circumstances, and by permission of one of the registrars.

9. When it is necessary to administer an oath or take an affirmation, the party shall be sworn or affirmed before some proper authority of the principal registry, or of a district registry, unless otherwise permitted by one of the registrars.

10. Every applicant for a first grant of probate or letters of administration must produce a certificate of the death or burial of the deceased, or give a reason to the satisfaction of one of the registrars for the non-production thereof.

11. Every applicant must be prepared with a reference to some person of position of character, to establish his or her identity.

12. The engrossments of wills and testamentary papers will be made in the registry.

13. Every applicant for a grant of probate or letters of administration shall give under his or her hand a schedule of the property to be affected by the grant in the form hereunto annexed, marked A. (The necessary forms will be provided in the registry.)

14. Legal advice is not to be given to applicants, either with respect to the property to be included in the above-mentioned schedule, or upon any other matter connected with the application, and the clerks in this department are only to be held responsible for embodying in a proper form the instructions given to them, but they will, as far as practicable, assist applicants by giving them information and directions as to the course which they must pursue.

15. A receipt or acknowledgment of each application will be handed to the applicant, and the production of such receipt will be required of the person who attends to obtain the grant when completed.

16. No clerk or officer of this department is to become surety to any administration bond.

17. All administration bonds in cases of personal applications are to be executed in this department, or in a district registry ; if executed in this department the bond must be attested by the chief clerk or senior clerk in attendance.

PART II.—CONTENTIOUS BUSINESS.

RULES AND ORDERS

FOR HER MAJESTY'S COURT OF PROBATE,

Made under the Provisions of the Statutes 20 *&* 21 *Vict. c.* 77, *and* 21 *&* 22 *Vict. c.* 95,

IN RESPECT OF

CONTENTIOUS BUSINESS.

[N.B.—These rules are only in force so far as they have not been altered or annulled by the Rules of the Supreme Court (see ante, p. 568).]

1. All rules and orders heretofore made and issued in respect of CONTENTIOUS business shall be repealed on and after the 1st day of September, 1862, except so far as concerns any matters or things done in accordance with them prior to the said day.

2. The following rules and orders in respect of contentious business shall take effect on and after the 1st day of September, 1862.

CONTENTIOUS BUSINESS.

3. All proceedings in the Court of Probate or in the registries thereof in respect of business not included in the Court of Probate

Act, 1857, under the expression "Common Form Business," except the warning of caveats, shall be deemed to be contentious business.

Parties to Causes.

4. Executors or other parties who, previously to the passing of the Court of Probate Act, 1857, might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities, and effect as heretofore.

5. Next of kin and others who, previously to the passing of the said Act, had a right to put executors or parties entitled to adminsitration with will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore.

6. Parties who previously to the passing of the said Act had a right to intervene in a cause may do so, with leave of the judge or one of the registrars, obtained by order on summons, subject to the same limitations and the same rules with respect to costs as heretofore.

Caveats.

7. Caveats may be entered in the principal registry of the Court of Probate or in a district registry thereof; if in the principal registry the person entering the caveat must insert the name of the deceased in the index to the caveat book.

8. A caveat shall bear date on the day it is entered, and shall remain in force for the space of six months, and then expire and be of no effect, but may be renewed from time to time.

9. Caveats shall be warned from the principal registry. The warning is to be served by leaving the same or a true copy thereof at the place mentioned in the caveat as the address of the person who entered it.

10. It shall be sufficient for the warning of a caveat that a registrar send by the public post a warning signed by himself, and directed to the person who entered it, at the address mentioned in it.

11. The warning to a caveat is to state the name and interest of the party on whose behalf the same is issued, and if such person claims under a will or codicil, is also to state the date of such will or codicil, and must be accompanied by an address within three miles of the General Post Office at which any notice requiring service may be left. The form of warning will be supplied in the registry.

12. Upon an appearance being entered in answer to the warning of a caveat, the matter shall be entered as a cause in the Court book, and the contentious business shall thereupon be held to commence, and the expenses of the entry of such caveat and the warning thereof shall, upon taxation, be considered as costs in the cause.

Citations.

13. Citations can only be extracted from the principal registry, and no citation is to issue under seal until an affidavit in verification of the averments it contains has been filed in the registry.

14. When a party proposes to prove a will or codicil in solemn form of law, and no caveat has been entered, or a caveat has been entered and no appearance given to the warning thereof, the contentious business shall be held to commence with the extracting of a citation in the Forms Nos. 1 and 2, or in some similar form.

No caveat is required in a citation to see proceedings.

Citations are no longer required.

15. Before a citation is signed by the registrar a caveat shall be entered against any grant being made in respect of the estate and effects of the deceased to which such citation relates, and notice thereof shall be sent to the registrar of any district in which the deceased appears to have had a residence at the time of his death. Such caveat is to be renewed from time to time, so as to be kept in force so long as the proceedings arising from the service of the citation are pending. [This rule is not to apply to citations to exhibit an inventory, and to render an account, nor to citations to show cause why a bond should not be assigned in order to its being enforced against the sureties.]

16. Citations to see proceedings may be extracted from the registry, on the application of any party to the cause.

Parchment is no longer required.

17. Every citation shall be written or printed on parchment, and the party extracting the same, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, a form of which is given, marked No. 5, to the registry, and there deposit the præcipe, and get the citation signed and sealed. The address given in the præcipe must be within three miles of the General Post Office.

18. Citations are to be served personally when that can be done, the party cited being resident in Great Britain or Ireland, but if personal service cannot be effected the direction of the judge or registrars as to the mode of service must be obtained. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing such party the original, if required by him so to do.

19. Citations may be served upon parties resident out of Great Britain and Ireland by the insertion of the same or of an abstract thereof, settled and signed by one of the registrars, as an advertisement, in such of the morning and evening London newspapers, and if necessary in such local newspapers, and at such intervals as the judge or a registrar may direct: Provided that in any case the judge or a registrar may direct a citation to be served personally. If the party cited be abroad, having an agent resident in England, such agent must be served with a true copy of the citation.

20. Before a party can proceed after the service of a citation an appearance must have been entered by or on behalf of the party cited, or an affidavit of personal service, and of non-appearance must, together with the citation, have been filed in the registry, or if personal service has not been duly effected, the order of the judge, or of one of the registrars in his absence, founded on an affidavit, and giving leave to proceed, must have been obtained. In case the citation has been advertised, the newspapers containing the advertisement, together with the citation and an affidavit of non-appearance, must be filed in the registry.

21. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

22. If contentious proceedings arise from the service of a citation, the expense of the citation and service thereof shall, upon taxation, be considered as costs in the cause.

Suits in Formâ Pauperis.

23. Any person desirous of prosecuting a suit in formâ pauperis is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

24. No person shall be admitted to prosecute a suit in formâ pauperis without the order of the judge ; and to obtain such order, the case laid before counsel, and his opinion thereon, with an affidavit of the party, or of his or her proctor, solicitor, or attorney that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit by the party applying that he or she is not worth £25 after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

25. Where a pauper omits to proceed to trial, pursuant to notice, he or she may be called upon by summons to show cause why he or she should not pay costs, though he or she has not been dispaupered, and why all future proceedings should not be stayed until such costs are paid.

Appearances.

26. All appearances are to be entered in the principal registry in a book provided for the purpose, and kept by the clerk of the papers. The entry must set forth the interest which the person on whose behalf it is entered has in the estate and effects of the deceased.

27. The entry of the appearance of a party shall be accompanied by an address within three miles of the General Post Office (*a*).

Service of Pleadings, etc.

28. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and orders, at the address furnished as aforesaid by the plaintiff and defendant respectively.

Default.

29. In case the party cited does not appear within the time limited in the citation, the cause shall proceed in default ; nevertheless the

(*a*) Now Central Hall of Royal Courts of Justice.

party cited may enter an appearance at any time before a proceeding has been taken in default, or afterwards by leave of the judge or of one of the registrars.

Affidavits as to Scripts.

30. In testamentary causes the plaintiff and defendant, within eight days of the entry of an appearance on the part of the defendant, are respectively to file their affidavits as to scripts, whether they have or have not any script in their possession. A Form, No. 10, is given.

31. Every script which has at any time been made by or under the direction of a testator, whether a will, codicil, draft of a will or codicil, or written instructions for the same, of which the deponent has any knowledge, is to be specified in his affidavit of scripts; and every script in the custody or under the control of the party making the affidavit is to be annexed thereto, and deposited therewith in the registry.

32. No party to the cause, nor his proctor, solicitor, or attorney, shall be at liberty, except by leave of the judge, or of one of the registrars of the principal registry, to inspect the affidavit as to scripts, or the scripts annexed thereto, filed by any other party to the cause, until his own affidavit as to scripts shall have been filed.

The Declaration.

Declarations are no longer in use. The practice as regards pleadings is governed by the orders in the summons for directions.

33. In ordinary cases it belongs to the plaintiff to deliver the declaration, and to the defendant to deliver the plea; but the party propounding the alleged last will and testament of the deceased shall, in all cases, even if defendant in the suit, deliver the declaration, and the party opposing the same deliver the plea.

34. The declaration is to be delivered to the opposite party, and a copy thereof filed in the registry on one and the same day, and within one month from the entry of appearance by the defendant; but the party whose duty it is to bring in the declaration shall not be compelled to deliver it, or to file a copy thereof, until the expiration of eight days after the other party has filed his affidavit as to scripts.

35. In case of proving a will in solemn form of law, the party whose duty it is shall declare in the Form No. 6, or as near thereto as the circumstances of the case admit.

36. In case of proceedings in default, the plaintiff shall file his declaration in the registry within eight days from the last day allowed in the citation for the appearance of the defendant.

Interest of Party opposing Will.

See *supra.*

37. In a testamentary cause after delivery of the declaration the interest of the party to whom it has been delivered cannot be disputed by the party declaring, except by leave of the judge.

The Plea.

38. A party desirous of pleading must deliver his plea to the other party within eight days after the service of the declaration, and file a copy thereof in the registry on one and the same day, otherwise he will not be permitted to plead, except with the permission of the judge, or of the registrars of the principal registry in the absence of the judge. A form of plea is given, No. 8.

Pleadings are not filed in the registry until the case is entered for trial.

Further Pleadings.

39. Either of the parties may, within eight days of the service upon him of the last previous pleading, give in a replication, rejoinder, sur-rejoinder, rebutter, or demurrer, as he may be advised. The form of the declaration and plea will, it is presumed, be a sufficient guide as to the form of any further pleadings.

See note in rule 33.

General Rules as to Pleadings.

40. If one party propounds a will or testamentary script in his declaration, and the adverse parties, or either of them, desire to propound another will or testamentary script, the adverse parties must, with their pleas, deliver to the opposite party and file in the registry a declaration propounding such other will or testamentary script, to which the opposite party shall plead; and the form of declaration, and the pleadings and proceedings arising therefrom, shall be the same as are directed by the rules and orders of this Court in respect to the original declaration delivered and filed in the cause (*a*).

40A. The party or parties pleading to a declaration propounding a will or testamentary script shall be allowed to plead only the pleas hereunder set forth, unless by leave of the judge, to be obtained on summons.

(1.) That the paper writing bearing date, etc., and alleged by the plaintiff [*or* defendant] to be the last will and testament [*or* codicil to the last will and testament] of A. B., late of, etc., deceased, was not duly executed according to the provisions of the statute 1 Vict. c. 26, in manner and form as alleged.

(2.) That A. B., the deceased in this cause, at the time his alleged will [*or* codicil] bears date, to wit, on the, etc., was not of sound mind, memory, and understanding.

(3.) That the execution of the said alleged will [*or* codicil] was obtained by the undue influence of C. D. and others acting with him.

(4.) That the execution of the said alleged will [*or* codicil] was obtained by the fraud of C. D. and others acting with him.

(5.) That the deceased at the time of the execution of the said alleged will [*or* codicil] did not know and approve of the contents thereof.

Any party pleading the last of the above pleas shall therewith (unless otherwise ordered by the judge) deliver to the adverse parties and file in the registry particulars in writing, stating shortly the substance of the case he intends to set up thereunder; and no defence

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(*a*) Amended and additional rules and orders, dated 29th December, 1865.

shall be available thereunder which might have been raised under any other of the said pleas, unless such other plea be pleaded therewith (a).

[The original rule 40 of 1862 read as follows :—*If one party propound a will in his declaration, and the other party in his plea allege the existence of another will, each party may, with and subject to the permission of the judge, adduce proof at the trial or hearing of the cause of the validity of the will upon which he relies.*]

41. In all cases the party opposing a will may, with his plea, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the Prerogative Court.

No motion is now necessary.

42. Either party desiring to alter or amend a pleading must apply to the Court upon motion; but if the alteration or amendment required be merely verbal or in the nature of a clerical error it may be made by order upon summons.

43. When a pleading has been ordered to be altered or amended, the time for filing the next pleading shall commence from the time of the order having been complied with.

44. If a party in any cause fail to deliver, or file a copy of the declaration, plea, or other pleading, within the time specified in these rules, or within such extended time as may have been allowed, the party to whom such declaration, plea, or other pleading ought to have been delivered shall not be bound to receive it, and the copy of such declaration, plea, or other pleading shall not be filed, unless by direction of the judge, or by order of the registrars of the principal registry, obtained on summons. The expense of every application for such direction or order shall fall on the party who has caused the delay, unless the judge or registrars shall otherwise direct.

45. When in any cause a conditional order is made, the party entitled to proceed in default must, before he can take the next step, obtain an order of the registrars, or, if required, an order of the judge upon summons, or on motion in Court.

The Issue.

46. Within fourteen days after the delivery of the last pleading in the cause, the party who brought in the declaration is to deliver to the other parties in the cause the issue in the Form No. 11, or in a form as near thereto as the circumstances of the case will admit, but the issue is not to be filed.

See chapter on Summons for Directions.

The Mode of Trial.

47. The party who delivers the issue shall therewith give notice to the other parties to the cause, that, after the expiration of eight days, he intends on a day to be specified in the notice to apply to the

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(a) Amended and additional rules and orders, dated 29th December, 1865.

Court to try the questions at issue before itself, either with or without a jury, or to direct an issue to be tried before a judge of assize, as the case may be; and if he do not give such notice with the issue, or within sixteen days from the day on which the issue was delivered, the other party may give a similar notice to him. A form of notice, No. 12, is subjoined.

48. A copy of every such notice shall be filed in the registry with the case for motion as to mode of trial.

49. In each case the judge shall, after hearing the parties upon motion in Court, direct in what mode the cause shall be tried or heard.

See chapter on Summons for Directions.

The Record.

50. After the direction of the judge has been obtained as to the mode in which the cause is to be tried or heard, the party who delivered the declaration shall, within eight days, deposit the record of the cause in the registry. The record is to conclude with a statement of the mode in which the judge has directed the cause to be tried or heard, as in the Form No. 13.

51. In default of the appearance of defendants, being parties cited, a record, as in Form No. 14, or as near thereto as can be, shall be deposited in the registry.

Trial by Jury.

52. If the cause be directed to be tried by a jury, the questions at issue between the parties are to be prepared by the party declaring from the record, and settled by one of the registrars of the principal registry. A form is given, No. 15, and a copy of such questions so settled is to be served on all the other parties to the cause.

Questions are not now settled by the registrars except under special circumstances.

53. After the questions have been so settled, any party in the cause shall be at liberty to apply to the judge on summons to alter or amend the same, and his decision shall be final and binding on the parties.

Setting down the Cause for Trial or Hearing.

54. The party who has deposited the record shall set down the cause for trial or hearing, and upon the day on which he so sets it down shall give notice of his having done so to each party for whom an appearance has been entered; but if he delay setting down the cause for trial or hearing for the space of one month after the Court has directed the mode in which the questions at issue shall be tried or heard, either of the other parties may set the cause down for trial or hearing, and give a similar notice. A copy of every such notice shall be filed in the registry; and the cause, unless the judge shall otherwise direct, shall come on in its turn.

55. No cause is to be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the written consent of all parties to the suit, previously filed in the registry.

Demurrer.

No demurrer allowed now. See chapter on Pleadings.

56. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the judge without a jury.

The Hearing.

57. The hearing of the cause shall be conducted in Court, and the counsel shall address the Court, subject to the same rules and regulations as now obtain in the Courts of common law.

58. After the conclusion of the trial or hearing, the registrar shall enter on the record the finding of the jury, or the decision of the judge, in a form corresponding as near as may be with those given, Nos. 25 and 26, and shall sign the same.

New Trial.

See chapter on New Trial.

59. An application for a new trial of an issue tried before a jury may be made to the Court by motion within fourteen days from the day on which the issue was tried if the Court be then sitting; if not, on the first motion day after the expiration of the fourteen days.

60. An application for a re-hearing of a cause heard before the judge without a jury, and in which evidence has been given vivâ voce, may be made by motion within fourteen days from the day on which the same was heard, if the Court be then sitting; if not, on the first motion day after the expiration of the fourteen days.

Interest Causes.

61. In interest causes, as heretofore, each party shall be at liberty to deny the interest of the other; and in such cases both parties may, with and subject to the permission of the judge, adduce proof on one and the same trial of their interests respectively.

62. In interest causes the pleading of each party must show on the face of it that no other person exists having a prior interest to that of the claimant.

63. Forms of the declaration and plea in an interest cause are given, No. 7 and No. 9. (These forms are not now used.)

Proceedings by Petition.

Matters formerly done by petition are now heard by summons.

64. Any question arising in a cause, and not being one of interest, domicile, or other matter usually brought before the Court by declaration and plea, may be brought before the Court by petition.

65. The party desiring to proceed by petition is to give notice thereof in writing to all the other parties in the cause, and such notice is to set forth the question intended to be raised for the decision of the Court, and a copy of such notice is to be filed in the registry.

66. In proceedings by petition the plaintiff shall, within eight days after he has given notice, deliver his petition to the defendant, and file a copy thereof in the registry upon one and the same day.

67. The defendant shall, within eight days after the delivery of the petition, deliver his answer to the plaintiff, and file a copy thereof in the registry upon one and the same day; and the same course shall be pursued with respect to the reply, rejoinder, &c., until the petition is concluded.

Matters formerly done by petition are now heard by summons.

68. When the defendant raises the question to be heard by petition, and gives notice thereof to the plaintiff, the plaintiff shall, within eight days from the receipt of such notice, file a petition; otherwise the defendant shall be at liberty to do so.

69. Both plaintiff and defendant shall, within eight days from the day upon which the petition is concluded, file in the registry such affidavits and other proofs as may be necessary in support of their several averments therein. A form of petition is given, No. 28.

70. After the time for filing the affidavits and other proofs has expired, the petitioner is to set down the petition for hearing in the same manner as a cause.

Subpœnas.

Now on paper.

71. Every subpœna shall be written or printed on parchment, and may include the names of any number of witnesses. The party, or his proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there get it signed and sealed, and deposit the præcipe.

Admission of Documents.

72. Any party in a cause may call upon the other party or parties, by notice in writing in the form given, No. 20, to admit any document, saving any just exceptions; and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial or hearing the judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed as costs in the cause except in cases where the omission to give the notice was, in the opinion of the registrar, a saving of expense.

Production of Wills, etc.

73. Applications for an order for the production of papers or writings purporting to be testamentary, may be made to the judge, by motion or by summons when a suit is pending, and by motion upon affidavit when no suit is pending. If it can be shown that a testamentary paper is in the possession, within the power, or under the control of any person, a subpœna for the production of the same may be obtained by a registrar's order, founded on an affidavit, Forms of subpœnas applicable to these cases are given, Nos. 21 and 22, and forms of præcipe, Nos. 23 and 24.

Guardians to Minors.

74. A minor may elect a guardian for the purpose of carrying on, defending, or intervening in a suit, in the same manner and subject to the same rules as in respect of non-contentious business, and without having such guardian assigned to him; but guardians are to be

assigned to infants (under the age of seven years) for the above purposes by the judge, or by an order of one of the registrars, founded on an affidavit to the effect required for such assignment in non-contentious business.

Pencil Writing on Will, etc.

75. When any pencil writing appears on a will, script, or other document filed in the registry, a fac-simile copy of the will, script, or other document, or of the pages or sheets thereof, containing the pencil writing, must also be filed with those portions written in red ink which appear in pencil in the original. Such copy must be examined by an examiner in the registry.

Inventories.

76. In contentious business, inventories, and not merely declarations of the personal estate and effects of the deceased, are to be filed, unless by order of the judge or of a registrar.

Notices.

77. All notices required by these rules, or by the practice of the Court, are to be in writing.

Real Estate.

78. Any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the judge, or to a registrar in his absence, for an order authorising him to cite the heir or heirs-at-law, or other person or persons having or pretending interest in such real estate, to see proceedings; and the judge or registrar on being satisfied by affidavit that the will in question does affect or purport to affect the real estate, will make an order authorising the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid: Provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires.

Receiver of Real Estate.

79. A receiver of real estate pending suit is to give bond in the form given, No. 29, or in a form as near thereto as the circumstances of the case will admit of, with two sureties, and in a penalty of such an amount as may be directed by the judge.

Affidavits.

80. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every person making an affidavit is to be inserted therein.

81. In every affidavit made by two or more persons, the names of the several persons making it are to be written in the jurat.

82. No affidavit will be admitted in any matter depending in the Court of Probate any material part of which is written on an erasure, or in the jurat of which there is any interlineation or erasure.

83. When an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other person before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also that such party made his or her mark thereto, or wrote his or her signature thereto, in the presence of the registrar, commissioner, or other person before whom the affidavit was made.

84. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor, solicitor, or attorney, or before the partner or clerk of his proctor, solicitor, or attorney.

85. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules in respect of taking affidavits which are applicable to those in whose stead they are acting.

86. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used in Court, unless by leave of the judge.

Appeals.

87. Application for leave to appeal against any interlocutory decree or order of the Court of Probate must be made within a month of the delivery of the decree or order appealed from, or within such extended time as the judge shall direct, and notice of such application must be given to the party in whose favour such order or decree has been made, and filed in the registry. A form of notice is given, No. 29.

See chapter on Appeals.

88. Parties may proceed to carry into effect the decision of the Court of Probate, notwithstanding any notice of appeal, or of application for leave to appeal, unless the judge shall otherwise order; and the judge may order the execution of his decree or order to be suspended, upon such terms as he sees fit.

Time fixed by these Rules.

89. The judge shall in every case in which a time is fixed by these rules for the performance of any act, have power to extend the same to such time, and with such qualifications and restrictions, and on such terms, as to him may seem fit.

90. To prevent the time fixed for the performance of any act from expiring before application can be made to the judge for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the judge shall next sit in chambers, or in Court to hear motions.

91. The time fixed in these rules for bringing in pleadings and for other proceedings shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

Taxing Bills of Costs.

92. All bills of costs in contentious business are referred to the registrars of the principal registry for taxation, and may be taxed by them without any special order for that purpose. Such bills are (unless by leave of a judge or a registrar) to be filed in the registry two days at least before the day appointed for the taxation. An appointment for taxation will be made at the time of filing the bill.

93. The party who has obtained an appointment to tax his bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at the same time deliver to him or them a copy of the bill to be taxed.

94. When an appointment has been made by a registrar of the principal registry for taxing any bill of costs, and any of the parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill, after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

95. If more than one-sixth is deducted from any bill of costs taxed as between practitioner and client, no costs incurred in the taxation thereof shall be allowed as part of such bill.

Accounts of Administrators and Receivers pending Suit.

96. Every administrator pendente lite and receiver of real estate shall exhibit an inventory and render an account of the property of the deceased which comes to his hands, and the accounts of every such administrator and receiver shall be referred to the registrars of the principal registry for investigation and report, before the same are allowed by the Court, unless the judge shall otherwise direct; and the foregoing rules and orders respecting the taxation of costs shall, so far as the same are applicable, be observed with respect to the investigation of such accounts, and any other accounts referred to the registrars for examination.

Paying Money out of Court.

The Rules of the High Court now apply.

97. Persons applying for payment of money out of the registry must give forty-eight hours' notice of such application to the clerk of the papers. Such notice is to be in writing, and to set forth the day on which the money applied for was paid into the registry—the minute entered on receiving the same—the date and particulars of the order for payment to the applicant—and if the same be in payment of costs, the date of filing the bill for taxation and of the registrar's certificate. During the summer vacation money can only be paid out on certain days, to be fixed by the registrars, notice whereof will be given in the registry.

Summonses (*a*).

98. A summons may be taken out by any person in any matter, whether contentious or non-contentious, in which there is no rule or practice requiring a different mode of proceeding.

99. A printed form must be obtained and filled up with the object of the summons, and a proper fee stamp affixed. It must then be taken to the clerk of the papers, who will insert in the blank left in the printed form the time when the summons is to be made returnable, and get the summons signed by a registrar.

See practice in chapter on Summons.

100. The clerk of the papers is then to enter the name of the cause or matter and of the agent taking out the summons in the summons book, and return the summons (with the stamp cancelled), signed, to the applicant, who is to serve a copy on the party summoned. This copy must be served on the party summoned one clear day at least before the summons is returnable and before 7 p.m. On Saturdays the copy of the summons is to be served before 2 p.m.

101. On the day and at the hour named in the summons the party issuing the same is to present himself with the original at the judge's chambers.

102. Both parties will be heard by the judge, who will make such order as he may think fit, and a note of such order will be made by the registrar in the summons book.

103. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit.

104. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion.

105. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the opposite party, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy. The clerk of the papers before giving out the order is to see that the proper stamp has been affixed to it, and is to cancel such stamp.

106. If a summons is brought to the clerk of the papers, with a consent to an order endorsed thereon, signed by the party summoned, or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the judge; provided that the order sought is, in the opinion of the registrars, one which, under the circumstances, would be made by the judge.

Writs of Attachment and other Writs.

107. Applications for writs of attachment, and also for writs of fieri facias and of sequestration, must be made to the judge by motion in Court (*b*).

Motions are only required for writ of attachment.

(*a*) See rules 133—136, *post*.

(*b*) Additional rules and orders, dated December 29th, 1865.

108. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the registry, with an office copy of the order, and, when approved and signed by one of the registrars, shall be sealed with the seal of the Court, and it shall not be necessary for the judge to sign such writs (*a*).

109. Any person in custody under a writ of attachment may apply for his or her discharge to the judge if the Court be then sitting; if not, then to one of the registrars, who for good cause shown shall have power to order such discharge (*a*).

Service of Notices, etc.

110. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by the rules and orders of the Court are required to be given or delivered to the opposite parties in a cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required, at the address furnished by such parties respectively (*b*).

See practice in chapter on Motions.

111. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the other parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the judge, or of the registrars in his absence (*b*).

112. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded, on the application of the parties upon whom the notice should have been served; and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the judge shall otherwise direct (*b*).

113. When it is necessary to serve personally any order or decree of the Court, the original order or decree, or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the Commissioner or other person before whom the affidavit is sworn (*b*).

Change of Proctor, Solicitor, or Attorney.

A notice of change is now filed.

114. A party may obtain an order to change his or her proctor, solicitor, or attorney upon application by summons to the judge, or to the registrars in his absence (*b*).

115. In case the former proctor, solicitor, or attorney neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction and by order of the judge or of the registrars, proceed in the cause by the new proctor, solicitor, or attorney, without previous payment of such costs (*b*).

(*a*) Additional rules and orders, dated December 29th, 1865.

(*b*) Additional rules and orders, to take effect after March 2nd, 1874.

Order for the immediate Examination of a Witness.

116. Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the judge, or to one of the registrars in his absence, by summons, or if on behalf of a plaintiff proceeding in default of appearance of the parties cited or warned in the cause without summons before one of the registrars, who will direct the order to issue, or refer the application to the judge, as he may think fit (*a*).

117. Such witness shall be examined vivâ voce, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the judge or by the registrar to whom the application for the order is made (*a*).

118. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the judge or the registrar to whom the application is made for the order shall direct a shorter notice to be given (*a*).

Commissions and Requisitions for Examination of Witnesses.

119. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a plaintiff proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue, or refer the application to the judge, as he may think fit (*a*).

120. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by one of the registrars, or for want of agreement to be nominated by the registrar to whom the application is made (*a*).

121. The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court, and they or either of them may apply to one of the registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application, or refer the matter to the judge. Form of a commission and requisition is given in the Appendix, No. 31 (*a*).

122. Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the judge (*a*).

123. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars (*a*).

(*a*) Additional rules and orders, to take effect after March 2nd, 1874.

Cases for Motion.

124. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court; the proceedings already had in the cause, and the dates of the same; the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded (*a*).

125. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars (*a*).

126. On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion, and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion, must be also left in the registry; or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the judge (*a*).

127. Copies of any affidavits or documents to be read or used in support of a motion are to be delivered to the other parties to the suit who are entitled to be heard in opposition thereto (*a*).

As to Costs.

128. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor, or attorney of the party to whom such costs are to be paid may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or re-hearing shall have expired; or, in case a rule should have been granted, until the rule is disposed of, unless the judge shall, for cause shown, direct a more speedy taxation (*a*).

Review of Taxation.

129. Application for a review of taxation is to be made to the judge on summons (*a*).

Recovery of Costs.

130. Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days, unless a summons be taken out for a review of the taxation, in which case the order for payment shall be suspended until the summons is disposed of (*a*).

No committal now for non-payment of costs.

131. This order shall be served on the proctor, solicitor, or attorney of the party liable [or if it is desired to enforce the order by committal on the party himself], and if the costs be not paid within the seven days a writ of fieri facias or writ of sequestration or a writ of elegit shall be issued as of course in the registry, upon an affidavit of service of the order, and non-payment (*a*).

(*a*) Additional rules and orders, to take effect after March 2nd, 1874.

As to Subpœnas.

132. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness (*a*).

133. All summonses heretofore heard by the registrars at the principal registry in the absence of the judge shall hereafter be heard before one or more of the registrars at the principal registry during the period appointed for the sittings of the Court at Westminster, as well as in the judge's absence (*a*).

134. All rules and orders in respect to summonses now heard before the judge in chambers at Westminster shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the registrars at the principal registry (*b*).

135. The registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the judge (*b*).

136. Any person heard on the summons objecting to the order so issued under the direction of the registrars may, subject to any order as to costs, apply to the judge on summons to rescind or vary the same (*b*).

(*a*) Additional rules and orders, to take effect after March 2nd, 1874.

(*b*) Additional and amended rules and orders, dated March 1st, 1874.

APPENDIX IV.

INSTRUCTIONS AND MEMORANDA.

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MEMORANDA

FOR THE USE OF THE DISTRICT REGISTRARS.

AS TO FILLING IN OATH AND GRANT.

1. As a general rule the district registrars are to adopt the signature of a testator as his name, although it differ from the name as written in the heading of the will.

2. In case of a variance between the name of the testator in the heading of the will and the name as signed at the foot or end of it, and in case the former is the more correct, the testator should be described by the name he signs, the word "otherwise" followed by the name given him in the will being added.

3. If the testator's name is wrongly spelt in the will, and he signs his will by his initials or by a mark, he should be described in the probate by his correct name, the word "otherwise" followed by the name written in the will being added.

4. If the testator is described in the will as "the elder," but does not so subscribe himself, such description is not to be inserted in the probate.

5. If the testator is described in the will as "the younger," but does not so describe himself, he should, notwithstanding, be described in the probate as "the younger," or "heretofore the younger," as the case may be.

6. The testator's last place of residence, as stated in the will or codicil, should form part of his description in the oath and in the grant, and any previous or subsequent residence may be added,

provided that not more than three places of residence be inserted in the grant (*a*).

7. When there is but one executor or executrix named in the will, he or she should be described in the probate as "the sole executor" or "the sole executrix."

8. When there are more executors than one, if they are all females, they are to be described as "the executrixes." If they are all males, or partly males and partly females, they are to be described as "the executors." The expressions "joint executors" and "executor and executrix" should not be used.

9. If the name of an executor or executrix is misspelt in the will, the words "in the will written" should be added to his or her correct name, and if the two names be identical in sound, no proof of identity is required.

10. If an executor be wrongly described in the will as "the elder," or "the younger," or by a wrong Christian name, an affidavit is requisite in proof of the identity of the person intended to be named in the will with the executor applying for the grant, or to whom power to apply is to be reserved in the grant.

11. Whenever it appears from the contents of the will that an executor or executrix is related to the testator, as father, mother, grandfather, grandmother, son, daughter, grandson, grand-daughter, brother, sister, uncle, aunt, great-uncle, great-aunt, nephew, niece, great-nephew, great-niece, or as the son or daughter or connection of any relative or of any other person, he or she is to be so described in the probate.

12. Administrators are to be described as follows:—

A husband as "the lawful husband."

A wife as "the lawful widow and relict."

A father as "the natural and lawful father."

A mother as "the natural and lawful mother" and "next of kin."

A child as "the natural and lawful son" [or daughter] and "one of the next of kin" or "only next of kin."

A brother as "the natural and lawful brother."

A sister as "the natural and lawful sister."

If there be no parents living, the brother or sister are further to be described as "one of the next of kin," or the "only next of kin."

A nephew as "the lawful nephew" and "one of the" [or "only"] "next of kin."

A niece as "the lawful niece" and "one of the" [or "only"] "next of kin."

If a brother or sister should be living, and the nephew or niece being the child of the intestate's brother or sister who died in his lifetime takes the letters of administration, he or she is to be described as "one of the parties entitled in distribution."

Grandparents, grandchildren, cousins, etc., are to be described as "lawful."

(*a*) NOTE.—The last place of abode of the deceased (where a former address is also inserted) should appear first in the grant.

LAND TRANSFER ACT, 1897.

INSTRUCTIONS TO THE OFFICERS OF THE PRINCIPAL AND DISTRICT PROBATE REGISTRIES.

1. This Act comes into operation on the 1st January, 1898. Speaking generally, in cases of persons dying on or after the 1st January, 1898, a grant will be made sufficient in terms to cover real and personal estate.

2. It is considered that the term "estate" will be sufficient to express both real and personal estate, and in place of the words "the personal estate of," the following words will be inserted in the grant, oath, Act, and bond :—

> "All the estate which by law devolves to and vests in the personal representative of."

When the estate is mentioned more than once in a document, it will be sufficient on subsequent occasions to use the words "the said estate."

3. In the Act the footnotes will read as follows :—

> "Gross value of estate, £ .
> "Net value of personal estate, £ ."

4. There will be no addition to or alteration of the *ad valorem* fee on the grant, which will be charged as now upon the net personal estate only.

5. In the case of a grant made to an heir-at-law, the necessary evidence that the applicant's claim is well founded will usually appear in the oath, but need not be set out in the grant.

6. Grants to be made under sec. 1 (3) will be general in terms, and will not be limited to real estate.

8. As the grant will cover both real and personal estate, the bond will be conditioned for the due administration of both kinds of property, which will be described as in the grant, and the consequent additional penalty shall be double the gross annual value of the real estate of the deceased, which will appear in the account annexed to the Inland Revenue Affidavit.

LAND TRANSFER ACT, 1897.

ADDITIONAL INSTRUCTIONS TO THE OFFICERS OF THE PRINCIPAL AND DISTRICT PROBATE REGISTRIES.

1. If the deceased did not die possessed of any real estate, the Act does not apply. If it be necessary to clear off a prior right that would exist if there were real estate, it should be done by a statement in the oath (which should also be inserted in the grant) that "the deceased did not die possessed of real estate."

2. A residuary legatee and a residuary devisee are equally entitled to a grant.

3. Where there is a residuary devisee in trust he should be cleared off before a grant can be made to a residuary legatee, and where there is a residuary legatee in trust he should be cleared off before a grant can be made to a residuary devisee.

4. The next of kin and heir-at-law are equally entitled to a grant. [But see No. 8.]

5. If there be no executor or residuary legatee, a grant should not be made to a next of kin without clearing off the residuary devisee, and if there be no executor or residuary devisee, a grant should not be made to the heir-at-law without clearing off the residuary legatee.

6. A grant should not be made to the representative of a deceased residuary legatee without clearing off the residuary devisee.

7. The prior right of the husband or widow of an intestate to a grant is not affected by the Act.

8. Although the next of kin and heir-at-law are equally entitled to a grant, yet, in the case of the renunciation of the husband of an intestate, the heir-at-law should be cleared off before a grant is made to the next of kin who has no interest in the estate.

9. But on the renunciation of the widow of an intestate, it is not necessary to clear off the heir-at-law before making a grant to the next of kin.

10. On the renunciation of the husband of an intestate a grant should not be made to the husband's receiver in bankruptcy without clearing off the heir-at-law.

11. A grant should not be made to a person who (though not one of the next of kin) is entitled in distribution to the personal estate, without clearing off the heir-at-law as well as the next of kin.

12. A grant should not be made to the representative of a next of kin of an intestate without clearing off the heir-at-law.

13. Guardians of minors and infants are not entitled to a grant without clearing off all persons of age equally entitled with such minors and infants whether as interested in real or personal estate.

14. A grant will not be made to a person for the use of a lunatic without clearing off all other persons equally entitled with the lunatic whether as having an interest in real or personal estate.

15. A person acting under a power of attorney has the same equality and priority as the donor of the power would have if applying personally.

16. When a grant is made to an heir-at-law, his relationship to the deceased should not appear in the grant.

17. The value of any real estate in Scotland or Ireland accounted for in the Inland Revenue Affidavit should not be included in the oath or certificate on the grant.

18. Bonds are liable to duty (5*s.*) unless the gross value of the real and personal estate to be dealt with by the administrator does not exceed £100.

19. Where the gross value of the personal estate and the annual value of the real estate together do not exceed £50, one surety to the bond is sufficient, although the total gross values of the real and personal estate exceed that sum.

20. The foregoing instructions are to be considered provisional. Should any case arise in which a departure from them might seem to be expedient, such case should be referred to the registrars of the principal registry.

DEPOSITORY FOR WILLS OF LIVING PERSONS.

INSTRUCTIONS TO DEPOSITORS.

In pursuance of the provisions of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77, sec. 91), the Principal Probate Registry of the High Court of Justice, Somerset House, Strand, London, is the depository now provided for the wills of living persons, and testators are at liberty to deposit their wills and codicils therein, under the following regulations:—

1. The will or codicil to be deposited must be enclosed in a sealed envelope and delivered to one of the registrars of the Principal Probate Registry, either by the testator himself, or by some person specially authorised by him to deposit the same on his behalf.

2. The will or codicil so deposited will not be delivered up to any person, but must remain in the registry until after the testator's death, unless revoked by him in manner hereinafter mentioned.

3. In case the testator himself deposits his will or codicil, he will be required to sign his name, or acknowledge his signature, in the presence of the registrar, to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect :—

"This sealed packet contains the last will and testament [*or* codicil to the last will and testament, *or* last will and testament and codicil thereto], bearing date respectively [*here state the dates of all the papers enclosed*], of A. B., of etc., whereof C. D., of etc., and E. F., of etc., are appointed executors, and the same are brought into the Principal Probate Registry of the High Court of Justice by me for safe custody, there to remain deposited until after my decease, unless previously revoked by destruction in my presence, and by my direction." *The residences of the testator and of the executors should be set forth in this endorsement, and also the date of signature.*

4. In case the testator authorises some other person to deposit his will or codicil for him he will be required to subscribe his name in presence of an attesting witness to an endorsement on the envelope in which the will or codicil is enclosed, to the following effect :—

"This sealed packet contains the last will and testament [*or* codicil to the last will and testament, *or* last will and testament and codicil thereto] of me, A. B., of etc., whereof C. D., of etc., and E. F., of etc., are appointed executors, and I authorise G. H. to deposit the same for safe custody in the Principal Probate Registry of the High Court of Justice, there to remain deposited until after my decease, unless previously revoked by destruction in my presence and by my direction. (Signed) A. B. Witness, K. L." *The residences of the testator and of the executors, and the date of signature should be set forth in this endorsement.*

5. The packet containing the will or codicil must be accompanied by an affidavit (*a*) from the attesting witness to the effect that the signature of the testator to the above endorsement, witnessed by the deponent, is in the proper handwriting of such testator, and was by him signed in the deponent's presence on the day mentioned in the

(*a*) For form, see Appendix VII., Form 13.

endorsement, and that the signature "K. L." is in the proper handwriting of the deponent. An affidavit (*a*) will also be required from the person authorised to deposit the packet, to the effect that the sealed packet produced for the purpose of being deposited for safe custody in the Principal Probate Registry of the High Court of Justice, and on the back of which the deponent has signed his name, is at the time of making the affidavit precisely in the same state, plight, and condition as when received by the deponent from the hands of A. B. [the testator] on a day to be mentioned as that on which he received it.

6. The last-mentioned affidavit is to be sworn before the registrar to whom the packet containing the will or codicil is delivered.

7. A minute will be drawn up in duplicate by the registrar setting forth the production of the packet containing the will or codicil, and the affidavits (if any), and when and by whom the same were produced, and the declaration of the testator, or his agent, that he deposited the same in the registry for safe custody, also acknowledging the receipt of the packet. One copy of this minute will be delivered to the testator, or his agent, and the other retained in the registry (Forms of Minute: Appendix VII., Forms 135, 136).

8. The following fees will be payable in stamps :—

	£	*s.*	*d.*
For depositing the will and receipt for same ...	0	10	0
For drawing and entering minute of the registrar	0	2	6
For filing each affidavit	0	2	0

9. Envelopes for wills and codicil with necessary endorsements and forms of affidavits are to be had on application to the record keepers at the Principal Probate Registry.

10. Testators are at liberty to transmit their wills and codicils to the Principal Probate Registry, to be deposited there for safe custody, through the registrar of a district probate registry, who will send the same by the general post in a registered letter.

11. The affidavit of the person authorised by the testator to deposit his will or codicil will, in that case, be sworn before the district registrar to whom the packet containing them is delivered.

12. On production to the district registrar of the sealed packet containing the will or codicils to be deposited, and the affidavits (if any), he will draw up a certificate under his hand, setting forth when and by whom the same were produced to, and left with him, and file this certificate in his district registry, and he will transmit an office copy of the certificate, with the sealed packet and affidavits, and form of receipt, to the Principal Probate Registry.

13. The following fees will be payable to the district registrar in addition to the fees before mentioned :—

	£	*s.*	*d.*
For his certificate	0	2	6
For filing same	0	2	0
For office copy to transmit with the will or codicil	0	2	6
For receipt	0	1	0

(*a*) For form, see Appendix VII., Form 12.

14. In the event of a testator desiring to revoke a will deposited in the registry, he will be at liberty to do so upon his producing the original minute of the registrar handed to him on depositing the same, and such other proof of identity, as one of the registrars may deem necessary. The will to be revoked will not be delivered out of the registry, but will there be destroyed in the presence and by direction of the testator.

[For form of minute on opening will, see Appendix VII., Form 137 ; and on destruction thereof, Appendix VII., Form 138.]

INSTRUCTIONS WITH REGARD TO APPLICATIONS BY THE PUBLIC TRUSTEE.

1. For grants of letters of administration.

(a) When the Public Trustee applies for letters of administration, notice should be given by him to the widower, widow, heir-at-law, next of kin, and persons entitled in distribution or their representatives, as the case may be, or such of them as can, without delay, be communicated with, intimating that the application for the grant is being made by the Public Trustee, and that unless application for a grant be made, or a caveat be entered, within eight days from the date of the posting of the notices, he will proceed with his application without further notice; but if a person to whom notice is sent is not in the United Kingdom the period of eight days should be increased by the addition of time sufficient for a reply by return of post in ordinary course of postage from the place to which the notice is sent.

(b) If any application for a grant in preference to the Public Trustee be made, the question of preference may be dealt with by one of the registrars, or on an application to the Court.

(c) If a caveat be entered, the usual practice is to be followed.

(d) If it is suggested that there is a will, the Public Trustee must first cite the executors and the persons interested thereunder to propound the same.

2. When the Public Trustee applies for letters of administration with the will annexed, he must clear off executors in the usual way, and notice should be given, as above mentioned, to the residuary legatees and devisees, or their representatives, as the case may be, or, if there are no residuary legatees and devisees, to the person or persons entitled to the undisposed-of residue, or their representatives.

3. In the wording of the grant, the Public Trustee should be described as "the Public Trustee."

[NOTE.—It is considered that, if the Public Trustee take a grant as executor, he thereby continues the chain of executorship. Since June, 1908, grants to the Public Trustee have been allowed to issue from the district probate registries.]

RE-SEALING ENGLISH GRANTS IN IRELAND UNDER RULE 108 N.-C.B.

Applications to transmit an English grant to Ireland to be re-sealed may be made either by the executor or administrator, or by his solicitor.

The applicant must personally deposit at the Personal Application Department (Room 37)—

(1.) The original grant;

(2.) A copy of the grant fairly written with the number of folios (a folio contains 90 words) clearly marked outside the copy;

(3.) A *certificate* from the Inland Revenue Office that *estate duty* has been paid according to the value of the property in England and *Ireland*.

[NOTE.—This certificate is obtained either on a personal request or by letter addressed to the Secretary, Estate Duty Department, Somerset House.]

(4.) A *certificate* (in cases of grants of administration with or without will) that sufficient *bond* has been given to cover the personal estate in Ireland.

[NOTE.—Application for this certificate must be made at the Notation Department (Room 70), Principal Registry, accompanied by an affidavit made by the administrator. A form of the affidavit (Appendix VII., Form 29) can be obtained of the Messenger, Contentious Department (Room 43). The applicant must also look up the bond in the Public Hall. The fees in respect of this certificate are :—Filing affidavit, 2*s.* ; certificate, 2*s.* 6*d.* ; looking up bond, 1*s.*]

Upon presenting the documents at the Personal Application Department, the applicant must deposit postal orders for the amount of the fees payable in Ireland. Particulars of these fees will be furnished to the applicant by this department on the documents being left (see *post*, p. 960).

APPENDIX V.

FEES.

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PART I.—FEES IN NON-CONTENTIOUS BUSINESS.

FEES

TO BE TAKEN IN THE

PRINCIPAL REGISTRY OF THE COURT OF PROBATE

IN

NON-CONTENTIOUS BUSINESS.

[**NOTE.—This is the Table of the 2nd March, 1874, as altered and amended by subsequent orders.**]

PROBATES OR LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

Including double or cessate probates or letters of administration with will annexed, de bonis non or cessate, upon which stamp duty is payable in respect of the value of the personal estate of the testator.

If the personal estate is sworn to be under the value of—

	£	*s.*	*d.*
£5	0	1	0
20	0	1	0
100	0	1	0
200	0	3	0
300	0	7	6
450	0	12	0
600	0	16	6
800	1	2	6
1,000	1	13	0
1,500	2	5	0
2,000	3	0	0
3,000	3	15	0
4,000	4	10	0
5,000	4	15	0
6,000	5	0	0
7,000	5	5	0
8,000	5	10	0
9,000	5	15	0
10,000	6	0	0
12,000	6	5	0
14,000	6	10	0
16,000	6	17	6
18,000	7	5	0
20,000	7	12	6
25,000	8	2	6

If the personal estate is sworn to be under the value of—

	£	*s.*	*d.*
£30,000	8	15	
35,000	9	7	6
40,000	10	6	3
45,000	11	5	0
50,000	12	3	9
60,000	13	2	6
70,000	15	0	0
80,000	16	17	6
90,000	18	15	0
100,000	20	12	6
120,000	21	11	3
140,000	23	8	9
160,000	25	6	3
180,000	27	3	9
200,000	29	1	3
250,000	30	18	9
300,000	35	12	6
350,000	40	6	3
400,000	41	17	6
500,000	43	8	9
For every additional £100,000 or any fractional part of £100,000 a further and additional fee of	3	2	6

[NOTE.—These fees are calculated upon the NET amount of the PERSONAL estate upon which stamp duty is paid.]

Double or Cessate Probate, etc.

For every double or cessate probate, or letters of administration with the will annexed, de bonis non or cessate, upon which no stamp duty is payable, when the personal estate is under £450 or any

	£	s.	d.
smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £450 and upwards	0	12	6
For every duplicate and triplicate probate, or letters of administration with the will annexed, when the personal estate is under £450 or any smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £450 and upwards	0	12	6

Exemplifications.

	£	s.	d.
For every exemplification of a probate, or letters of administration with the will annexed, in addition to the fees for engrossing and collating the will and other documents registered with the same	1	1	0

Registering and collating or engrossing and collating Wills.

	£	s.	d.
For registering and collating or engrossing and collating wills and other documents, if three folios of ninety words each, or under, including parchment	0	4	6
If above three folios of ninety words each, per folio	0	1	6
In cases of grants for Queen's pay or prize money, the effects being under £100, without reference to the length of the will	0	4	6
If there are pencil marks in a will or codicil, or if a will or codicil or any part thereof is to be or has been registered fac-simile, in addition to any other fee for registering and collating or for engrossing and collating the same :—			
If the part or parts to be registered or engrossed fac-simile are two folios of ninety words in length, or under	0	1	0
If exceeding two folios, for every additional folio or part of a folio of ninety words	0	0	6

Codicils to Wills already Proved.

For every probate of a codicil or codicils, or letters of administration with a codicil or codicils annexed, being a codicil or codicils to a will already proved, the same fees respectively as on a duplicate probate or duplicate letters of administration with will annexed.

LETTERS OF ADMINISTRATION,

Including letters of administration de bonis non or cessate upon which stamp duty is payable in respect of the personal estate of an intestate.

If the personal estate is sworn to be under the value of—	£	s.	d.	If the personal estate is sworn to be under the value of—	£	s.	d.
£5	0	1	0	£7,000	6	0	0
20	0	1	0	8,000	6	7	6
50	0	1	0	9,000	6	15	0
100	0	1	0	10,000	7	2	6
200	0	4	6	12,000	7	10	0
300	0	12	0	14,000	7	17	6
450	0	16	6	16,000	8	8	9
600	1	2	6	18,000	9	0	0
800	1	13	0	20,000	9	11	3
1,000	2	5	0	25,000	10	6	3
1,500	3	7	6	30,000	11	5	0
2,000	4	10	0	35,000	12	3	9
3,000	4	13	9	40,000	13	11	3
4,000	4	17	6	45,000	15	0	0
5,000	5	5	0	50,000	16	7	6
6,000	5	12	6	60,000	17	16	3

If the personal estate is sworn to be under the value of—	£	s.	d.
£70,000	20	12	6
80,000	23	8	9
90,000	26	5	0
100,000	29	1	3
120,000	30	9	6
140,000	33	5	9
160,000	36	2	0
180,000	38	18	3
200,000	41	14	6
250,000	44	10	9

If the personal estate is sworn to be under the value of—	£	s.	d.
£300,000	46	17	6
350,000	49	4	6
400,000	51	11	3
500,000	53	18	3
For every additional £100,000 or any fractional part of £100,000 a further and additional fee of	4	13	6

[NOTE.—These fees are calculated upon the NET amount of the PERSONAL estate upon which stamp duty is paid.]

Duplicate and Triplicate Letters of Administration, etc.

	£	s.	d.
For every duplicate and triplicate letters of administration when the personal estate is under £300 or any sum less than £300, the same fee as on a first grant of letters of administration under the same sum.			
For every duplicate and triplicate letters of administration when the personal estate is of the value of £300 and upwards	0	12	6

Exemplifications.

For every exemplification of letters of administration	1	1	0

Administrations de bonis non or cessate.

For every grant of letters of administration de bonis non or cessate, upon which no stamp duty is payable, when the personal estate is under £300 or any smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £300 and upwards	0	12	6

Additional Security.

For noting on the grant of letters of administration with or without will annexed, and on the Act, that additional security has been given	0	5	0
For every certificate for the Inland Revenue Office, that additional security has been given	0	1	0

Articles to pay Pro Ratâ.

For articles entered into by administrators to pay creditors pro ratâ, per folio of seventy-two words each	0	2	0
For the bond for the performance of the articles, or for payment of creditors pro ratâ, per folio of seventy-two words	0	2	0

Searches and Inspection of Wills, etc.

For every search for will or grant of letters of administration or any document filed in the Principal Registry, including the looking up and inspecting an original will before the same is registered, or a registered copy of a will or an Administration Act	0	1	0
For every third will or Administration Act looked up in addition to the above	0	1	0
For looking up and inspecting an original will after the same is registered, in addition to the fee for the search	0	1	0
For looking up and producing any document filed in the registry other than an original will or Administration Act	0	1	0
For a search for a will or grant of letters of administration, and for reading the will when the party applying is unable or unwilling to search for or read the same :—			
For the search for each year or part of a year	0	0	6
For reading the will :—			
If twenty folios of ninety words each or under	0	6	0
For every additional twenty folios or part of twenty folios of ninety words each	0	1	0

Searches for former Grants.

£ s. d.

For every search by an officer of the Principal Registry in order to ascertain whether any probate or grant of letters of administration has already issued, or any application has been made for a grant of probate or administration, as under:—

For every full year or part of a year which has elapsed since the deceased's death 0 0 6

In case it be requisite to extend the search to one or more district registries, a similar additional fee for the search in each of such district registries.

Special and Limited Grants.

For every special or limited grant of probate or letters of administration with or without will annexed, in addition to the ordinary fees, as under:—

If the personal estate is under the value of £20, 1*s.* per folio of seventy-two words each on the bond, on the Act, and on the grant of probate or letters of administration.

If the personal estate is of the value of £20 and upwards, 2*s.* per folio of seventy-two words each on the bond, on the Act, and on the grant of probate or letters of administration.

Whenever the personal estate to be placed in possession of, or dealt with by, the executor or administrator, by means of a special or limited grant of probate or letters of administration, exceeds in value the sum of £20, the fee of 2*s.* per folio of seventy-two words shall be payable on the bond, on the Act, and on the grant, although the personal estate be sworn under £20.

Sealing Irish and Scotch Grants.

For fees payable in Ireland on re-sealing English grants, see *post*, p. 960.

For affixing the seal of the Court to any grant of probate or letters of administration, with or without will annexed, or to any exemplification of probate or letters of administration, with or without will annexed, under seal of the Court of Probate in Ireland, in order to its becoming in force for property in England, such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England which is to be affected by the probate or other instrument to which the seal of the Court is to be affixed. [Except as under:—

Added by an order of the 12th December, 1892.

When the property in England amounts to or exceeds £300 in value, and is shown to have been included in the property in respect of which a fee was paid in Ireland .... 0 12 6]

For the registrar's fiat on an Irish grant 0 5 0

For affixing the seal of the Court to any confirmation of an executor issued by authority of a Commissary Court in Scotland 1 1 0

Sealing Colonial Grants.

Order of the 12th December, 1892.

The fees hereunder written are fixed and appointed to be taken in the Principal Probate Registry in respect of applications under the Colonial Probates Act, 1892, in addition to any fees payable under the existing Table of Fees in non-contentious business.

£ s. d.

For affixing the seal of the Court to any grant of probate or letters of administration, with or without will annexed, or copy thereof, in order to its becoming in force for property in England, such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England which is to be affected by the probate or other instrument to which the seal of the Court is to be affixed.

For the registrar's fiat 0 5 0

If the application to seal under the above-mentioned Act be made through the Personal Application Department, the additional fees payable when a grant is extracted through that department, inclusive of the *ad valorem* fee for probate or letters of administration under seal, are to be taken.

Notation of Domicile.

	£	s.	d.
For noting on a probate or on letters of administration, with or without will annexed, that the testator or intestate died domiciled in England	0	5	0

Office Copies and Extracts.

For every office copy or extract of a will, or of a probate, or Administration Act, or of any document filed or deposited in the Principal Registry, if five folios of ninety words or under	0	2	6
If exceeding five folios of ninety words, for every additional folio or part of a folio	0	0	6
If the will or other document is 200 years old, five folios of ninety words or under	0	5	0
If exceeding five folios of ninety words, for every additional folio or part of a folio	0	0	9
If the office copy of a will or any part of a will or other document is required to be made fac-simile, and such will or part of a will or other document is two folios of ninety words in length or under, in addition to the fee for the copy	0	1	0
If exceeding two folios of ninety words, for every additional folio or part of a folio	0	0	6
For copies of wills and other documents in foreign languages made by persons specially employed for that purpose, the charges of the persons so employed will be taken in addition to any other fees which may be payable in respect of such copies.			
If a copy is required to be printed (in addition to a manuscript copy for the printer, at 6*d*. per folio of ninety words, and collating) :—			
For twenty folios of ninety words or under	0	10	0
For every additional folio or part of a folio	0	1	0
For office copy of a will, minute, order, decree, or any document under seal of the Court for which no other fee is payable :—			
For the seal, in addition to the fee for the copy and collating	0	5	0
For copies of plans, drawings, and armorial bearings, etc., such fee as shall be determined by the registrar in each particular case.			

Collating Documents.

For collating copy of a probate and will, or copy of letters of administration with or without the will annexed, or any other instrument to be filed or deposited in the registry, or for collating any copy or instrument with an original document already filed or deposited in the registry, including the registrar's certificate in verification thereof :—			
If ten folios of ninety words each, or under	0	2	6
If above ten folios of ninety words each, per folio	0	0	3

[NOTE.—The fee for re-collating, or for collating "copy to assist," or for fiat, etc., is 3*d*. per folio for each necessary examination; the minimum fee of 2*s*. 6*d*. referred to in the Rules as to Fees not being considered applicable to this class of work (Circular, March 21st, 1898).]

If there is any pencil writing copied, or the copy or any part thereof is fac-simile, in addition to the above fees :—			
If such pencil writing or fac-simile copy is two folios of ninety words in length or under	0	0	6
For every additional folio or part of a folio	0	0	3

Attendances.

For attendance with any book or original document in any of the Courts of law or equity in London or Westminster, or elsewhere within three miles of the Principal Registry	*1*	*1*	*0*
For the second and each subsequent attendance in the same term or sittings after term	*0*	*10*	*6*
For attendance with books or original documents in any of the Courts			

	£	s.	d.
of law or equity in London or Westminster; or elsewhere within three miles of the Principal Registry, when more than one book or document are required, for each book or document besides the first	*0*	*5*	*0*
For the second and each subsequent attendance in the same term or sittings after term, for each book or document besides the first	*0*	*2*	*6*
For each day's attendance with any book or original document in any of the Courts of law or equity, or elsewhere beyond the distance of three miles from the Principal Registry, exclusive of travelling expenses	*1*	*1*	*0*
For each day's attendance with books or original documents in any of the Courts of law or equity, or elsewhere beyond the distance of three miles from the Principal Registry, exclusive of travelling expenses, when more than one book or document are required, for each book or document besides the first	*0*	*5*	*0*

The travelling expenses to be advanced and paid to the messenger attending with books, or original documents, shall include all other necessary expenses which are to be or may have been incurred by such messenger.

[NOTE.—The fees for attendances are now regulated by the Order as to Supreme Court Fees, 1884, item 25. (See *post*, p. 966.)]

Registrar's Order.

	£	s.	d.
For every registrar's order for revocation of a grant	0	5	0
For every other registrar's order	0	2	6

Filing.

	£	s.	d.
For filing every *affidavit* or other document in the Principal Registry, except the oaths for executors, administrators, or administrators with the will, the first administration bond and the testamentary papers in respect of which probate or administration with will annexed is granted	0	2	6
For filing every exhibit	*0*	*1*	*0*
For filing in the Principal Registry any notice required to be sent there by a district registrar	0	0	6
For filing in a district registry any notice required to be sent there by a registrar of the Principal Registry	0	0	6

[NOTE.—The fee for filing an affidavit is altered to 2*s.*, and no fee is charged for filing an exhibit; the fee for filing a declaration remains at 2*s.* 6*d.*]

Caveats.

	£	s.	d.
For the entry of every caveat	0	1	0
For each notice of such caveat to the district registrars	0	1	0
For every warning to a caveat	0	2	6
For every service of a warning to caveat sent by a registrar through the public post	0	2	6
For subducting a caveat	0	1	0
For notice to any district registrar to whom notice of a caveat has been sent of its having been subducted or warned	0	1	0

Receipts for Papers.

	£	s.	d.
For every receipt for documents left in the Principal Registry in order to obtain a grant of probate or letters of administration with or without will annexed, or any second or subsequent grant	0	1	0
For every receipt for a document or documents delivered out of the Principal Registry	0	1	0

Deposit of Wills.

	£	s.	d.
For depositing every will of a person deceased in the Principal Registry for safe custody	0	10	0
For depositing every will of a living person for safe custody, including the deposit receipt	0	10	0

	£	s.	d.
Taxing Costs.			
For taxing every bill of costs, inclusive of the registrar's certificate :—			
If five folios of seventy-two words, or under	0	5	0
If exceeding that length, for every additional folio	0	1	0
For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed :—			
If the bill of costs is five folios of seventy-two words, or under	0	1	0
If exceeding five folios of seventy-two words, and under fifteen folios	0	2	6
If exceeding fifteen folios	0	5	0
Bonds.			
For superintending and attesting the execution of a bond	0	1	6
If not completed on one occasion, for each subsequent attestation	0	1	0
Oaths.			
For every oath (*a*) administered by the registrars, or by a commissioner authorised to administer oaths in the Principal Registry, to each deponent	0	1	6
For marking each exhibit	0	1	0
Settling Advertisements.			
For settling the abstract of citation for advertisement or other advertisement	0	2	6
Alterations in Grants.			
For making alterations in grants of probate or letters of administration in pursuance of the order of one of the registrars	0	2	6
Notations.			
For noting alterations in and revocations of grants on the record of the same	0	2	6
For noting second and subsequent grants on the record of the first grant	0	2	6
For noting renunciations, or any other necessary matter on the record of a grant	0	2	6
Certificates.			
For every certificate under the hand of one or more of the registrars of the Principal Registry for which no other fee is payable	0	2	6
Fiats.			
For the fiat of a registrar as to the form in which any will or codicil is to be registered	0	5	0
For noting on a testamentary paper that probate thereof is refused	0	5	
Notices.			
For every notice required to be sent to a district registrar for which no other fee is payable, except notices required by rule 72	0	1	0
Perusing and Settling Oaths, etc.			
For perusing and settling oaths to lead special or limited grants of probate or letters of administration, with or without will, or other instruments :—			
If five folios of seventy-two words, or under	0	2	6
If above five folios, for each additional folio	0	0	3
For perusing deeds and other documents when necessary, per folio of seventy-two words	0	0	3

(*a*) Altered from 1*s.* to 1*s.* 6*d.* in 1876.

Commissioner.	£	s.	d.
For each appointment of a commissioner to administer oaths in the Court of Probate, other than clerks and officers of the Court authorised to administer oaths in the principal or in a district registry only	1	0	0
For registering the appointment of a commissioner appointed to administer oaths in the Court of Chancery	0	5	0

IN ADDITION TO THE ORDINARY FEES

TO BE TAKEN IN THE

PRINCIPAL REGISTRY OF THE COURT OF PROBATE IN NON-CONTENTIOUS BUSINESS,

The following Fees are to be taken in

THE DEPARTMENT FOR PERSONAL APPLICATIONS.

[**NOTE.—This is the table of 1874 as altered and amended by subsequent orders.**]

ON PROBATES OR LETTERS OF ADMINISTRATION WITH WILL ANNEXED,

Or double or cessate probate or letters of administration with will annexed, de bonis non or cessate, upon which stamp duty is payable in respect of the personal estate of the testator.

Effects sworn under	Preparing Oath of Executors.			Preparing Affidavit for the Inland Revenue Office.			Probate under Seal.			Clerks.		
£	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
5	0	2	6	0	2	6	0	1	0		—	
20	0	2	6	0	2	6	0	1	0	0	1	0
100	0	5	0	0	5	0	0	1	0	0	2	0
200	0	5	0	0	5	0	0	2	0	0	2	0
300	0	5	0	0	5	0	0	5	0	0	2	0
450	0	5	0	0	5	0	0	8	0	0	2	0
600	0	5	0	0	5	0	0	11	0	0	2	0
800	0	5	0	0	5	0	0	15	0	0	2	0
1,000	0	5	0	0	5	0	1	2	0	0	2	0
1,500	0	5	0	0	5	0	1	10	0	0	5	0
2,000	0	5	0	0	5	0	2	0	0	0	5	0
3,000	0	5	0	0	5	0	2	10	0	0	5	0
4,000	0	5	0	0	5	0	3	0	0	0	5	0
5,000	0	5	0	0	5	0	3	2	6	0	7	6
6,000	0	5	0	0	5	0	3	5	0	0	7	6
7,000	0	5	0	0	5	0	3	7	6	0	7	6
8,000	0	5	0	0	5	0	3	10	0	0	7	6
9,000	0	5	0	0	5	0	3	12	6	0	7	6
10,000	0	5	0	0	5	0	3	15	0	0	7	6
12,000	0	5	0	0	5	0	3	17	6	0	7	6
14,000	0	5	0	0	5	0	4	0	0	0	7	6
16,000	0	5	0	0	5	0	4	3	9	0	7	6

Effects sworn under	Preparing Oath of Executors.			Preparing Affidavit for the Inland Revenue Office.			Probate under Seal.			Clerks.		
£	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
18,000	0	5	0	0	5	0	4	7	6	0	7	6
20,000	0	5	0	0	5	0	4	11	3	0	7	6
25,000	0	5	0	0	5	0	4	16	3	0	7	6
30,000	0	5	0	0	5	0	5	2	6	0	7	6
35,000	0	5	0	0	5	0	5	8	9	0	7	6
40,000	0	5	0	0	5	0	5	18	3	0	7	6
45,000	0	5	0	0	5	0	6	7	6	0	7	6
50,000	0	5	0	0	5	0	6	17	0	0	7	6
60,000	0	5	0	0	5	0	7	6	3	0	7	6
70,000	0	5	0	0	5	0	8	5	0	0	7	6
80,000	0	5	0	0	5	0	9	3	9	1	1	0
90,000	0	5	0	0	5	0	10	2	6	1	1	0
100,000	0	5	0	0	5	0	11	1	3	1	1	0
120,000	0	5	0	0	5	0	11	10	9	1	1	0
140,000	0	5	0	0	5	0	12	9	6	1	1	0
160,000	0	5	0	0	5	0	13	8	3	1	1	0
180,000	0	5	0	0	5	0	14	7	0	1	1	0
200,000	0	5	0	0	5	0	15	5	9	1	1	0
250,000	0	5	0	0	5	0	16	4	6	1	1	0
300,000	0	5	0	0	5	0	18	11	3	1	1	0
350,000	0	5	0	0	5	0	20	18	3	1	1	0
400,000	0	5	0	0	6	0	21	13	9	1	1	0
500,000	0	5	0	0	5	0	22	9	6	1	1	0

For every additional £100,000, or any fractional part of £100,000 under which the effects are sworn, in addition to the above fees, £1 11*s.* 3*d.*

In addition to the above, for all second and subsequent grants the same fees for looking up and taking an account of each former representation as on similar grants on which no stamp duty is payable.

	£	s.	d
For engrossing and collating the will, if three folios of ninety words or under, including parchment	0	4	6
If exceeding three folios, per folio..	0	1	6

For engrossing and collating a will or codicil for a grant of probate or letters of administration with the will annexed, when there are pencil marks in the will or codicil, or when the will or codicil is to be registered fac-simile, in addition to any other fee for engrossing and collating the same :—

	£	s.	d.
If the pencil marks in the will or codicil, or the part or parts thereof to be registered fac-simile, are two folios of ninety words in length or under..	0	1	0
If exceeding two folios, for every additional folio or part of the folio of ninety words	0	0	6

FEES ON LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

In addition to the above fees,

For preparing the bond—if the effects are—

	£	s.	d.
Under £20............................	0	1	6
£20 and under £100..................	0	3	6
£100 and upwards	0	5	0

ON LETTERS OF ADMINISTRATION GRANTED TO A WIDOW OF AN INTESTATE, OR TO ONE OR MORE OF HIS CHILDREN, OR TO ONE OR MORE OF THE CHILDREN OF AN INTESTATE WIDOW,

On personal application at the Principal Registry, other than letters of administration granted in pursuance of the provisions of the Act of 36 & 37 Vict. c. 52, as extended by the Act of 38 & 39 Vict. c. 27.

In lieu of all fees heretofore authorised to be taken when the personal (*a*) estate is sworn :—

Amended table of fees to be taken on and after 26th July, 1875.

[For fees to be taken in pursuance of 36 & 37 Vict. c. 52, see *post*, p. 958.]

	£	*s.*	*d.*
Not to exceed in value £20	0	5	0
Not to exceed in value £30	0	6	0
Not to exceed in value £40	0	7	0
Not to exceed in value £50	0	8	0
Not to exceed in value £60	0	9	0
Not to exceed in value £70	0	10	0
Not to exceed in value £80	0	11	0
Not to exceed in value £90	0	12	0
Not to exceed in value £100	0	13	0

The above include the fees payable for taking instructions for, and drawing, and copying an instrument of renunciation to be executed by the widow of an intestate if required, and all other fees payable in respect of such grants.

ON OTHER GRANTS OF LETTERS OF ADMINISTRATION,

Including letters of administration de bonis non or cessate, upon which stamp duty is payable in respect of the personal estate of the intestate.

Effects sworn not to exceed	Preparing Oath of Administrator and Bond.	Preparing Affidavit for the Inland Revenue.	Letters of Administration under Seal.	Clerks.
£	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
5	0 4 0	0 2 6	0 1 0	—
20	0 4 0	0 2 6	0 1 0	0 1 0
50	0 7 6	0 3 0	0 1 0	0 2 0
100	0 8 6	0 5 0	0 1 0	0 2 0
Effects sworn under				
200	0 10 0	0 5 0	0 3 0	0 2 0
300	0 10 0	0 5 0	0 8 0	0 2 0
450	0 10 0	0 5 0	0 11 0	0 2 0
600	0 10 0	0 5 0	0 15 0	0 2 0
800	0 10 0	0 5 0	1 2 0	0 2 0
1,000	0 10 0	0 5 0	1 10 0	0 5 0
1,500	0 10 0	0 5 0	2 5 0	0 5 0
2,000	0 10 0	0 5 0	3 0 0	0 5 0
3,000	0 10 0	0 5 0	3 1 9	0 7 6
4,000	0 10 0	0 5 0	3 3 9	0 7 6
5,000	0 10 0	0 5 0	3 7 6	0 7 6
6,000	0 10 0	0 5 0	3 11 3	0 7 6
7,000	0 10 0	0 5 0	3 15 0	0 7 6
8,000	0 10 0	0 5 0	3 18 9	0 7 6
9,000	0 10 0	0 5 0	4 2 6	0 7 6
10,000	0 10 0	0 5 0	4 6 3	0 7 6
12,000	0 10 0	0 5 0	4 10 0	0 7 6
14,000	0 10 0	0 5 0	4 13 9	0 7 6
16,000	0 10 0	0 5 0	4 19 6	0 7 6
18,000	0 10 0	0 5 0	5 5 0	0 7 6
20,000	0 10 0	0 5 0	5 10 9	0 7 6

(*a*) It is considered that the fact that the deceased, whose personal estate is under £100, died possessed of real estate sufficient to bring the whole estate over £100, does not affect the right of the applicant to pay *fees* under this table ; though the duty must be paid in the ordinary way. The above does not apply to similar cases in which application is made under sec. 16 of the Finance Act, 1894, when the 15*s.* fee must be paid.

Effects sworn not to exceed	Preparing Oath of Administrator and Bond.	Preparing Affidavit for the Inland Revenue.	Letters of Administration under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
25,000	0 10 0	0 5 0	5 18 3	0 7 6
30,000	0 10 0	0 5 0	6 7 6	0 7 6
35,000	0 10 0	0 5 0	6 17 0	0 7 6
40,000	0 10 0	0 5 0	7 10 9	0 7 6
45,000	0 10 0	0 5 0	8 5 0	0 7 6
50,000	0 10 0	0 5 0	8 18 9	0 7 6
60,000	0 10 0	0 5 0	9 13 3	0 7 6
70,000	0 10 0	0 5 0	11 1 3	0 7 6
80,000	0 10 0	0 5 0	12 9 6	1 1 0
90,000	0 10 0	0 5 0	13 17 6	1 1 0
100,000	0 10 0	0 5 0	15 5 9	1 1 0
120,000	0 10 0	0 5 0	15 19 9	1 1 0
140,000	0 10 0	0 5 0	17 8 0	1 1 0
160,000	0 10 0	0 5 0	18 16 3	1 1 0
180,000	0 10 0	0 5 0	20 4 0	1 1 0
200,000	0 10 0	0 5 0	21 12 6	1 1 0
250,000	0 10 0	0 5 0	23 0 3	1 1 0
300,000	0 10 0	0 5 0	24 3 9	1 1 0
350,000	0 10 0	0 5 0	25 7 3	1 1 0
400,000	0 10 0	0 5 0	26 10 6	1 1 0
500,000	0 10 0	0 5 0	27 14 0	1 1 0
600,000	0 10 0	0 5 0	30 10 0	1 1 0
700,000	0 10 0	0 5 0	32 7 9	1 1 0
800,000	0 10 0	0 5 0	34 13 9	1 1 0
900,000	0 10 0	0 5 0	37 1 6	1 1 0
1,000,000	0 10 0	0 5 0	39 8 6	1 1 0

For every additional £100,000, or any fractional part of £100,000, under which the effects are sworn, in addition to the above fees, £2 7*s.*

In addition to the above, for all second and subsequent grants, the same fees for looking up and taking an account of each former representation as on similar grants on which no stamp duty is payable:—

ON DOUBLE OR CESSATE PROBATES ON WHICH NO STAMP DUTY IS PAYABLE.

If the Effects are sworn under	Looking up and taking an Account of each former Grant.	Oath of the Executor	Affidavit for Inland Revenue Office.	Double or Cessate Probate under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 2 6	0 2 6	0 1 0	0 1 0
100	0 5 0	0 5 0	0 5 0	0 1 0	0 2 0
200	0 5 0	0 6 6	0 5 0	0 3 0	0 2 0
300	0 5 0	0 6 6	0 5 0	0 7 6	0 2 0
450	0 5 0	0 6 6	0 5 0	0 12 0	0 2 0
600	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
800	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
1,000	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
1,500	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
2,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
3,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
4,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
5,000	0 5 0	0 6 6	0 5 0	0 12 6	0 7 6
Above 5,000	The fees to be taken are the same as above, except the fee for clerks, which, if the effects are of the value of £70,000 or upwards, is £1 1*s.*				

ON EXEMPLIFICATION OF PROBATE OR LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED.

	£	s.	d.
Looking up the grant of probate and original will, or grant of administration	0	5	0
Exemplification under seal, in addition to the £3 stamp	0	15	0
Clerks	0	2	6

ON DUPLICATE AND TRIPLICATE PROBATES OR LETTERS OF ADMINISTRATION (WITH OR WITHOUT WILL ANNEXED), ETC.

Looking up the will	0	5	0
Duplicate or triplicate probate or letters of administration, with or without the will annexed, or probate of codicil to will already proved, or letters of administration (with same annexed), if the personal estate is sworn under £450, or any smaller sum, the same fees as on the original grant.			
If the personal estate is of the value of £450 and upwards	0	12	6
Clerks	0	2	6

ON LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED, DE BONIS NON OR CESSATE, ON WHICH NO STAMP DUTY IS PAYABLE.

If the Effects are sworn under	Looking-up and taking an Account of each former Grant.			Oath of the Adminis-trator and Bond.			Affidavit for Inland Revenue Office.			De Bonis or Cessate Administration under Seal and Duty-paid Stamp.			Clerks.		
£	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
5	0	2	6	0	2	6	0	2	6	0	1	0		—	
20	0	2	6	0	4	0	0	2	6	0	1	0	0	1	0
50	0	3	6	0	6	0	0	3	0	0	1	6	0	2	0
100	0	5	0	0	7	6	0	5	0	0	3	0	0	2	0
200	0	5	0	0	10	0	0	5	0	0	4	6	0	2	0
300	0	5	0	0	10	0	0	5	0	0	12	0	0	2	0
450	0	5	0	0	10	0	0	5	0	0	12	6	0	2	0
600	0	5	0	0	10	0	0	5	0	0	12	6	0	2	0

If the effects are £600 and upwards, the same fees as above, except the fee for clerks, which is 5*s*.

Instructions, Drawing, Copying, etc.

	£	s.	d.
Instructions for every oath, affidavit, instrument, or document, other than the oaths and affidavits and instruments of renunciation included in the foregoing fees	0	5	0
Drawing same, at per folio of 72 words	0	1	0
Copies of any documents prepared in the Department for Personal Applications, not included in the foregoing fees, at per folio of 72 words	0	0	6
Instructions for special or limited probates, or letters of administration (*with or without will annexed*)	0	5	0
Attendances on settling oaths for special or limited grants	0	10	0
All other fees to be taken the same as for ordinary grants.			

Perusing, etc.

Perusing and settling oaths, affidavits, and other instruments and documents not drawn in the Department for Personal Applications, if 6 folios of 72 words or under	0	1	6
If exceeding six folios, at per folio of 72 words	0	0	3
Perusing and abstracting deeds, or other instruments when necessary, at per folio of 72 words	0	0	3

Oaths, etc.

	£	s.	d.
Administering oaths, or taking affirmations, other than those included in the foregoing fees, each deponent	0	1	0
Marking each exhibit	0	1	0

N.B.—The fee for oath was altered to 1*s.* 6*d.* in 1877.

Bonds.

	£	s.	d.
Attesting execution of bond other than the bond of a widow or children of an intestate included in former fees	0	1	6
If not completed on one occasion, for each subsequent attestation	0	1	0
On giving additional security in addition to the above fees and the fees for preparing new bond :—			
For looking up original or any former bond	0	5	0

FEES

TO BE TAKEN IN THE

DISTRICT REGISTRIES OF THE COURT OF PROBATE.

[**NOTE.—This is the table of 1874 as altered and amended by subsequent orders.**]

PROBATES OR LETTERS OF ADMINISTRATION WITH WILL ANNEXED,

Including double or cessate probates or letters of administration with will annexed de bonis non or cessate upon which stamp duty is payable in respect of the value of the personal estate of the testator.

If the personal estate is sworn to be—				If the personal estate is sworn to be—			
Under the value of	£	s.	d.	Under the value of	£	s.	d.
£5	0	1	0	£35,000	9	7	6
20	0	1	0	40,000	10	6	3
100	0	1	0	45,000	11	5	0
200	0	3	0	50,000	12	3	9
300	0	7	6	60,000	13	2	6
450	0	12	0	70,000	15	0	0
600	0	16	6	80,000	16	17	6
800	1	2	6	90,000	18	15	0
1,000	1	13	0	100,000	20	12	6
1,500	2	5	0	120,000	21	11	3
2,000	3	0	0	140,000	23	8	9
3,000	3	15	0	160,000	25	6	3
4,000	4	10	0	180,000	27	3	9
5,000	4	15	0	200,000	29	1	3
6,000	5	0	0	250,000	30	18	9
7,000	5	5	0	300,000	35	12	6
8,000	5	10	0	350,000	40	6	3
9,000	5	15	0	400,000	41	17	6
10,000	6	0	0	500,000	43	8	9
12,000	6	5	0				
14,000	6	10	0	For every additional 100,000*l.* or any fractional part of 100,000*l.* a further and additional fee of	3	2	6
16,000	6	17	6				
18,000	7	5	0				
20,000	7	12	6				
25,000	8	2	6				
30,000	8	15	0				

[NOTE.—These fees are calculated upon the NET amount of the PERSONAL estate upon which stamp duty is paid.]

Double or Cessate Probate, etc.

	£	s.	d.
For every double or cessate probate, or letters of administration with the will annexed, de bonis non or cessate, upon which no stamp duty is payable, when the personal estate is under £450 or any smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £450 and upwards...	0	12	6
For every duplicate and triplicate probate or letters of administration with the will annexed, when the personal estate is under £450 or any smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £450 and upwards...	0	12	6

Exemplifications.

	£	s.	d.
For every exemplification of a probate, or letters of administration with the will annexed, in addition to the fees for engrossing and collating the will and other documents registered with the same ...	1	1	0

Registering and Collating or Engrossing and Collating Wills.

	£	s.	d.
For registering and collating or engrossing and collating wills and other documents, if three folios of ninety words each, or under, including parchment	0	4	6
If above three folios of ninety words each, per folio........	0	1	6
In cases of grants for Queen's pay or prize money, the effects being under £100, without reference to the length of the will	0	4	6
If there are pencil marks in a will or codicil, or if a will or codicil, or any part thereof, is to be or has been registered fac simile, in addition to any other fee for registering and collating or for engrossing and collating the same :			
If the part or parts to be registered or engrossed fac simile are two folios of ninety words in length, or under........	0	1	0
If exceeding two folios, for every additional folio or part of a folio of ninety words	0	0	6

Codicils to Wills already Proved.

For every probate of a codicil or codicils or letters of administration with a codicil or codicils annexed, being a codicil or codicils to a will already proved, the same fees respectively as on a duplicate probate or duplicate letters of administration with will annexed.

LETTERS OF ADMINISTRATION,

Including letters of administration de bonis non or cessate upon which stamp duty is payable in respect of the personal estate of an intestate.

If the personal estate is sworn to be under the value of—	£	s.	d.	If the personal estate is sworn to be under the value of—	£	s.	d.
£5	0	1	0	£8,000	6	7	0
20	0	1	0	9,000	6	15	6
50	0	1	0	10,000	7	2	0
100	0	1	0	12,000	7	10	6
200	0	4	6	14,000	7	17	6
300	0	12	0	16,000	8	8	9
450	0	16	6	18,000	9	0	0
600	1	2	6	20,000	9	11	3
800	1	13	0	25,000	10	6	3
1,000	2	5	0	30,000	11	5	0
1,500	3	7	6	35,000	12	3	9
2,000	4	10	0	40,000	13	11	3
3,000	4	13	9	45,000	15	0	0
4,000	4	17	6	50,000	16	7	6
5,000	5	5	0	60,000	17	16	3
6,000	5	12	6	70,000	20	12	6
7,000	6	0	0	80,000	23	8	9

If the personal estate is sworn to be under the value of—	£	s.	d.
£90,000	26	5	0
100,000	29	1	3
120,000	30	9	6
140,000	33	5	9
160,000	36	2	0
180,000	38	18	3
200,000	41	14	6
250,000	44	10	9
300,000	46	17	6
350,000	49	4	6

If the personal estate is sworn to be under the value of—	£	s.	d.
£400,000	51	11	3
500,000	53	18	3
For every additional £100,000, or fractional part of £100,000, a further and additional fee of	4	13	6

[NOTE.—These fees are calculated upon the NET amount of the PERSONAL estate upon which stamp duty is paid.]

Duplicate and Triplicate Letters of Administration, etc.

	£	s.	d.
For every duplicate and triplicate letters of administration when the personal estate is under £300 or any sum less than £300, the same fee as on a first grant of letters of administration under the same sum.			
For every duplicate and triplicate letters of administration when the personal estate is of the value of £300 and upwards	0	12	6

Exemplifications.

For every exemplification of letters of administration	1	1	0

Administrations de bonis non or cessate.

For every grant of letters of administration de bonis non or cessate, upon which no stamp duty is payable, when the personal estate is under £300 or any smaller sum, the same fee as on a first grant under the same sum.			
When the personal estate is of the value of £300 and upwards ...	0	12	6

Additional Security.

For noting on the grant of letters of administration with or without will annexed, and on the Act, that additional security has been given	0	5	0
For every certificate for the Inland Revenue Office, that additional security has been given	0	1	0

Articles to pay Pro Ratâ.

For articles entered into by administrators to pay creditors pro ratâ, per folio of seventy-two words each	0	2	0
For the bond for the performance of the articles, or for payment of creditors pro ratâ, per folio of seventy-two words	0	2	0

Searches and Inspection of Will, etc.

For every search for a will or grant of letters of administration or any document filed in a district registry, including the looking up and inspecting an original will before the same is registered, or a registered copy of a will or an Administration Act	0	1	0
For every third will or Administration Act looked up in addition to the above	0	1	0
For looking up and inspecting the original will after the same is registered in addition to the fee for the search	0	1	0
For looking up and producing any document filed in a district registry other than the original will or Administration Act	0	1	0
For a search for a will or grant of letters of administration, and for reading the will when the party applying is unable or unwilling to search for or read the same :—			
For the search for each year or part of a year	0	0	6

	£	s.	d.
For reading the will:—			
If twenty folios of ninety words each or under	0	1	0
For every additional twenty folios or part of twenty folios of ninety words each	0	1	0

Searches for former Grants.

For every search by an officer of the Principal Registry, or by an officer of a district registry, in order to ascertain whether any probate or grant of letters of administration has already issued, or any application has been made for a grant of probate or administration, as under:—			
For every full year or part of a year which has elapsed since the deceased's death	0	0	6
In case it be requisite to extend the search to one or more other district registries, a similar additional fee for the search in each of such registries.			

Special and Limited Grants.

For every special or limited grant of probate or letters of administration with or without will annexed, in addition to the ordinary fees, as under:—

If the personal estate is under the value of £20, 1*s.* per folio of seventy-two words each on the bond, on the Act, and on the grant of probate or letters of administration.

If the personal estate is under the value of £20. and upwards, 2*s.* per folio of seventy-two words each on the bond, on the Act, and on the grant of probate or letters of administration.

Whenever the personal estate to be placed in possession of, or dealt with by, the executor or administrator, by means of a special or limited grant of probate or letters of administration, exceeds in value the sum of £20, the fee of 2*s.* per folio of seventy-two words shall be payable on the bond, on the Act, and on the grant, although the personal estate be sworn under £20.

Notation of Domicile.

For noting on a probate or on letters of administration, with or without will annexed, that the testator or intestate died domiciled in England	0	5	0

Office Copies and Extracts.

For every office copy or extract of a will, or probate, or Administration Act, or of any document filed or deposited in a district registry, if five folios or ninety words or under	0	2	6
If exceeding five folios of ninety words, for every additional folio or part of a folio	0	0	6
If the will or other document is 200 years old and five folios of ninety words or under	0	5	0
If exceeding five folios of ninety words, for every additional folio or part of a folio	0	0	9
If the office copy of a will or any part of a will or other document is required to be made fac simile, and such will or part of a will or other document is two folios of ninety words in length or under, in addition to the fee for the copy	0	1	0
If exceeding two folios of ninety words, for every additional folio or part of a folio	0	0	6

For copies of wills and other documents in foreign languages made by persons specially employed for that purpose, the charges of the persons so employed will be taken in addition to any other fees which may be payable in respect of such copies.

	£	s.	d.
If a copy is required to be printed (in addition to a manuscript copy for the printer, at 6*d.* per folio of ninety words and collating) :—			
If twenty folios of ninety words or under	0	10	0
For every additional folio or part of a folio	0	1	0
For office copy of a will, minute, order, decree, or any document under seal of the Court for which no other fee is payable :—			
For the seal in addition to the fee for the copy and collating	0	5	0
For copies of plans, drawings, and armorial bearings, etc., such fee as shall be determined by the district registrar in each particular case.			

Collating Documents.

For collating copy of a probate and will, or copy of letters of administration with or without the will annexed, or any other instrument to be filed or deposited in a district registry, or for collating any copy or instrument with an original document already filed or deposited in a district registry, including the district registrar's certificate in verification thereof.			
If ten folios of ninety words each, or under	0	2	6
If above ten folios of ninety words each, per folio	0	0	3
If there is any pencil writing copied or the copy or any part thereof is fac simile in addition to the above fees :—			
If such pencil writing or fac simile copy is two folios of ninety words in length or under	0	0	6
For every additional folio or part of a folio	0	0	3

Attendances.

For attendance with any book or original document within three miles of the district registry	*1*	*1*	*0*
For the second and each subsequent attendance at the same place within fourteen days	*0*	*10*	*6*
For attendance with books or original documents within three miles of the district registry, when more than one book or document are required, for each book or document besides the first	*0*	*5*	*0*
For the second and each subsequent attendance at the same place within fourteen days, for each book or document besides the first	*0*	*2*	*6*
For each day's attendance with any book or original document beyond the distance of three miles from the district registry, exclusive of travelling expenses	*1*	*1*	*0*
For each day's attendance with any books or original documents beyond the distance of three miles from the district registry, exclusive of travelling expenses, when more than one book or document are required, for each book or document besides the first	*0*	*5*	*0*

The travelling expenses to be advanced and paid to the messenger attending with books or original documents shall include all other necessary expenses which are to be or may have been incurred by such messenger.

[NOTE.—The fees for attendances are now regulated by the Order as to Supreme Court Fees, 1884, item 25. (See *post*, p. 966.)]

District Registrar's Minute.

For every district registrar's minute	0	2	6

Filing.

For filing every *affidavit* or other document brought into and deposited in a district registry, except the oaths for executors, administrators, or administrators with the will, the first administration bond and the testamentary papers in respect of which probate or administration with will annexed is granted	0	2	6
For filing every exhibit	*0*	*1*	*0*
For filing in a district registry any notice required to be sent there from the Principal Registry	0	0	6
For filing in the Principal Registry any notice required to be sent there by the district registrar	0	0	6

[NOTE.—The fee for filing an affidavit is altered to 2*s*., and no fee is charged for filing an exhibit.]

	£	s.	d.
Caveats.			
For the entry of every caveat	0	1	0
For each notice of such caveat to the principal or to any district registry	0	1	0
For subducting a caveat	0	1	0
For notice to the Principal Registry or to any district registry to which notice of a caveat has been sent of its having been subducted	0	1	0
Receipts for Papers.			
For every receipt for documents left in a district registry	0	1	0
For every receipt for a document or documents delivered out of a district registry	0	1	0
Deposit of Wills.			
For depositing every will of a person deceased in a district registry for safe custody	0	10	0
Bonds.			
For superintending and attesting the execution of a bond	0	1	6
If not completed on one occasion, for each subsequent attestation	0	1	0
Oaths.			
For every oath (*a*) administered by a district registrar or by a commissioner authorised to administer oaths in the district registry to each deponent	0	1	6
For marking each exhibit	0	1	0
Alterations in Grants.			
For making alterations in grants of probate or letters of administration in pursuance of an order of one of the registrars of the Principal Registry	0	2	6
Notations.			
For noting alterations and revocations on grants on the record of the same	0	2	6
For noting second and subsequent grants on the record of the first grant	0	2	6
For noting renunciations, or any other necessary matter on the record of a grant	0	2	6
Certificates.			
For every certificate under the hand of a district registrar for which no other fee is payable	0	2	6
Fiats.			
For the fiat of a district registrar as to the form in which any will or codicil is to be registered	0	5	0
For noting on a testamentary paper that probate thereof is refused	0	5	0
Notices.			
For every notice required to be sent to the Principal Registry for which no other fee is payable, except notices required by rule 82	0	1	0
Perusal of Deeds, etc.			
For perusing deeds or other documents when necessary, for every folio or part of a folio of seventy-two words	0	0	3

(*a*) Altered from 1*s*. to 1*s*. 6*d*. in 1876.

IN ADDITION TO THE ORDINARY FEES

TO BE TAKEN IN THE

DISTRICT REGISTRIES

Attached to the Court of Probate

IN NON-CONTENTIOUS BUSINESS.

The following Fees are to be taken in

CASES OF PERSONAL APPLICATIONS.

[**NOTE.—This is the table of 1874, as altered and amended by subsequent orders.**]

ON PROBATES OR LETTERS OF ADMINISTRATION WITH WILL ANNEXED,

Or double or cessate probates or letters of administration with will annexed, de bonis non or cessate, upon which stamp duty is payable in respect of the personal estate of the testator.

Effects sworn under	Preparing Oath of Executors.	Preparing Affidavit for the Inland Revenue Office.	Probate under Seal.	Clerks.
£	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
5	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 2 6	0 1 0	0 1 0
100	0 5 0	0 5 0	0 1 0	0 2 0
200	0 5 0	0 5 0	0 2 0	0 2 0
300	0 5 0	0 5 0	0 5 0	0 2 0
450	0 5 0	0 5 0	0 8 0	0 2 0
600	0 5 0	0 5 0	0 11 0	0 2 0
800	0 5 0	0 5 0	0 15 0	0 2 0
1,000	0 5 0	0 5 0	1 2 0	0 2 0
1,500	0 5 0	0 5 0	1 10 0	0 5 0
2,000	0 5 0	0 5 0	2 0 0	0 5 0
3,000	0 5 0	0 5 0	2 10 0	0 5 0
4,000	0 5 0	0 5 0	3 0 0	0 5 0
5,000	0 5 0	0 5 0	3 2 6	0 7 6
6,000	0 5 0	0 5 0	3 5 0	0 7 6
7,000	0 5 0	0 5 0	3 7 6	0 7 6
8,000	0 5 0	0 5 0	3 10 0	0 7 6
9,000	0 5 0	0 5 0	3 12 6	0 7 6
10,000	0 5 0	0 5 0	3 15 0	0 7 6
12,000	0 5 0	0 5 0	3 17 6	0 7 6
14,000	0 5 0	0 5 0	4 0 0	0 7 6
16,000	0 5 0	0 5 0	4 3 9	0 7 6
18,000	0 5 0	0 5 0	4 7 6	0 7 6
20,000	0 5 0	0 5 0	4 11 3	0 7 6
25,000	0 5 0	0 5 0	4 16 3	0 7 6
30,000	0 5 0	0 5 0	5 2 6	0 7 6
35,000	0 5 0	0 5 0	5 8 9	0 7 6
40,000	0 5 0	0 5 0	5 18 3	0 7 6
45,000	0 5 0	0 5 0	6 7 6	0 7 6
50,000	0 5 0	0 5 0	6 17 0	0 7 6

Effects sworn under	Preparing Oath of Executors.			Preparing Affidavit for the Inland Revenue Office.			Probate under Seal.			Clerks.		
£	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
60,000	0	5	0	0	5	0	7	6	3	0	7	6
70,000	0	5	0	0	5	0	8	5	0	0	7	6
80,000	0	5	0	0	5	0	9	3	9	1	1	0
90,000	0	5	0	0	5	0	10	2	6	1	1	0
100,000	0	5	0	0	5	0	11	1	3	1	1	0
120,000	0	5	0	0	5	0	11	10	9	1	1	0
140,000	0	5	0	0	5	0	12	9	6	1	1	0
160,000	0	5	0	0	5	0	13	8	3	1	1	0
180,000	0	5	0	0	5	0	14	7	0	1	1	0
200,000	0	5	0	0	5	0	15	5	9	1	1	0
250,000	0	5	0	0	5	0	16	4	6	1	1	0
300,000	0	5	0	0	5	0	18	11	3	1	1	0
350,000	0	5	0	0	5	0	20	18	3	1	1	0
400,000	0	5	0	0	5	0	21	13	9	1	1	0
500,000	0	5	0	0	5	0	22	9	6	1	1	0

For every additional £100,000, or any fractional part of £100,000 under which the effects are sworn, in addition to the above fees, £1 11*s.* 3*d.*

In addition to the above, for all second and subsequent grants the same fees for looking up and taking an account of each former representation as on similar grants on which no stamp duty is payable.

	£	s.	d.
For engrossing and collating the will, if three folios of ninety words or under, including parchment	0	4	6
If exceeding three folios, per folio	0	1	6

For engrossing and collating a will or codicil for a grant of probate or letters of administration with the will annexed, when there are pencil marks in the will or codicil, or when the will or codicil is to be registered fac-simile, in addition to any other fee for engrossing and collating the same :—

	£	s.	d.
If the pencil marks in the will or codicil, or the part or parts thereof to be registered fac-simile, are two folios of 90 words in length or under	0	1	0
If exceeding two folios, for every additional folio or part of the folio of 90 words	0	0	6

FEES ON LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

In addition to the above fees :

For preparing the bond—if the effects are—

	£	s.	d.
Under £20	0	1	6
£20 and under £100	0	3	6
£100 and upwards	0	5	0

ON LETTERS OF ADMINISTRATION GRANTED TO A WIDOW OF AN INTESTATE OR TO ONE OR MORE OF HIS CHILDREN, OR TO ONE OR MORE OF THE CHILDREN OF AN INTESTATE WIDOW,

On personal application at a district registry, other than letters of administration granted in pursuance of the provisions of the Act of 36 & 37 Vict. c. 52, as extended by the Act of 38 & 39 Vict. c. 27.

In lieu of all fees heretofore authorised to be taken when the personal (*a*) estate is sworn :—

(*a*) See note on p. 944, *ante.*

Amended table of fees to be taken on and after July 26th, 1875.

	£ s. d.
Not to exceed in value £20	0 5 0
Not to exceed in value £30	0 6 0
Not to exceed in value £40	0 7 0
Not to exceed in value £50	0 8 0
Not to exceed in value £60	0 9 0
Not to exceed in value £70	0 10 0
Not to exceed in value £80	0 11 0
Not to exceed in value £90	0 12 0
Not to exceed in value £100	0 13 0

[For fees to be taken in pursuance of 36 & 37 Vict. c. 52, see *post*, p. 958.]

The above include the fees payable for taking instructions for, and drawing, and copying an instrument of renunciation to be executed by the widow of an intestate if required, and all other fees payable in respect of such grants.

ON OTHER GRANTS OF LETTERS OF ADMINISTRATION,

Including letters of administration de bonis non or cessate, upon which stamp duty is payable in respect of the personal estate of the intestate.

Effects sworn not to exceed	Preparing Oath for Administrator and Bond.	Preparing Affidavit for the Inland Revenue.	Letters of Administration under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 4 0	0 2 6	0 1 0	—
20	0 4 0	0 2 6	0 1 0	0 1 0
50	0 7 6	0 3 0	0 1 0	0 2 0
100	0 8 6	0 5 0	0 1 0	0 2 0
Effects sworn under				
200	0 10 0	0 5 0	0 3 0	0 2 0
300	0 10 0	0 5 0	0 8 0	0 2 0
450	0 10 0	0 5 0	0 11 0	0 2 0
600	0 10 0	0 5 0	0 15 0	0 2 0
800	0 10 0	0 5 0	1 2 0	0 2 0
1,000	0 10 0	0 5 0	1 10 0	0 5 0
1,500	0 10 0	0 5 0	2 5 0	0 5 0
2,000	0 10 0	0 5 0	3 0 0	0 5 0
3,000	0 10 0	0 5 0	3 1 9	0 7 6
4,000	0 10 0	0 5 0	3 3 9	0 7 6
5,000	0 10 0	0 5 0	3 7 6	0 7 6
6,000	0 10 0	0 5 0	3 11 3	0 7 6
7,000	0 10 0	0 5 0	3 15 0	0 7 6
8,000	0 10 0	0 5 0	3 18 9	0 7 6
9,000	0 10 0	0 5 0	4 2 6	0 7 6
10,000	0 10 0	0 5 0	4 6 3	0 7 6
12,000	0 10 0	0 5 0	4 10 0	0 7 6
14,000	0 10 0	0 5 0	4 13 9	0 7 6
16,000	0 10 0	0 5 0	4 19 6	0 7 6
18,000	0 10 0	0 5 0	5 5 0	0 7 6
20,000	0 10 0	0 5 0	5 10 9	0 7 6
25,000	0 10 0	0 5 0	5 18 3	0 7 6
30,000	0 10 0	0 5 0	6 7 6	0 7 6
35,000	0 10 0	0 5 0	6 17 0	0 7 6
40,000	0 10 0	0 5 0	7 10 9	0 7 6
45,000	0 10 0	0 5 0	8 5 0	0 7 6
50,000	0 10 0	0 5 0	8 18 9	0 7 6
60,000	0 10 0	0 5 0	9 13 3	0 7 6

Effects sworn not to exceed	Preparing Oath for Administrator and Bond.	Preparing Affidavit for the Inland Revenue.	Letters of Administration under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
70,000	0 10 0	0 5 0	11 1 3	0 7 6
80,000	0 10 0	0 5 0	12 9 6	1 1 0
90,000	0 10 0	0 5 0	13 17 6	1 1 0
100,000	0 10 0	0 5 0	15 5 9	1 1 0
120,000	0 10 0	0 5 0	15 19 9	1 1 0
140,000	0 10 0	0 5 0	17 8 0	1 1 0
160,000	0 10 0	0 5 0	18 16 3	1 1 0
180,000	0 10 0	0 5 0	20 4 0	1 1 0
200,000	0 10 0	0 5 0	21 12 6	1 1 0
250,000	0 10 0	0 5 0	23 0 3	1 1 0
300,000	0 10 0	0 5 0	24 3 9	1 1 0
350,000	0 10 0	0 5 0	25 7 3	1 1 0
400,000	0 10 0	0 5 0	26 10 6	1 1 0
500,000	0 10 0	0 5 0	27 14 0	1 1 0
600,000	0 10 0	0 5 0	30 10 0	1 1 0
700,000	0 10 0	0 5 0	32 7 9	1 1 0
800,000	0 10 0	0 5 0	34 13 9	1 1 0
900,000	0 10 0	0 5 0	37 1 6	1 1 0
1,000,000	0 10 0	0 6 0	39 8 6	1 1 0

For every additional £100,000, or any fractional part of £100,000, under which the effects are sworn, in addition to the above fees, £2 7*s.*

In addition to the above for all second and subsequent grants the same fees for looking-up and taking an account of each former representation as on similar grants on which no stamp duty is payable.

ON DOUBLE OR CESSATE PROBATES ON WHICH NO STAMP DUTY IS PAYABLE.

If the Effects are sworn under	Looking up and taking an Account of each former Grant.	Oath of the Executor.	Affidavit for Inland Revenue Office.	Double or Cessate Probate under Seal.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 2 6	0 2 6	0 1 0	0 1 0
100	0 5 0	0 5 0	0 5 0	0 1 0	0 2 0
200	0 5 0	0 6 6	0 5 0	0 3 0	0 2 0
300	0 5 0	0 6 6	0 5 0	0 7 6	0 2 0
450	0 5 0	0 6 6	0 5 0	0 12 0	0 2 0
600	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
800	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
1,000	0 5 0	0 6 6	0 5 0	0 12 6	0 2 0
1,500	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
2,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
3,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
4,000	0 5 0	0 6 6	0 5 0	0 12 6	0 5 0
5,000	0 5 0	0 6 6	0 5 0	0 12 6	0 7 6
Above 5,000	The fees to be taken are the same as above, except the fee for clerks, which, if the effects are of the value of £70,000 or upwards, is £1 1*s.*				

ON EXEMPLIFICATION OF PROBATE OR LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED.

	£	s.	d.
Looking up the grant of probate and original will, or grant of administration	0	5	0
Exemplification under seal, in addition to the £3 stamp	0	15	0
Clerks	0	2	6

ON DUPLICATE AND TRIPLICATE PROBATES, OR LETTERS OF ADMINISTRATION (WITH OR WITHOUT WILL ANNEXED), ETC.

	£	s.	d.
Looking up the will	0	5	0
Duplicate or triplicate probate or letters of administration, with or without the will annexed, or probate of codicil to will already proved, or letters of administration (with same annexed), if the personal estate is sworn under £450, or any smaller sum, the same fees as on the original grant.			
If the personal estate is of the value of £450 and upwards	0	12	6
Clerks	0	2	6

ON LETTERS OF ADMINISTRATION, WITH OR WITHOUT WILL ANNEXED, DE BONIS NON OR CESSATE, ON WHICH NO STAMP DUTY IS PAYABLE.

If the Effects are sworn under	Looking-up and taking an Account of each former Grant.	Oath of the Administrator and Bond.	Affidavit for Inland Revenue Office.	De Bonis Non or Cessate Administration under Seal and Duty-paid Stamp.	Clerks.
£	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
5	0 2 6	0 2 6	0 2 6	0 1 0	—
20	0 2 6	0 4 0	0 2 6	0 1 0	0 1 0
50	0 3 6	0 6 0	0 3 0	0 1 6	0 2 0
100	0 5 0	0 7 6	0 5 0	0 3 0	0 2 0
200	0 5 0	0 10 0	0 5 0	0 4 6	0 2 0
300	0 5 0	0 10 0	0 5 0	0 12 0	0 2 0
450	0 5 0	0 10 0	0 5 0	0 12 6	0 2 0
600	0 5 0	0 10 0	0 5 0	0 12 6	0 2 0

If the effects are £600 and upwards, the same fees as above, except the fee for clerks, which is 5*s.*

Instructions, Drawing, Copying, etc.

	£	s.	d.
Instructions for every oath, affidavit, instrument, or document, other than the oaths and affidavits and instruments of renunciation included in the foregoing fees	0	5	0
Drawing same, at per folio of 72 words	0	1	0
Copies of any documents prepared in the Department for Personal Applications, not included in the foregoing fees, at per folio of 72 words	0	0	6
Instructions for special or limited probates, or letters of administration (*with or without will annexed*)	0	5	0
Attendances on settling oaths for special or limited grants	0	10	0

All other fees to be taken the same as for ordinary grants.

Perusing, etc.

	£	s.	d.
Perusing and settling oaths, affidavits, and other instruments and documents not drawn in the district registry, if 6 folios of 72 words or under	0	1	6
If exceeding 6 folios, at per folio of 72 words	0	0	3

TABLE OF FEES

To be taken in

THE PRINCIPAL REGISTRY AND DISTRICT REGISTRIES OF THE COURT OF PROBATE, AND BY THE REGISTRARS OF COUNTY COURTS,

In pursuance of

THE INTESTATES' WIDOWS AND CHILDREN ACT, 1873 (36 & 37 VICT. c. 52).

Letters of administration of the personal estate of an intestate granted to his widow or one or more of his children, under the authority of the Act 36 & 37 Vict. c. 52, when the whole of such personal estate is sworn :—

	£	*s.*	*d.*
Not to exceed in value £20	0	5	0
Not to exceed in value £30	0	6	0
Not to exceed in value £40	0	7	0
Not to exceed in value £50	0	8	0
Not to exceed in value £60	0	9	0
Not to exceed in value £70	0	10	0
Not to exceed in value £80	0	11	0
Not to exceed in value £90	0	12	0
Not to exceed in value £100	0	13	0

The moiety of the above fees to be paid to or retained by the acting county court registrar, and the remaining moiety to be deposited in or remitted to the principal or district registries of the Court in the form of fee stamps.

(Signed) JAMES HANNEN.

Dated this 8th day of August, 1873.

Approved by the Commissioners of
Her Majesty's Treasury,
13th August, 1873.

FEES PAYABLE IN RESPECT OF PROBATES AND LETTERS OF ADMINISTRATION UNDER SEC. 33 OF THE CUSTOMS AND INLAND REVENUE ACT, 1881, AMENDED BY SEC. 16 OF THE FINANCE ACT, 1894.

Under sec. 33 of the Customs and Inland Revenue Act, 1881 (as amended by sec. 16 of the Finance Act, 1894),

an inclusive fee of fifteen shillings

to cover all Court fees and expenses with reference to the grant of probate or administration is payable :

44 Vict. c. 12, s. 33. (1) Where the deceased died on or after the 1st June, 1881, and before the 2nd August, 1894, and the whole personal estate and effects of the deceased (inclusive of property by law made such personal estate and effects for the purpose of the charge of duty, and any personal estate and effects situate out of the United Kingdom, without any deduction for debts or funeral expenses), does not exceed the value of **£300**.

57 & 58 Vict. c. 30 s. 16. (2) Where the gross value of the property real and personal in respect of which estate duty is payable on the death of the deceased (exclusive of

property settled otherwise than by the will of the deceased) does not exceed **£500**.

*** As to the duty payable in such cases, *vide ante*, pp. 868, 873.

[NOTE.—In these cases it is considered that solicitors are *not* entitled to have the engrossments made in the registry free of charge. The fee includes the charge for all orders made by registrars in chambers, *e.g.*, appointing guardian or presuming death ; *vide ante*, p. 451.]

SUMMARY OF FEES IN RESPECT OF RESEALING IN ENGLAND IRISH PROBATES AND LETTERS OF ADMINISTRATION WITH WILL ANNEXED (*a*).

	s.	*d.*
SEALING grant.		
Where property in England amounts to or exceeds £300 in value, and is shown to have been included in the property in respect of which a fee was paid in Ireland	12	6
In other cases, such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England affected by the grant.		
SEARCH.		
For every full year or part of a year which has elapsed since the deceased's death	0	6
RECEIPT for grant	1	0
REGISTRAR'S fiat	5	0
FILING copy will and grant	2	6
COLLATING copy with original grant—		
If 10 folios of 90 words each	2	6
If above 10 folios of 90 words each, per folio	0	3
INLAND REVENUE certificate	2	6
CERTIFICATE of bond (if any)	2	6

SUMMARY OF FEES IN RESPECT OF RESEALING IN ENGLAND IRISH LETTERS OF ADMINISTRATION (*a*).

	s.	*d.*
SEALING grant.		
Where property in England amounts to or exceeds £300 in value, and is shown to have been included in the property in respect of which a fee was paid in Ireland	12	6
In other cases, such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England affected by the grant.		
SEARCH.		
For every full year or part of a year which has elapsed since the deceased's death	0	6
RECEIPT for grant	1	0
REGISTRAR'S fiat	5	0
FILING copy grant	2	6
COLLATING copy with original grant—		
If 10 folios of 90 words each	2	6
If above 10 folios of 90 words each, per folio	0	3
INLAND REVENUE certificate	2	6
CERTIFICATE of bond	2	6

(*a*) Where the application to reseal the grant is made under sec. 16 of the Finance Act, 1894, a fee of 2*s.* 6*d.* only is payable.

Fees in respect of Re-sealing IN IRELAND English Probates or Letters of Administration with Will annexed (*a*).

In the High Court of Justice (Ireland) Probate and Matrimonial Division.

	s.	*d.*
Grant.		
Effects in Ireland sworn under £20	1	0
,, ,, ,, ,, £100	10	0
,, ,, ,, at or over £100	12	6
Search.		
For every full year or part of a year (except the current one) which has elapsed since the deceased's death	0	6
Filing notice of application	2	6
Receipt for grant	1	0
Registrar's fiat	5	0
Filing copy will and grant	2	6
Comparing copy with original grant—		
If 10 folios of 90 words each or under	2	6
If above 10 folios of 90 words each, per folio	0	3
Stamp Office certificate	2	6
Certificate of bond (if any)	2	6

Fees in respect of Re-sealing IN IRELAND English Letters of Administration (*a*).

In the High Court of Justice (Ireland) Probate and Matrimonial Division.

	s.	*d.*
Grant.		
Effects in Ireland sworn under £20	1	0
,, ,, ,, ,, £50	5	0
,, ,, ,, ,, £100	10	0
,, ,, ,, at or over £100	12	6
Search.		
For every full year or part of a year (except the current one) which has elapsed since the deceased's death	0	6
Filing notice of application	2	6
Receipt for grant	1	0
Registrar's fiat	5	0
Filing copy grant	2	6
Comparing copy with original grant—		
If 10 folios of 90 words each or under	2	6
If above 10 folios of 90 words each, per folio	0	3
Stamp Office certificate	2	6
Certificate of bond	2	6

Summary of Fees in Respect of Re-sealing Scotch Confirmations in England (*a*).

	s.	*d.*
Sealing confirmation	21	0
Search.		
For every full year or part of a year which has elapsed since the deceased's death	0	6
Receipt for confirmation	1	0
Filing copy confirmation	2	6
Collating copy with original confirmation—		
If 10 folios of 90 words each	2	6
If above 10 folios of 90 words each, per folio	0	3

(*a*) Where the application to reseal the grant is made under sec. 16 of the Finance Act, 1894, a fee of 2*s*. 6*d*. only is payable.

SUMMARY OF FEES IN RESPECT OF RE-SEALING COLONIAL GRANTS IN ENGLAND (*a*).

	s.	*d.*
SEALING GRANT.		
Such fee as would be payable in respect of a grant originally made in England for property equal in amount to the property in England which is to be affected by the grant (*a*).		
SEARCH.		
For every full year or part of a year which has elapsed since the deceased's death	0	6
RECEIPT for grant	1	0
REGISTRAR'S fiat and certificate	7	6
FILING copy grant	2	6
COLLATING copy with original grant—		
If 10 folios of 90 words each	2	6
If above 10 folios of 90 words each, per folio	0	3
POWER OF ATTORNEY (if any)	2	6
CERTIFICATE OF DELAY (if required)	2	6

(*a*) If the application is made through the Personal Application Department, the additional fees payable when a grant is extracted through that department, inclusive of the *ad valorem* fee for probate and letters of administration under seal, are to be taken. Where the application to re-seal the grant is made under sec. 16 of the Finance Act, 1894, a fee of 2*s.* 6*d.* only is payable.

PART II.—FEES IN CONTENTIOUS BUSINESS.

[NOTE.—The fees taken in Contentious Business are regulated by the Order as to Supreme Court Fees, 1884, set out, so far as it applies to Contentious Probate Practice, on pp. 964—970 of this Appendix. The following table is an alphabetical re-arrangement of some of the more important items in this order.]

Order as to Supreme Court Fees: Item No.		£	*s.*	*d.*
	Advertisement.			
126.	Signing, settling, or approving	0	10	0
	Affidavits.			
26.	Swearing (each person)	0	1	6
27.	Marking each exhibit	0	1	0
29.	Filing each affidavit	0	2	6
	Affidavit of Scripts. See "Scripts."			
	Amended Pleading.			
29.	Filing	0	2	6
	[NOTE.—This fee is taken whether a fresh copy is filed or not.]			
	Appeals.			
52.	Entering or setting down (or re-entering or re-setting down) an appeal to the Court of Appeal	2	0	0
57.	Fee for drawing up decree [taken when the appeal is entered]	1	0	0
29.	Filing notice of appeal	0	2	6

Order as to Supreme Court Fees: Item No.		£	s.	d.
	Appearances.			
17.	Entering appearance (for each person)	0	2	0
18.	Amending appearance	0	2	0
	Associate's Certificate.			
53.	After trial at assizes, to be paid to the Associate	1	0	0
	Attendances.			
25.	On application for any officer to attend as a witness, for each day or part thereof he is absent from his office	1	0	0
	[See the terms of the item on p. 966, *post.*]			
	Bond.			
130.	Assignment of bond (in addition to the 5*s.* duty stamp)	0	5	0
29.	Filing bond	0	2	6
	Certificates.			
	Associate's certificate, see above.			
42.	Certificate of appearance, or of pleading, etc., filed, or the negative	0	2	6
43.	If required for use in a foreign country	0	5	0
	Citations.			
29.	Filing affidavit to lead	0	2	6
29.	Filing citation	0	2	6
136.	Sealing citation	0	5	0
	Commissions.			
15.	Sealing or issuing	1	0	0
	Copies.			
20.	Item 20 of the Supreme Court Fees does *not* apply to probate practice. The fees for making copies are those charged in non-contentious business (*ante*, p. 939). The folio in contentious business is 72 words.			
	Decrees. See "Orders."			
	Depositions. See "Filing."			
	Filing.			
29.	Affidavits, each	0	2	6
	Bonds, see "Bond."			
	Citations, see "Citations."			
29.	Deposition (a fee of 3*s.* is charged for the minute)	0	2	6
29.	Other document (except scripts)	0	2	6
	Scripts. See "Scripts."			
	Hearing.			
52.	Entering an action for trial	2	0	0
57.	Fee for drawing up decree [taken when action is set down]	1	0	0
	Judge's Notes.			
133.	On application to produce	0	5	0
	Judgments. See "Orders."			

Order as to Supreme Court Fees: Item No.		£	s.	d.
	Minute.			
67.	Minutes of orders made by the registrar which do not require personal service	0	3	0
	[Order of the President, January 30th, 1884.]			
	Motions.			
58.	Fee for order (including filing of case on motion)	0	10	0
29.	Filing affidavits, each	0	2	6
	[These fees are taken when the motion is set down.]			
	Notice under Summons for Directions. See "Summons for Directions."			
	Oaths. See "Affidavits."			
	Orders.			
	On drawing up and entering judgments, decrees, and orders:—			
57.	If made in Court on the original hearing of a cause	1	0	0
57.	On any application to the Court of Appeal unless otherwise provided	1	0	0
58.	If a judgment without hearing in Court	0	10	0
58.	Final order in a probate action by a registrar	0	10	0
58.	Order made in a probate action on a motion	0	10	0
66.	Any other order	0	5	0
	Receipt.			
33.	For scripts, or any other document delivered out of the registry	0	2	6
	Receiver.			
128.	Appointment of receiver *pendente lite*	1	0	0
15.	**Requisition or Commission**	1	0	0
	Scripts.			
29.	Filing affidavit of scripts	0	2	6
	Filing scripts:			
31.	If not exceeding five	0	5	0
32.	If exceeding five	0	10	0
33.	On a receipt for scripts, when delivered out	0	2	6
46.	On an application to inspect scripts filed, for each hour or part of an hour occupied	0	2	6
47.	Not exceeding on one day	0	10	0
	Search.			
45.	On application to search for an appearance or an affidavit	0	1	0
46.	On application to search an index, and to inspect scripts, for each hour or part of an hour occupied	0	2	6
47.	Not exceeding on one day	0	10	0
	Setting down. See "Hearing."			
	Subpœna.			
	Subpœna to bring in will under sec. 23 of the Court of Probate Act, 1858:—			
6.	Sealing	0	5	0
66.	Order	0	5	0
29.	Affidavit (filing)	0	2	6
5.	Subpœna for three witnesses (each subpœna carries three witnesses)	0	5	0

Order as to Supreme Court Fees: Item No.		£	s.	d.
	Summonses.			
	Summons for directions :			
10.	Sealing or issuing	0	10	0
66.	Order	0	5	0
	Subsequent directions :			
	Notice—no fee.			
66.	Order	0	5	0
	Extension of time—			
67.	Memorandum of	0	3	0
	Summons for discontinuance :			
11.	Issuing	0	3	0
58.	Order	0	10	0
	[If under the summons for directions, the fee of 10*s.* for the order is alone paid.]			
	Any other summons :			
11.	Issuing	0	3	0
66.	Order	0	5	0
	On appeal to the judge, no fee.			
	Swearing. See " Affidavits."			
	Taxation of Costs.			
29.	Filing bill of costs	0	2	6
66.	Order (if any)	0	5	0
	On taxing bill of costs :			
102.	Where the amount allowed does not exceed £4	0	2	0
103.	Where the amount exceeds £4, for every £2 allowed, or fraction thereof	0	1	0
	[NOTE.—A deposit of one-third of the fee payable on the bill as untaxed is taken.]			
	Writs.			
1.	Sealing writ of summons for commencement of an action	0	10	0
	Sealing a writ of :			
6.	Attachment	0	5	0
6.	Elegit	0	5	0
6.	Fi. fa.	0	5	0
6.	Sequestration	0	5	0

A SELECTION OF ITEMS

FROM THE

ORDER AS TO SUPREME COURT FEES, 1884.

I. The fees and percentages contained in the Schedule hereto are fixed and appointed to be, and shall be taken in the High Court of Justice, and in the Court of Appeal, and in any Court to be created by any commission, and in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, and by any officer paid wholly or partly out of public moneys who is attached to any of those Courts, or the Supreme Court or any judge of those Courts, or any of them. And the said fees and percentages shall, until otherwise determined by the Treasury, be taken by stamps in the same manner as heretofore, except those taken in the district registries, which shall, until otherwise determined by the Treasury, be taken as the fees and percentages are now taken.

II. The provisions in this Order shall not apply to or affect any of the matters following (that is to say) :—

The existing fees and percentages in respect of any of the jurisdictions which are not, by the Supreme Court of Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or the Court of Appeal.

The existing fees and percentages in respect of any matters within the jurisdiction of the Court of Probate at the time of the passing of the Supreme Court of Judicature Act, 1875, other than probate actions.

. . . . . .

III. Save as otherwise provided by this Order, all existing fees and percentages which may be taken in any of the Courts whose jurisdiction is, by the Judicature Acts, 1873 and 1875, transferred to the High Court of Justice or Court of Appeal, or in any office which is connected with any of those Courts, or in which any business connected with any of those Courts is conducted, or by any officer paid wholly or partly out of public moneys who is attached to any of those Courts, or the Supreme Court, or any judge of those Courts or any of them, shall be and are hereby abolished.

IV. A folio is to comprise 72 words, every figure comprised in a column or authorised to be used being counted as one word.

V. The provisions of Order LXXI. of the Rules of the Supreme Court, 1883, shall apply to this Order.

VI. This Order shall come into operation on the 25th day of January, 1884, and may be cited as "The Order as to Supreme Court Fees, 1884."

THE SCHEDULE ABOVE REFERRED TO.

An order or rule herein referred to by number shall mean the order or rule so numbered in the Rules of the Supreme Court, 1883.

Summonses, Writs, Notices, Commissions, and Warrants.

	£	s.	d.
1. On sealing a writ of summons for commencement of an action ...	0	10	0
2. On sealing a concurrent, renewed or amended writ of summons for commencement of an action	0	2	6
2A. On bespeaking a request for service of notice of writ by a foreign Court under Order XI., r. 8	1	0	0
(*Added by Order as to S. C. Fees, November*, 1903.)			
3. On sealing a notice for service under Order XVI., r. 48	0	2	6
4. On sealing a writ of mandamus	1	0	0
5. On sealing a writ of subpœna for witnesses, not exceeding three persons	0	5	0
6. On sealing a writ of execution, a subpœna pursuant to the Court of Probate Act, 1858, sec. 23, and every other writ	0	5	0
7. On sealing or issuing an originating summons under the Act 6 & 7 Vict. c. 73, for the taxation of a solicitor's bill of costs within twelve months after delivery, or delivery of a bill of costs by a solicitor, including the order to be made thereon	0	10	0
(*Note.—Compare fee No.* 65.)			
8. On sealing any other originating summons	0	10	0
9. On amending same	0	2	6
(*As amended by Order as to S. C. Fees, November*, 1903.)			
10. On sealing or issuing a summons for directions under Order XXX.	0	10	0
11. On sealing or issuing any other summons	0	3	0
14. On sealing or issuing a commission to take oaths or affidavits in the Supreme Court	5	0	0
15. On every other commission	1	0	0
16. On marking a copy of a petition of right for service	0	5	0

Appearances.

	£	s.	d.
17. On entering an appearance, for each person	0	2	0
18. On amending same	0	2	0

Copies.

	£	s.	d.
21. On making a copy and marking same as an office copy, for each folio	0	0	6
22. On a copy in a foreign language—the actual cost.			

	£	s.	d.
23. On a copy of a plan, map, section, drawing, photograph, or diagram—the actual cost.			
24. On a printed copy of an order, not being an office or certified copy, for each folio	0	0	1

Attendances.

25. On an application, with or without a subpœna, for any officer to attend as a witness, or to produce records or documents to be given in evidence (in addition to the reasonable expenses of the officer), for each day or part of a day he shall necessarily be absent from his office	1	0	0

The officer may require a deposit of stamps on account of any further fees, and a deposit of money on account of any further expenses which may probably become payable beyond the amount paid for fees and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum therof on the application.

The officer may also require an undertaking in writing to pay any further fees and expenses which may become payable beyond the amounts so paid and deposited.

Oaths, etc.

26. On taking an affidavit or an affirmation or attestation upon honour in lieu of an affidavit or a declaration, except for the purpose of receipt of dividends from the Paymaster-General, for each person making the same	0	1	6
27. And in addition thereto for each exhibit therein referred to and required to be marked	0	1	0

Filing.

28. On filing a special case or petition of right	1	0	0
29. On filing, except in Admiralty actions, and unless otherwise provided, an affidavit, deposition, or set of depositions (including any exhibits annexed to any such affidavit or deposition), statement of claim in default of appearance, official and special referees' certificates, petition, preliminary act, submission to arbitration, award, warrant of attorney, cognovit, bail, satisfaction piece, bond, writ of execution with return, and power of attorney, and every other proceeding in a probate action or in a divorce or other matrimonial cause or matter required by Act of Parliament, general order, or order in the action, cause or matter to be filed in the Principal Probate Registry	0	2	6
31. On filing scripts in a probate action or on depositing, pursuant to an order in any cause or matter, any documents for safe custody or production, if the number does not exceed five	0	5	0
32. If exceeding five	0	10	0
33. On a receipt for any document or documents to which the two last fees apply, when delivered out, or for any other document or documents when delivered out of the Principal Probate Registry	0	2	6

Certificates.

42. On a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof, unless otherwise provided	0	2	6
43. Or if required for use in a foreign country	0	5	0
44. Or if a certificate of proceedings pursuant to Order LXI., r. 24 ...	0	5	0

Searches and Inspections.

45. On an application to search for an appearance or an affidavit, and inspecting the same	0	1	0

	£	s.	d.
46. On an application to search an index, and inspect a pleading, judgment, decree, order, or other record, unless otherwise expressly provided for by any Act of Parliament or this Order, and to inspect scripts filed or documents deposited pursuant to an order for safe custody or production, for each hour or part of an hour occupied	0	2	6
47. Not exceeding on one day	0	10	0

Examination of Witnesses.

	£	s.	d.
48. On every memorandum of appointment for an examination to be taken before an examiner of the Court	0	5	0
49. On every witness sworn and examined by an officer of the Court in his office, unless otherwise provided, including oath, for each hour or part of an hour	0	10	0
50. On an examination of witnesses by any such officer away from the office (in addition to reasonable travelling and other expenses), per day	3	0	0

51. The officer may require a deposit of stamps on account of fees and a deposit of money on account of expenses which may probably become payable beyond any amount paid for fees and expenses upon the examination, and the officer, or his clerk, taking such deposit shall thereupon make a memorandum thereof and deliver the same to the party making the deposit.

The officer may also require an undertaking, in writing, to pay any further fees and expenses which may become payable beyond the amount so paid and deposited.

Hearing (*a*).

	£	s.	d.
52. On entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause or matter for trial or hearing in any Court in London or Middlesex or at any assizes, including hearing on further consideration where no such fee was paid on the original hearing, whether on summons adjourned from chambers or otherwise, and including special case, a petition in a divorce or matrimonial cause or matter by which a proceeding is commenced, and petition of right, but not any other petition, nor any other summons adjourned from chambers	2	0	0

[NOTE.—This fee is payable though the matter for hearing does not arise in an action, as in the case of a rule nisi against a justice under 11 & 12 Vict. c. 44, s. 5 (*Hasker*, (1884) 14 Q. B. D. 82). In *Dudley*, (1885) 33 W. R. 750, it was held by a Divisional Court, after consultation with other judges, that this fee was not payable on an appeal from chambers (see *Hasker*, *supra*). Subsequent to *Dudley*, appeals from chambers in matters of practice and procedure were transferred to the Court of Appeal, and this fee has become payable on setting down all such appeals. The ruling in *Dudley*, however, would appear to apply still to appeals from chambers to the Divisional Court in matters other than practice and procedure.

A second fee is not payable on re-entry of actions made *remanet*, adjourned or postponed from one assize to another, or sent down for trial on circuit after entry in London, or *vice versâ*, or on change of venue from one town to another on the same circuit. But a second fee is payable on re-entry of a case for new trial after order for new trial, or after disagreement of jury. (So decided by the Treasury on question submitted by the Master of the Crown Office, July, 1904.)]

(*a*) By order as to Supreme Court Fees, October, 1884, the fees hereunder written are to be taken in appeals brought on or after the 24th October, 1884, from inferior Courts :—

	£	s.	d.
On filing	0	10	0
On hearing	1	0	0
On drawing up judgment	0	10	0

	£	s.	d.
53. On entering directions of the judge at a trial pursuant to Order XXXVI., rr. 41 and 42, and certifying same when required ...	1	0	0
55. On answering and setting down for hearing in Court a petition by which any proceeding is commenced, unless otherwise provided	1	0	0
56. Any other petition	0	10	0

Judgments, Decrees, and Orders.

On drawing up and entering judgments, decrees, and orders (*a*)—

	£	s.	d.
57. If made in Court on the original hearing or hearing on further consideration of a cause, or on the hearing of a motion, special case or petition, or on any application to the Court of Appeal unless otherwise provided	1	0	0

Where in a divorce or matrimonial cause or matter a decree nisi is made, and afterwards a decree absolute, no fee shall be payable on the decree absolute.

(*As amended by Order as to S. C. Fees, November*, 1903.)

	£	s.	d.
58. If a judgment without hearing in Court or a final order in a probate action made by a registrar, or if an order made in a probate action or in a divorce or matrimonial cause or matter on a motion, including filing the case or application on which the order is made	0	10	0
59. If made on the hearing of an originating summons, unless otherwise provided	0	10	0
65. If an order of course under the Act 6 & 7 Vict. c. 73, to tax a solicitor's bill of costs within twelve months after delivery, or for delivery of a bill of costs by a solicitor where fee No. 7 is not applicable	0	10	0
65A. If an order appointing a receiver, liquidator or guardian or other person required to give security	0	10	0

(See Weekly Notes, 1909, p. 269.)

	£	s.	d.
66. On any other order	0	5	0
67. On signing a note or memorandum of an order pursuant to Order LII., r. 14, when required for production, where no order is drawn up	0	3	0
71. On proceedings pursuant to an order in any cause or matter where the amount of the outstanding or undisposed-of estate of a deceased person or of the estate subject to any trust or partnership shall be ascertained for the purpose of being dealt with in such cause or matter without deducting any payment to creditors or parties interested after the commencement of the cause or matter, for every £100, or portion of £100, of the amount or value thereof	0	1	0
72. On taking an account of moneys received by an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, partner, receiver, guardian, consignee, bailee, manager, provisional official or other liquidator, sequestrator, or execution creditor, or other person liable to account, for every £100, or fraction of £100, of the amount found to have been received without deducting any payment	0	1	0

[N.B.—The percentage is to be taken on the amount found to have been received on any periodical account (*Re Crawshay*, 39 Ch. D. 552).]

	£	s.	d.
81. On a certificate of a . . . . taxing master . . . . of the result of any . . . . taxation of costs before him, including one or any number of matters	0	10	0

(*a*) See note (*a*) on preceding page.

On Proceedings in the King's Bench and Probate, Divorce and Admiralty Divisions, except in Admiralty Actions, before a Master, Registrar, or District Registrar.

	£	*s.*	*d.*
82. The fee No. 72 on taking accounts applicable to proceedings in the Chancery Division upon similar proceedings in these Divisions.			
83. On every other reference, investigation, or inquiry, including examination of witnesses, if any, for every hour or part of an hour the officer is occupied	0	10	0

Taxation of Costs.

(*See also fee* 81, *for certificate of costs.*)

102. On taxing a bill of costs where the amount allowed does not exceed £4	0	2	0
103. Where the amount exceeds £4, for every £2 allowed or a fraction thereof	0	1	0

These fees, unless otherwise provided, shall be taken on signing the certificate or on the allowance of the bill of costs as taxed; but the fees shall be due and payable, if no certificate or allocatur is required, on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.

The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation, and the officer or his clerk on taking such deposit shall make a memorandum thereof on the bill of costs.

Order V., r. 58, of the Chancery Funds Consolidated Rules, 1874, shall continue to be acted upon in cases to which it is applicable. [This rule is now repealed, and rule 67A of the Funds Rules, 1905, which is identical in effect, is substituted for it.]

On Proceedings in the Pay Office of the Supreme Court.

104. On a certificate of the amount and description of any money, funds, or securities, including the request therefor	0	1	0
105. On a transcript of an account for each opening, including the request therefor	0	2	0
106. On a request to the Paymaster, Bank of England, or a registrar of the Probate, Divorce and Admiralty Division (unless otherwise provided), for any of the following purposes: paying, lodging, transferring, or depositing money, funds, or securities in Court without an order, or money in addition to the amount directed by an order to be paid in; paying out of Court any money without an order or a certificate of a taxing officer; information in writing in respect of any money, funds, or securities, or any transaction in the Pay Office	0	1	0
107. On a request for information respecting any money, funds, or securities to the credit of any cause or matter contained in any list prepared by the Paymaster of causes and matters to the credit of which any money, funds, or securities have not been dealt with during 15 years	0	2	6
108. On an affidavit for the purpose of paying, transferring, or depositing any money, funds, or securities in Court pursuant to the statute 10 & 11 Vict. c. 96	0	1	0
109. On preparing a power of attorney	0	3	0

Miscellaneous.

125. On a fiat of a judge	0	5	0
126. On signing, settling, or approving an advertisement	0	10	0

	£	s.	d.
128. On an appointment of a receiver in a probate action	1	0	0
129. On taking a recognisance or bond, whether one or more than one recognisor or obligor, and whether entered into by all at one time or not	0	10	0
130. On assignment of a bond	0	5	0
132. On a commitment	0	5	0
133. On an application to produce judge's notes	0	5	0
135. On vacating a recognisance or bond	0	10	0

(*As amended by Order as to S. C. Fees, November*, 1903. *Where a bond and recognisance are vacated together, only one fee is payable. By direction of the Chancery Judges, March*, 1904.)

	£	s.	d.
136. On a citation	0	5	0

APPENDIX VI.

COSTS.

CONTENTS.

◆

PART I.—COSTS IN NON-CONTENTIOUS BUSINESS.

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PART I.—COSTS IN NON-CONTENTIOUS BUSINESS.

COSTS

To be allowed

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in

THE PRINCIPAL REGISTRY

Of the Court of Probate, in

NON-CONTENTIOUS BUSINESS.

[**NOTE.—This is the table of 5th February, 1874.**]

IN RESPECT OF PROBATES,

Including double or cessate probates or letters of administration with will annexed, de bonis non or cessate, upon which stamp duty is payable in respect of the personal estate of the testator.

Effects sworn under	Oath of Executor and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn.	Engrossing and collating the Will, 3 fos. of 90 words or under, including parchment.	Probate under Seal.	Extracting.	Clerks.
£	*s.* *d.*	*s.* *d.*	*s.* *d.*	£ *s.* *d.*	*s.* *d.*	£ *s.* *d.*
5	2 6	2 6	4 6	0 1 0	1 0	—
20	2 6	2 6	4 6	0 1 0	3 4	0 1 0
100	5 0	5 0	4 6	0 1 0	6 8	0 2 0
200	6 8	5 0	4 6	0 3 0	6 8	0 2 0
300	10 0	10 0	4 6	0 7 6	6 8	0 2 0

Effects sworn under	Oath of Executor and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn.	Engrossing and collating the Will, 3 fos. of 90 words or under, including parchment.	Probate under Seal.	Extracting.	Clerks.
£	s. d.	s. d.	s. d.	£ s. d.	s. d.	£ s. d.
450	10 0	10 0	4 6	0 12 0	6 8	0 2 0
600	10 0	10 0	4 6	0 16 6	6 8	0 2 0
800	10 0	10 0	4 6	1 2 6	6 8	0 2 0
1,000	10 0	10 0	4 6	1 13 0	6 8	0 2 0
1,500	10 0	10 0	4 6	2 5 0	6 8	0 5 0
2,000	10 0	10 0	4 6	3 0 0	6 8	0 5 0
3,000	10 0	10 0	4 6	3 15 0	13 4	0 5 0
4,000	10 0	10 0	4 6	4 10 0	13 4	0 5 0
5,000	10 0	10 0	4 6	4 15 0	13 4	0 7 6
6,000	10 0	10 0	4 6	5 0 0	13 4	0 7 6
7,000	10 0	10 0	4 6	5 5 0	13 4	0 7 6
8,000	10 0	10 0	4 6	5 10 0	13 4	0 7 6
9,000	10 0	10 0	4 6	5 15 0	13 4	0 7 6
10,000	10 0	10 0	4 6	6 0 0	13 4	0 7 6
12,000	10 0	10 0	4 6	6 5 0	13 4	0 7 6
14,000	10 0	10 0	4 6	6 10 0	13 4	0 7 6
16,000	10 0	10 0	4 6	6 17 6	13 4	0 7 6
18,000	10 0	10 0	4 6	7 5 0	13 4	0 7 6
20,000	10 0	10 0	4 6	7 12 6	13 4	0 7 6
25,000	10 0	10 0	4 6	8 2 6	13 4	0 7 6
30,000	10 0	10 0	4 6	8 15 0	13 4	0 7 6
35,000	10 0	10 0	4 6	9 7 6	13 4	0 7 6
40,000	10 0	10 0	4 6	10 6 3	13 4	0 7 6
45,000	10 0	10 0	4 6	11 5 0	13 4	0 7 6
50,000	10 0	10 0	4 6	12 3 9	13 4	0 7 6
60,000	10 0	10 0	4 6	13 2 6	13 4	0 7 6
70,000	10 0	10 0	4 6	15 0 0	13 4	0 7 6
80,000	10 0	10 0	4 6	16 17 6	13 4	1 1 0
90,000	10 0	10 0	4 6	18 15 0	13 4	1 1 0
100,000	10 0	10 0	4 6	20 12 6	13 4	1 1 0
120,000	10 0	10 0	4 6	21 11 3	13 4	1 1 0
140,000	10 0	10 0	4 6	23 8 9	13 4	1 1 0
160,000	10 0	10 0	4 6	25 6 3	13 4	1 1 0
180,000	10 0	10 0	4 6	27 3 9	13 4	1 1 0
200,000	10 0	10 0	4 6	29 1 3	13 4	1 1 0
250,000	10 0	10 0	4 6	30 18 9	13 4	1 1 0
300,000	10 0	10 0	4 6	35 12 6	13 4	1 1 0
350,000	10 0	10 0	4 6	40 6 3	13 4	1 1 0
400,000	10 0	10 0	4 6	41 17 6	13 4	1 1 0
500,000	10 0	10 0	4 6	43 8 9	13 4	1 1 0

[NOTE.—These fees are calculated on the GROSS amount of the PERSONAL estate dealt with by the grant.]

	£ s. d.
And for every additional one hundred thousand pounds or any fractional part of one hundred thousand pounds under which the personal estate is sworn, in addition to the above fees, a further fee for probate under seal of	3 2 6
In addition to the above, for all second or subsequent grants of probate or letters of administration with will annexed, the same fees for looking up the will and bespeaking engrossment as on similar grants upon which no stamp duty is payable.	
For engrossing and collating the will, if more than three folios of 90 words each, per folio, including parchment	0 1 6

When there are two or more executors, and they are not sworn at the same time, for each attendance after the first on their being sworn to oath and affidavit :—

	£	s.	d.
If the effects are sworn under £20	0	2	6
If the effects are sworn under £100	0	5	0
If the effects are sworn above £100	0	6	8

IN RESPECT OF LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

In addition to the above fees, for preparing and attendance on the execution of the bond if the effects are :—

	£	s.	d.
Under £20	0	2	6
£20 and under £100	0	6	8
£100 and upwards	0	10	0

For engrossing and collating a will or codicil for a grant of probate or letters of administration with the will annexed, when there are pencil marks in the will or codicil, or when the will or codicil is to be registered fac-simile, in addition to any other fee for engrossing and collating the same :—

	£	s.	d.
If the pencil marks in the will or codicil, or the part or parts thereof to be registered fac-simile, are two folios of 90 words in length or under	0	1	0
If exceeding two folios, for every additional folio or part of a folio of 90 words	0	0	6

IN RESPECT OF LETTERS OF ADMINISTRATION,

Including letters of administration de bonis non or cessate upon which stamp duty is payable in respect of the personal estate of the intestate.

Effects sworn under	Oath of Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on Administrator being sworn.	Letters of Administration under Seal.	Extracting.	Clerks.
£	s. d.	s. d.	£ s. d.	s. d.	£ s. d.
5	2 6	2 6	0 1 0	1 0	—
20	3 4	2 6	0 1 0	3 4	0 1 0
50	5 0	5 0	0 1 6	4 8	0 2 0
100	6 8	6 8	0 3 0	6 8	0 2 0
200	10 0	6 8	0 4 6	6 8	0 2 0
300	13 4	10 0	0 12 0	6 8	0 2 0
450	13 4	10 0	0 16 6	6 8	0 2 0
600	13 4	10 0	1 2 6	6 8	0 2 0
800	13 4	10 0	1 13 0	6 8	0 2 0
1,000	13 4	10 0	2 5 0	6 8	0 5 0
1,500	13 4	10 0	3 7 6	6 8	0 5 0
2,000	13 4	10 0	4 10 0	13 4	0 5 0
3,000	13 4	10 0	4 13 9	13 4	0 7 6
4,000	13 4	10 0	4 17 6	13 4	0 7 6
5,000	13 4	10 0	5 5 0	13 4	0 7 6
6,000	13 4	10 0	5 12 6	13 4	0 7 6
7,000	13 4	10 0	6 0 0	13 4	0 7 6
8,000	13 4	10 0	6 7 6	13 4	0 7 6
9,000	13 4	10 0	6 15 0	13 4	0 7 6
10,000	13 4	10 0	7 2 6	13 4	0 7 6
12,000	13 4	10 0	7 10 0	13 4	0 7 6
14,000	13 4	10 0	7 17 6	13 4	0 7 6

Effects sworn under	Oath of Administrator and attendance on his being sworn, and on execution of the Bond.		Affidavit for Inland Revenue Office and attendance on Administrator being sworn.		Letters of Administration under Seal.			Extracting.		Clerks.		
£	s.	d.	s.	d.	£	s.	d.	s.	d.	£	s.	d.
16,000	13	4	10	0	8	8	9	13	4	0	7	6
18,000	13	4	10	0	9	0	0	13	4	0	7	6
20,000	13	4	10	0	9	11	3	13	4	0	7	6
25,000	13	4	10	0	10	6	3	13	4	0	7	6
30,000	13	4	10	0	11	5	0	13	4	0	7	6
35,000	13	4	10	0	12	3	9	13	4	0	7	6
40,000	13	4	10	0	13	11	3	13	4	0	7	6
45,000	13	4	10	0	15	0	0	13	4	0	7	6
50,000	13	4	10	0	16	7	6	13	4	0	7	6
60,000	13	4	10	0	17	16	3	13	4	0	7	6
70,000	13	4	10	0	20	12	6	13	4	0	7	6
80,000	13	4	10	0	23	8	9	13	4	1	1	0
90,000	13	4	10	0	26	5	0	13	4	1	1	0
100,000	13	4	10	0	29	7	3	13	4	1	1	0
120,000	13	4	10	0	30	9	6	13	4	1	1	0
140,000	13	4	10	0	33	5	9	13	4	1	1	0
160,000	13	4	10	0	36	2	0	13	4	1	1	0
180,000	13	4	10	0	38	18	3	13	4	1	1	0
200,000	13	4	10	0	41	14	6	13	4	1	1	0
250,000	13	4	10	0	44	10	9	13	4	1	1	0
300,000	13	4	10	0	46	17	6	13	4	1	1	0
350,000	13	4	10	0	49	4	6	13	4	1	1	0
400,000	13	4	10	0	51	11	3	13	4	1	1	0
500,000	13	4	10	0	53	18	3	13	4	1	1	0

[NOTE.—These fees are calculated on the GROSS amount of the PERSONAL estate to be dealt with by the grant.]

	£	s.	d.
And for every additional one hundred thousand pounds or any fractional part of one hundred thousand pounds under which the personal estate is sworn, in addition to the above fees, a further fee for letters of administration under seal of	4	13	6
When there are two or more administrators, and they are not sworn at the same time, for each attendance after the first on their being sworn to oath and affidavit, and on execution of the bond :—			
If the effects are under £20	0	3	4
If the effects are under £100	0	5	0
If the effects are above £100	0	10	0
In addition to the above fees, for preparing bond if the effects are :—			
Under £20	0	1	8
£20 and under £50	0	3	4
£50 and under £100	0	5	0
£100 and upwards	0	6	8

IN RESPECT OF DOUBLE OR CESSATE PROBATES, UPON WHICH NO STAMP DUTY IS PAYABLE.

If the effects are sworn under	Attendance in the Registry, and looking up the Will and bespeaking the Engrossment.	Oath of the Executor and attendance on his being sworn.	Affidavit for Inland Revenue Office, and attendance on the Executor being sworn.	Drawing and copying Statement in support of application for the duty-paid Stamp.	Attending the Commissioners of Stamps and procuring the duty-paid Stamp.	Double or Cessate Probate under Seal.	Extracting.	Clerks.
£	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*
5	3 4	2 6	2 6	—	—	1 0	1 0	—
20	3 4	2 6	2 6	—	—	1 0	3 4	1 0
100	6 8	5 0	5 0	6 8	13 4	1 0	6 8	2 0
200	6 8	6 8	6 8	6 8	13 4	3 0	6 8	2 0
300	6 8	10 0	10 0	6 8	13 4	7 6	6 8	2 0
450	6 8	10 0	10 0	6 8	13 4	12 0	6 8	2 0
600	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
800	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
1,000	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
1,500	6 8	10 0	10 0	10 0	13 4	12 6	6 8	5 0
2,000	6 8	10 0	10 0	10 0	13 4	12 6	6 8	5 0
3,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	5 0
4,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	5 0
5,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	7 6
Above 5,000	The fees to be taken are the same as above, except the clerk's fee, which, if the effects are of the value of £70,000 or upwards, is £1 1*s.*							

	£	*s.*	*d.*
The above fee for drawing and copying the statement in support of application for the duty-paid stamp is to be taken when the statement is five folios of 72 words or under. If the statement exceeds five folios, for each additional folio of 72 words	0	1	4

When there are two or more executors to be sworn, and they are not sworn at the same time, for each attendance after the first on their being sworn, the same fee as on a first grant under the same sum.

Exemplification of Probate or Letters of Administration with or without Will annexed.

	£	s.	d.
Attending in the registry, looking up the grant of probate and original will or grant of administration, and bespeaking exemplification	0	6	8
Exemplification under seal and stamp	1	1	0
Extracting	0	6	8
Clerks	0	2	6

In respect of Duplicate and Triplicate Probates or Letters of Administration with or without Will annexed.

	£	s.	d.
Attending in the registry, looking up the will, and bespeaking duplicate or triplicate of a grant and engrossment	0	6	8
Drawing and copying statement in support of application to the Inland Revenue Office for the duty-paid stamp :— The same fee as on a double or cessate probate.			
Attending at the Inland Revenue Office and procuring the duty-paid stamp	0	13	4
Duplicate or triplicate probate or letters of administration with or without will annexed. If the personal estate is under £450 or any smaller sum, the same fee as on the original grant.			
If the personal estate is of the value of £450 and upwards	0	12	6
Extracting	0	6	8
Clerks	0	2	6

IN RESPECT OF LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED DE BONIS NON OR CESSATE, UPON WHICH NO STAMP DUTY IS PAYABLE.

If the Effects are sworn under	Attending in the Registry, looking up and perusing the Will, and taking an account of the former Grant.	Oath of the Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on Administrator being sworn.	Drawing and copying Statement in support of application to the Inland Revenue Office for the duty-paid Stamp.	Attending at the Inland Revenue Office and procuring the duty paid Stamp.	De Bonis or Cessate Administration with or without Will under Seal and duty-paid Stamp.	Extracting.	Clerks.
£	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
5	6 8	5 0	2 6	—	—	1 0	1 0	—
20	6 8	5 0	2 6	—	—	1 0	3 4	1 0
50	6 8	6 8	5 0	—	—	1 6	4 8	2 0
100	6 8	10 0	6 8	5 0	6 8	3 0	6 8	2 0
200	6 8	13 4	6 8	6 8	13 4	4 6	6 8	2 0
300	6 8	16 8	10 0	6 8	13 4	12 0	6 8	2 0
450	6 8	16 8	10 0	6 8	13 4	12 6	6 8	2 0
Above 450	The fees to be taken are the same as above, except the extracting fee, which, if the effects are £1,500 and upwards is 13*s.* 4*d.*, and the clerk's fee, which, if the effects are £600 and upwards, is 5*s.*							

£ s. d.

If there has been more than one previous grant, for each grant looked up after the first, a further fee of.................................... 0 5 0

The above fee for drawing and copying the statement in support of application to the Inland Revenue Office for the duty-paid stamp is to be taken if the statement is five folios of 72 words or under. If it exceeds five folios, for each additional folio 0 1 4

In addition to the above, for preparing the bond, and for each attendance after the first on the administrators being sworn, and on the execution of the bond, when there are two or more administrators and they are not sworn at the same time, the same fees as on ordinary grants of letters of administration.

IN RESPECT OF PROBATES, SPECIAL OR LIMITED.

	£	s.	d.
Consulting fee	0	6	8
Affidavit for Inland Revenue Office and attendance on the executor being sworn thereto :— The same fee as on ordinary probates.			
Drawing special oath of executor, per folio of 72 words	0	1	0
Fair copy of the oath for the registrar, per folio of 72 words	0	0	4
Attending the registrar thereon	0	13	4
Engrossing same, per folio of 72 words	0	0	4
Each attendance on the executors being sworn	0	6	8
Engrossing and collating the will Special or limited probate under seal Extracting Clerks	The same fees as on ordinary probates.		

IN RESPECT OF LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED, SPECIAL OR LIMITED.

	£	s.	d.
Consulting fee	0	6	8
Perusing and abstracting deeds or other instruments, when necessary, at per folio of 72 words	0	0	4
Proxy of nomination	0	13	4
Affidavit for Inland Revenue Office and attendance on the administrators being sworn thereto :— The same fees as on ordinary grants of letters of administration.			
Drawing special oath of the administrators, per folio of 72 words	0	1	0
Fair copy of the oath for the registrar to peruse, per folio of 72 words	0	0	4
Attending the registrar thereon	0	13	4
Engrossing the same, per folio of 72 words	0	0	4
Each attendance on the administrators being sworn, and on execution of the bond	0	6	8
Engrossing and collating the will Letters of administration, under seal and stamp Extracting Clerks	The same fees as on ordinary grants of letters of administration, with or without will annexed.		

OFFICE COPIES OF, OR EXTRACTS FROM, RECORDS, WILLS, AND OTHER DOCUMENTS.

	£	s.	d.
For attendance in the registry and searching for a record will, or other document, or for a grant of probate, or letters of administration, with or without will annexed, for five years, or any period less than five years, *including* the ordering of a copy	0	5	0
For every five years after the first five years	0	3	4
For the perusal of a record, will, or other document, when necessary, for the purpose of ordering extracts or for any other purpose, including the ordering of extracts, per folio of 90 words	0	0	4
For collating an office copy or extract of a record, will, or other document, with the original, or a registered copy thereof, including extracting fee, per folio of 90 words	0	0	2
For collating an office copy of the Act on granting probate or administration with the original entry thereof, including extracting fee	0	1	0

CAVEATS.

For attendance in the registry and entering or subducting a caveat	0	6	8
For attendance in the registry and giving instructions for warning caveators to enter an appearance	0	6	8
For service of warning to a caveat, and copy	0	5	0

AFFIDAVITS OTHER THAN THE AFFIDAVITS AND OATHS INCLUDED IN THE FEES OF PROBATE AND LETTERS OF ADMINISTRATION ; AND DECLARATION OF PERSONAL ESTATE AND EFFECTS.

	£	s.	d.
For taking instructions for every affidavit or declaration of personal estate and effects	0	6	8
For drawing and fair copy of the same, per folio of 72 words	0	1	4
For every attendance on the deponents or declarants being sworn or affirmed to such affidavit or declaration	0	6	8

INSTRUMENTS OF RENUNCIATION AND CONSENT, LETTERS OF ATTORNEY, AND OTHER DOCUMENTS.

	£	s.	d.
For taking instructions for every instrument of renunciation or consent, letters of attorney, or other document	0	6	8
For drawing and fair copy thereof, per folio of 72 words	0	1	4

FOR COMMISSIONERS OF THE COURT.

	£	s.	d.
For each oath administered to each deponent by a commissioner, surrogate, or other person authorised to administer oaths in the Court of Probate	0	1	6
For marking each exhibit	0	1	0
For each occasion of superintending and attesting the execution of a bond	0	1	6

TAXING BILL OF COSTS.

	£	s.	d.
For attendance on taxation of bill of costs	0	6	8

If long, such further fee as the registrar may think proper.

Proctors, solicitors, and attornies are not entitled to any costs in addition to those allowed by the foregoing table in respect of the non-contentious business comprised therein ; but in case of their transacting any business not therein provided for, they will be allowed as follows :—

	£	s.	d.
For instructions for any original instrument prepared by them	0	6	8
For perusing every document which it is necessary to peruse as instructions, per folio of 72 words	0	0	4
For drawing and fair copy of any original instrument, per folio of 72 words	0	1	4
For every plain copy of a document, per folio of 72 words	0	0	4
If the same, or any part thereof, is to be copied fac simile, for the part or parts to be so copied, per folio of 72 words, in addition to the above	0	0	2
For every necessary attendance on counsel, or on any practitioner or party other than their own client	0	6	8

COSTS

To be allowed

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in the

DISTRICT REGISTRIES

Of the Court of Probate.

[**NOTE.—This is the Table of February 5th, 1874.**]

In respect of Probates,

Including double or cessate probates or letters of administration with will annexed de bonis non or cessate upon which stamp duty is payable in respect of the personal estate of the testator.

Effects sworn under	Oath of Executor and attendance on the party being sworn.		Affidavit for the Inland Revenue Office and attendance on the party being sworn		Engrossing & collating the Will, 3 fos. of 90 words or under, including parchment.		Probate under seal.			Extracting.		Clerks.		
£	*s.*	*d.*	*s.*	*d.*	*s.*	*d.*	£	*s.*	*d.*	*s.*	*d.*	£	*s.*	*d.*
5	2	6	2	6	4	6	0	1	0	1	0		—	
20	2	6	2	6	4	6	0	1	0	3	4	0	1	0
100	5	0	5	0	4	6	0	1	0	6	8	0	2	0
200	6	8	6	8	4	6	0	3	0	6	8	0	2	0
300	10	0	10	0	4	6	0	7	6	6	8	0	2	0
450	10	0	10	0	4	6	0	12	0	6	8	0	2	0
600	10	0	10	0	4	6	0	16	6	6	8	0	2	0
800	10	0	10	0	4	6	1	2	6	6	8	0	2	0
1,000	10	0	10	0	4	6	1	13	0	6	8	0	2	0
1,500	10	0	10	0	4	6	2	5	0	6	8	0	5	0
2,000	10	0	10	0	4	6	3	0	0	6	8	0	5	0
3,000	10	0	10	0	4	6	3	15	0	13	4	0	5	0
4,000	10	0	10	0	4	6	4	10	0	13	4	0	5	0
5,000	10	0	10	0	4	6	4	15	0	13	4	0	7	6
6,000	10	0	10	0	4	6	5	0	0	13	4	0	7	6
7,000	10	0	10	0	4	6	5	5	0	13	4	0	7	6
8,000	10	0	10	0	4	6	5	10	0	13	4	0	7	6
9,000	10	0	10	0	4	6	5	15	0	13	4	0	7	6
10,000	10	0	10	0	4	6	6	0	0	13	4	0	7	6
12,000	10	0	10	0	4	6	6	5	0	13	4	0	7	6
14,000	10	0	10	0	4	6	6	10	0	13	4	0	7	6
16,000	10	0	10	0	4	6	6	17	6	13	4	0	7	6
18,000	10	0	10	0	4	6	7	5	0	13	4	0	7	6
20,000	10	0	10	0	4	6	7	12	6	13	4	0	7	6
25,000	10	0	10	0	4	6	8	2	6	13	4	0	7	6
30,000	10	0	10	0	4	6	8	15	0	13	4	0	7	6
35,000	10	0	10	0	4	6	9	7	6	13	4	0	7	6
40,000	10	0	10	0	4	6	10	6	3	13	4	0	7	6
45,000	10	0	10	0	4	6	11	5	0	13	4	0	7	6
50,000	10	0	10	0	4	6	12	3	9	13	4	0	7	6
60,000	10	0	10	0	4	6	13	2	6	13	4	0	7	6
70,000	10	0	10	0	4	6	15	0	0	13	4	0	7	6

Effects sworn under	Oath of Executor and attendance on the party being sworn.	Affidavit for the Inland Revenue Office and attendance on the party being sworn	Engrossing & collating the Will, 3 fos. of 90 words or under including parchment.	Probate under seal.	Extracting.	Clerks.
£	*s. d.*	*s. d.*	*s. d.*	*£ s. d.*	*s. d.*	*£ s. d.*
80,000	10 0	10 0	4 6	16 17 6	13 4	1 1 0
90,000	10 0	10 0	4 6	18 15 0	13 4	1 1 0
100,000	10 0	10 0	4 6	20 12 6	13 4	1 1 0
120,000	10 0	10 0	4 6	21 11 3	13 4	1 1 0
140,000	10 0	10 0	4 6	23 8 9	13 4	1 1 0
160,000	10 0	10 0	4 6	25 6 3	13 4	1 1 0
180,000	10 0	10 0	4 6	27 3 9	13 4	1 1 0
200,000	10 0	10 0	4 6	29 1 3	13 4	1 1 0
250,000	10 0	10 0	4 6	30 18 9	13 4	1 1 0
300,000	10 0	10 0	4 6	35 12 6	13 4	1 1 0
350,000	10 0	10 0	4 6	40 6 3	13 4	1 1 0
400,000	10 0	10 0	4 6	41 17 6	13 4	1 1 0
500,000	10 0	10 0	4 6	43 8 9	13 4	1 1 0

[NOTE.—These fees are calculated on the GROSS amount of the PERSONAL estate dealt with by the grant.]

In addition to the above for all second or subsequent grants of probate or letters of administration with will annexed, the same fees for looking up the will and bespeaking engrossment as on similar grants upon which no stamp duty is payable.

	£ s. d.
And for every additional one hundred thousand pounds or any fractional part of one hundred thousand pounds under which the personal estate is sworn, in addition to the above fees, a further fee for probate, under seal, of	3 2 6
For engrossing and collating the will, if more than three folios of 90 words each, per folio, including parchment	0 1 6
When there are two or more executors, and they are not sworn at the same time, for each attendance after the first on their being sworn to oath and affidavit—	
If the effects are sworn under £20	0 2 6
If the effects are sworn under £100	0 5 0
If the effects are sworn above £100	0 6 8

IN RESPECT OF LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

In addition to the above fees, for preparing and attendance on the execution of the bond if the effects are—	
Under £20	0 2 6
£20 and under £100	0 6 8
£100 and upwards	0 10 0

For engrossing and collating a will or codicil for a grant of probate or letters of administration with the will annexed, when there are pencil marks in the will or codicil, or when the will or codicil is to be registered fac-simile, in addition to any other fee for engrossing and collating the same :—	
If the pencil marks in the will or codicil, or the part or parts thereof to be registered fac-simile, are two folios of 90 words in length or under	0 1 0
If exceeding two folios, for every additional folio or part of a folio of 90 words	0 0 6

IN RESPECT OF LETTERS OF ADMINISTRATION,

Including letters of administration de bonis non or cessate upon which stamp duty is payable in respect of the personal estate of the intestate.

Effects sworn under.	Oath of Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue and attendance on Administrator being sworn.	Letters of Administration under Seal.	Extracting.	Clerks.
£	*s. d.*	*s. d.*	£ *s. d.*	*s. d.*	£ *s. d.*
5	2 6	2 6	0 1 0	1 0	—
20	3 4	2 6	0 1 0	3 4	0 1 0
50	5 0	5 0	0 1 6	4 8	0 2 0
100	6 8	6 8	0 3 0	6 8	0 2 0
200	10 0	6 8	0 4 6	6 8	0 2 0
300	13 4	10 0	0 12 0	6 8	0 2 0
450	13 4	10 0	0 16 6	6 8	0 2 0
600	13 4	10 0	1 2 6	6 8	0 2 0
800	13 4	10 0	1 13 0	6 8	0 2 0
1,000	13 4	10 0	2 5 0	6 8	0 5 0
1,500	13 4	10 0	3 7 6	6 8	0 5 0
2,000	13 4	10 0	4 10 0	13 4	0 5 0
3,000	13 4	10 0	4 13 9	13 4	0 7 6
4,000	13 4	10 0	4 17 6	13 4	0 7 6
5,000	13 4	10 0	5 5 0	13 4	0 7 6
6,000	13 4	10 0	5 12 6	13 4	0 7 6
7,000	13 4	10 0	6 0 0	13 4	0 7 6
8,000	13 4	10 0	6 7 6	13 4	0 7 6
9,000	13 4	10 0	6 15 0	13 4	0 7 6
10,000	13 4	10 0	7 2 6	13 4	0 7 6
12,000	13 4	10 0	7 10 0	13 4	0 7 6
14,000	13 4	10 0	7 17 6	13 4	0 7 6
16,000	13 4	10 0	8 8 9	13 4	0 7 6
18,000	13 4	10 0	9 0 0	13 4	0 7 6
20,000	13 4	10 0	9 11 3	13 4	0 7 6
25,000	13 4	10 0	10 6 3	13 4	0 7 6
30,000	13 4	10 0	11 5 0	13 4	0 7 6
35,000	13 4	10 0	12 3 9	13 4	0 7 6
40,000	13 4	10 0	13 11 3	13 4	0 7 6
45,000	13 4	10 0	15 0 0	13 4	0 7 6
50,000	13 4	10 0	16 7 6	13 4	0 7 6
60,000	13 4	10 0	17 16 3	13 4	0 7 6
70,000	13 4	10 0	20 12 6	13 4	0 7 6
80,000	13 4	10 0	23 8 9	13 4	1 1 0
90,000	13 4	10 0	26 5 0	13 4	1 1 0
100,000	13 4	10 0	29 1 3	13 4	1 1 0
120,000	13 4	10 0	30 9 6	13 4	1 1 0
140,000	13 4	10 0	33 5 9	13 4	1 1 0
160,000	13 4	10 0	36 2 0	13 4	1 1 0
180,000	13 4	10 0	38 18 3	13 4	1 1 0
200,000	13 4	10 0	41 14 6	13 4	1 1 0
250,000	13 4	10 0	44 10 9	13 4	1 1 0
300,000	13 4	10 0	46 17 6	13 4	1 1 0
350,000	13 4	10 0	49 4 6	13 4	1 1 0
400,000	13 4	10 0	51 11 3	13 4	1 1 0
500,000	13 4	10 0	53 18 3	13 4	1 1 0

[NOTE.—These fees are calculated on the GROSS amount of the PERSONAL estate to be dealt with by the grant.]

	£	*s.*	*d.*
And for every additional one hundred thousand pounds or any fractional part of one hundred thousand pounds under which the personal estate is sworn, in addition to the above fees, a further fee for letters of administration under seal of	4	13	6
When there are two or more administrators, and they are not sworn at the same time, for each attendance after the first on their being sworn to oath and affidavit and on execution of the bond—			
If the effects are under £20	0	3	4
If the effects are under £100	0	5	0
If the effects are above £100	0	10	0

In addition to the above fees, for preparing bond if the effects are—			
Under £20	0	1	8
£20 and under £50	0	3	4
£50 and under £100	0	5	0
£100 and upwards	0	6	8

IN RESPECT OF DOUBLE OR CESSATE PROBATES, UPON WHICH NO STAMP DUTY IS PAYABLE.

If the Effects are sworn under	Attendance in the Registry, and looking up the Will and bespeaking the Engrossment.	Oath of the Executor and attendance on his being sworn.	Affidavit for Inland Revenue Office, and attendance on the Executor being sworn.	Drawing and copying statement in support of application for the duty-paid Stamp.	Attending the Commissioners of Stamps and procuring the duty-paid Stamp.	Double or Cessate Probate under Seal.	Extracting.	Clerks.
£	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*
5	3 4	2 6	2 6	—	—	1 0	1 0	—
20	3 4	2 6	2 6	—	—	1 0	3 4	1 0
100	6 8	5 0	5 0	6 8	13 4	1 0	6 8	2 0
200	6 8	6 8	6 8	6 8	13 4	3 0	6 8	2 0
300	6 8	10 0	10 0	6 8	13 4	7 6	6 8	2 0
450	6 8	10 0	10 0	6 8	13 4	12 0	6 8	2 0
600	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
800	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
1,000	6 8	10 0	10 0	10 0	13 4	12 6	6 8	2 0
1,500	6 8	10 0	10 0	10 0	13 4	12 6	6 8	5 0
2,000	6 8	10 0	10 0	10 0	13 4	12 6	6 8	5 0
3,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	5 0
4,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	5 0
5,000	6 8	10 0	10 0	10 0	13 4	12 6	13 4	7 6
Above 5,000	The fees to be taken are the same as above, except the clerk's fee, which, if the effects are of the value of £70,000 or upwards, is £1 1*s.*							

	£ *s.* *d.*
The above fee for drawing and copying the statement in support of application for the duty-paid stamp is to be taken when the statement is five folios of 72 words or under. If the statement exceeds five folios, for each additional folio of 72 words	0 1 4

When there are two or more executors to be sworn, and they are not sworn at the same time, for each attendance after the first on their being sworn, the same fee as on a first grant under the same sum.

Exemplification of Probate or Letters of Administration with or without Will annexed.

	£	s.	d.
Attending in the district registry, looking up the grant of probate and original will or grant of administration, and bespeaking exemplification	0	6	8
Exemplification under seal and stamp	1	1	0
Extracting	0	6	8
Clerk	0	2	6

In respect of Duplicate and Triplicate Probates or Letters of Administration with or without Will annexed.

	£	s.	d.
Attending in the district registry, looking up the will, and bespeaking duplicate or triplicate of a grant and engrossment	0	6	8
Drawing and copying statement in support of application to the Inland Revenue Office for the duty-paid stamp :— The same fee as on a double or cessate probate.			
Attending at the Inland Revenue Office and procuring the duty-paid stamp	0	13	4
Duplicate or triplicate probate or letters of administration with or without the will annexed. If the personal estate is under £450 or any smaller sum, the same fee as on the original grant.			
If the personal estate is of the value of £450 and upwards	0	12	6
Extracting	0	6	8
Clerks	0	2	6

LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED DE BONIS NON OR CESSATE, UPON WHICH NO STAMP DUTY IS PAYABLE.

If the Effects are sworn under	Attending in the Registry, looking up and perusing the Will, and taking an Account of the former Grant.	Oath of the Administrator and attendance on his being sworn, and on execution of the Bond.	Affidavit for Inland Revenue Office and attendance on Administrator being sworn.	Drawing and copying Statement in support of application to the Inland Revenue Office for the duty-paid Stamp.	Attending at the Inland Revenue Office and procuring the duty-paid Stamp.	De bonis or cessate Administration with or without Will under Seal and duty-paid Stamp.	Extracting.	Clerks.
£	*s. d.*	*s. d.*	*s. d.*	*s. d.*	*s. d.*	*s. d.*	*s. d.*	*s. d.*
5	6 8	5 0	2 6	—	—	1 0	1 0	—
20	6 8	5 0	2 6	—	—	1 0	3 4	1 0
50	6 8	6 8	5 0	—	—	1 6	4 8	2 0
100	6 8	10 0	6 8	5 0	6 8	3 0	6 8	2 0
200	6 8	13 4	6 8	6 8	13 4	4 6	6 8	2 0
300	6 8	16 8	10 0	6 8	13 4	12 0	6 8	2 0
450	6 8	16 8	10 0	6 8	13 4	12 6	6 8	2 0
Above 450	The fees to be taken are the same as above, except the extracting fee, which, if the effects are £1,500 and upwards, is 13*s.* 4*d.*, and the clerk's fee, which, if the effects are £600 and upwards, 5*s.*							

	£	*s.*	*d.*
If there has been more than one previous grant, for each grant looked up after the first, a further fee of	0	5	0
The above fee for drawing and copying the statement in support of application to the Inland Revenue Office for the duty-paid stamp is to be taken if the statement is five folios of 72 words or under. If it exceed five folios, for each additional folio	0	1	4

In addition to the above fees: for preparing the bond, and for each attendance after the first on the administrators being sworn, and on execution of the bond, when there are two or more administrators and they are not sworn at the same time, the same fees as on ordinary grants of letters of administration.

IN RESPECT OF PROBATES, SPECIAL OR LIMITED.

	£	s.	d.
Consulting fee	0	6	8
Affidavit for Inland Revenue Office and attendance on the executor being sworn thereto :— The same fee as on ordinary probates.			
Drawing special oath of executor, per folio of 72 words	0	1	0
Fair copy of the oath for the district registrar, per folio of 72 words	0	0	4
Attending the district registrar thereon	0	13	4
Engrossing same, per folio of 72 words	0	0	4
Attendance on the executor being sworn	0	6	8
Engrossing and collating the will	The same fees as on ordinary probates.		
Special or limited probate under seal			
Extracting			
Clerks			

IN RESPECT OF LETTERS OF ADMINISTRATION WITH OR WITHOUT WILL ANNEXED, SPECIAL OR LIMITED.

	£	s.	d.
Consulting fee	0	6	8
Perusing and abstracting deeds or other instruments, when necessary, at per folio of 72 words	0	0	4
Proxy of nomination	0	13	4
Affidavit for Inland Revenue Office and attendance on the administrator being sworn thereto :— The same fees as on ordinary grants of letters of administration.			
Drawing special oath of the administrator, per folio of 72 words	0	1	0
Fair copy of the oath for the district registrar to peruse, per folio of 72 words	0	0	4
Attending the district registrar thereon	0	13	4
Engrossing same per folio of 72 words	0	0	4
Attendance on the administrators being sworn, and on execution of the bond	0	6	8
Engrossing and collating the will	The same fees as on ordinary grants of letters of administration with or without the will annexed.		
Letters of administration under seal and stamp			
Extracting			
Clerks			

OFFICE COPIES OF, OR EXTRACTS FROM, RECORDS, WILLS, AND OTHER DOCUMENTS.

	£	s.	d.
For attendance in the District Registry and searching for a record, will, or other document, or for a grant of probate, or letters of administration, with or without a will annexed, for five years, or any period less than five years, *including* the ordering of a copy	0	5	0
For every five years after the first five years	0	3	4
For the perusal of a record, will, or other document, when necessary, for the purpose of ordering extracts or for any other purpose, including the ordering of extracts, per folio of 90 words	0	0	4
For collating an office copy or extract of a record, will, or other document, with the original, or a registered copy thereof, including extracting fee, per folio of 90 words	0	0	2
For collating an office copy of the Act on granting probate or administration with the original entry thereof, including extracting fee	0	1	0

CAVEATS.

	£	s.	d.
For attendance in the district registry and entering or subducting a caveat	0	6	8
For service of warning to a caveat, and copy	0	5	0

Affidavits other than the Affidavits and Oaths included in the Fees of Probate and Letters of Administration; and Declarations of Personal Estate and Effects.

	£	s.	d.
For taking instructions for every affidavit or declaration of personal estate and effects	0	6	8
For drawing and fair copy of the same, per folio of 72 words	0	1	4
For every attendance on the deponents or declarants being sworn or affirmed to such affidavits or declarations	0	6	8

Instruments of Renunciation and Consent, Letters of Attorney, and other Documents.

	£	s.	d.
For taking instructions for every instrument of renunciation or consent, letter of attorney, or other document	0	6	8
For drawing a fair copy thereof, per folio of 72 words	0	1	4

For Commissioners of the Court.

	£	s.	d.
For each oath administered to each deponent by a commissioner, surrogate, or other person authorised to administer oaths in the Court of Probate	0	1	6
For marking each exhibit	0	1	0
For each occasion of superintending and attesting the execution of a bond	0	1	6
Proctors, solicitors, and attorneys are not entitled to any costs in addition to those allowed by the foregoing tables in respect of the business comprised therein; but in case of their transacting any business not therein provided for, they will be allowed as follows:—			
For instructions for any original instrument prepared by them	0	6	8
For perusing every document which it is necessary to peruse as instructions, per folio of 72 words	0	0	4
For drawing and fair copy of any original instrument, per folio of 72 words	0	1	4
For every plain copy of a document, per folio of 72 words	0	0	4
If the same or any part thereof is to be copied fac-simile, for the part or parts to be so copied, per folio of 72 words in addition to the above	0	0	2
For every necessary attendance on counsel, or on any practitioner or party other than their own parties	0	6	8

PART II.—COSTS IN CONTENTIOUS BUSINESS.

[NOTE.—The practice in Contentious Business as to costs, and the allowance of the fees of Solicitors and Attorneys. is governed by Order LXV. of the Rules of the Supreme Court, and Appendix N. thereto. Only in particulars where the Rules of the Supreme Court are silent, are the Tables which follow in force.]

COSTS

To be allowed

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in the Court of Probate

IN COURT AND CONTENTIOUS BUSINESS (*a*).

Citation.

	£	*s.*	*d.*
Citation, including præcipe	0	7	6
Citation to see proceedings, including præcipe	0	7	6
Certificate of service	0	2	6
Service of citation, if within two miles of the place of business of the practitioner or of the person employed to effect the service	0	5	0
If beyond that distance, in addition for every mile one way	0	1	0
Affidavit of service, if three folios of 72 words or under	0	5	0
If necessarily more than three folios, for every folio, including copy	0	1	4
In cases in which the person to be served shall avoid service, or the service shall be effected beyond the jurisdiction, except in Scotland and Ireland, such a sum to be allowed for service as the registrar may consider reasonable under the circumstances.			

Subpœna.

	£	*s.*	*d.*
Subpœna ad testificandum, including præcipe	0	5	0
Subpœna duces tecum, or to bring in a script, if five folios of 72 words or under, including præcipe	0	5	0
If necessarily exceeding five folios, for each additional folio of 72 words	0	1	0
Service of a subpœna. Same as citation.			

Writ.

	£	*s.*	*d.*
Writ of attachment, including præcipe	0	7	6
Writ of sequestration, including præcipe	0	7	6
Writ of fieri facias, including præcipe	0	7	6

Instructions.

	£	*s.*	*d.*
Instructions for citation, for pleadings, for interrogatories, for special affidavits, or for inventories	0	6	8
Ditto to defend suit	0	6	8
Ditto for brief, or case for hearing	0	13	4
If there are several witnesses and the brief is necessarily long, an additional fee will be allowed.			

(*a*) [NOTE.—This table is only in force in so far as it is not superseded by the Rules of the Supreme Court.]

	£	s.	d.
Pleadings and Copies.			
Drawing and engrossing declaration, if ten folios of 72 words or under	1	0	0
If exceeding ten folios, for every additional folio	0	1	4
Drawing and engrossing pleas, replications, demurrers, and other pleadings, except those simply joining or taking issue, if ten folios of 72 words or under	1	0	0
If exceeding ten folios, for every additional folio	0	1	4
Copies of declaration or other pleadings to file, at per folio of 72 words	0	0	4
The Issue.			
Drawing the issue, if fifteen folios of 72 words or under, including copy	0	10	0
If exceeding fifteen folios, per folio, including copy	0	0	8
The Record.			
Engrossing record to file, at per folio of 72 words, including parchment	0	0	6
Special Case.			
For case for motion, including fair copy for the judge	0	10	0
If necessarily exceeding seven folios of 72 words in length, for every additional folio of 72 words, including copy	0	1	4
For case to advise on evidence, including copy for counsel	1	0	0
If the case exceeds ten folios in length, and it is shown that it could not be used as part of the brief or case for the hearing, an additional fee will be allowed.			
Drawing Instruments.			
Drawing any instrument to be filed in or issued by the registry for which no other fee is herein allowed, and for fair copy to be filed or issued, per folio of 72 words	0	1	4
Perusing and Abstracting.			
For perusing and abstracting pleadings, testamentary papers, and exhibits of all kinds, per folio of 72 words	0	0	4
Briefs and Cases for Hearing.			
For drawing same, per folio of 72 words	0	1	0
For each copy, per folio of 72 words	0	0	4
Maps and Plans.			
For maps or plans each from	1 3	1 to 3	0 0
Copies of same if required each from	0 1	10 to 0	0 0
Affidavits.			
Drawing affidavit :			
If five folios of 72 words or under, including copy for the Court or Registry	0	6	8
If above five folios, per folio, including copy	0	1	4

[NOTE.—The above tables are only in force in so far as they are not superseded by the Rules of the Supreme Court.]

Interrogatories.

	£	s.	d.
For drawing the same, at per folio of 72 words, and copy for the Court	0	1	4

Copies.

For every plain copy of a script, exhibit, or other instrument, per folio of 72 words	0	0	4
If the same or any part thereof are required to be made fac-simile, for the part or parts copied fac-simile, in addition to the above, per folio of 72 words	0	0	2
All copies on parchment, per folio of 72 words, including the parchment	0	0	6

Collating.

For collating any copy of a script, exhibit, or other instrument with the original, or with another copy thereof, per folio of 72 words, in addition to the fee for attendance	0	0	2

Notices.

All necessary notices, if three folios or under, inclusive of copy and service	0	5	0
If necessarily exceeding three folios, for every additional folio	0	1	0
In all cases where service of a notice is necessary beyond two miles of the place of business of the practitioner, the same fee as upon the service of a citation.			

Summonses.

Drawing summons	0	3	4
Copy of summons or order of the judge, and service	0	5	0

Attendances.

For attendance on and feeing counsel, when the fee is one guinea	0	3	4
When the fee exceeds one guinea and is under five guineas	0	6	8
When the fee is five guineas and upwards	0	13	4
Attendance on consultation	0	13	4
Attendance on conference	0	6	8
Attendance in pursuance of notice to admit	0	6	8
For every hour after the first	0	6	8
Attendance on trial or hearing when cause is in paper and not tried or heard, or on motion in Court	0	13	4
On trial or hearing	1	1	0
If it lasts the whole day	2	2	0
Attendance on examination of witnesses under a commission or order—			
If in England or Wales, per diem	2	2	0
If elsewhere ,,	3	3	0
For all necessary attendances in chambers before the judge or before a commissioner, on counsel, in the registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed	0	6	8

Term Fees, Letters, and Messengers.

Term fee, letters, and messengers, for each term in which any business is done in Court or in chambers other than obtaining an order for taxation, or attending the taxation of bills of costs	0	15	0
For every necessary letter written to any person other than the practitioner's own client	0	3	6

[NOTE.—The above tables are only in force in so far as they are not superseded by the Rules of the Supreme Court.]

Bills of Costs.

	£	s.	d.
Drawing bill of costs and copy for taxation, per folio of 72 words	0	1	0
Copy for the adverse party, per folio of 72 words	0	0	4
Attendance on taxation of bill of costs	0	13	4
If necessarily above an hour, for each additional hour or part of an hour	0	6	8

If in any Court or contentious business it should become necessary for proctors, solicitors, or attorneys to transact any business for which no fee is herein specified, such fee shall be allowed to them as would be allowed for similar business done in the Courts of Common Law and Equity.

[NOTE.—The above tables are only in force in so far as they are not superseded by the Rules of the Supreme Court.]

COSTS

To be allowed

PROCTORS, SOLICITORS, AND ATTORNIES

Practising in the Court of Probate

IN CONTENTIOUS BUSINESS

For the Use of other Persons (*a*).

Counsel's Clerks' Fees.

Not to exceed as under :	£	s.	d.
Upon a fee to counsel under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards, at per cent. on the fee paid	2	10	0
On consultations :			
Senior's clerk	0	5	0
Junior's clerk	0	2	6
On general retainer	0	10	6
On common retainer	0	2	6
On conference	0	5	0

Witnesses' Expenses.

Allowance to witnesses, including their board and lodging, as between party and party :			
Common witnesses, such as labourers, journeymen, etc. etc :			
If resident within five miles of the General Post Office, per diem	0	5	0
If beyond that distance, per diem	0	7	6
Master tradesmen, yeomen, farmers, etc. :			
If resident within five miles of the General Post Office, per diem	0	10	0
If resident beyond that distance, per diem	0	15	0
Auctioneers and accountants :			
If resident within five miles of the General Post Office, per diem	1	1	0
If resident beyond that distance, per diem	2	2	0
Professional men, including notaries, engineers, and surveyors, etc. :			
If resident within five miles of the General Post Office, per diem	1	1	0
If resident beyond that distance, per diem	3	3	0

(*a*) [NOTE.—This table is only in force in so far as it is not superseded by the Rules of the Supreme Court.]

	£	s.	d
Clerk to attornies or others:			
If resident within five miles of the General Post Office, per diem	0	10	6
If resident beyond that distance, per diem	1	1	0
Esquires, bankers, merchants, and gentlemen, per diem	1	1	0
Females according to station in life:			
If resident within five miles of the General Post Office, per diem, from	0 to 0	5 10	0 0
If resident beyond that distance, per diem, from	0 to 1	7 0	6 0
Police inspector:			
If resident within five miles of the General Post Office, per diem	0	7	6
If resident beyond that distance, per diem	0	10	0
Police constable:			
If resident within five miles of the General Post Office, per diem	0	5	0
If resident beyond that distance, per diem	0	7	6

The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1*s.* per mile one way.

Commissioners of the Court.

Commissioners of the Court for administering each oath to each deponent	0	1	6
For marking each exhibit	0	1	0

APPENDIX VII.

FORMS

IN USE IN CONTENTIOUS AND NON-CONTENTIOUS BUSINESS IN THE PRINCIPAL AND DISTRICT PROBATE REGISTRIES.

[**NOTE.**—*The following Forms are drawn to suit cases to which the Land Transfer Act*, 1897 (60 *&* 61 *Vict. c.* 65), *applies*, i.e., *where the deceased person in question died on or after the* 1st *January*, 1898. *They can also be used in cases where the death occurred before that date, but, if so, all references to the heir-at-law or persons interested in the real estate should be omitted. A collection of Forms used in the district probate registries will be found in Part II. of this Appendix, and the Forms in Part I. can be readily adapted for use in the district registries, when necessary.*]

N.B.—The following forms are specimens only, and must be altered to suit individual cases.

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ADMISSION OF FACTS. *See* "NOTICE TO ADMIT FACTS."

ADVERTISEMENT.

FORM No. 1.

Advertisement of Application to re-seal Colonial Grant (*a*).

Advertisement of application to re-seal Colonial grant.

A. B., deceased.

Notice is hereby given, that after the expiration of eight days application will be made in the Principal Probate Registry of the High Court of Justice for the sealing of the probate of the will [*or* letters of administration of the personal estate] of A. B., late of , deceased, granted by the Court at on the day of , 18 .

Solicitors for .

[NOTE.—*To be advertised once in the "Times" newspaper unless otherwise directed by one of the registrars. See Rule* 94 *N.-C. B. This form is printed* verbatim *as originally prescribed, and should be altered as to date, inclusion of real estate, etc., as the case may require.*]

ADVERTISEMENT, ABSTRACT OF CITATION FOR. *See* "CITATION, ABSTRACT OF, FOR ADVERTISEMENT."

AFFIDAVITS TO LEAD GRANTS. *See* "OATHS."

AFFIDAVITS.

FORM No. 2.

Affidavit of due Execution of Will or Codicil by an Attesting Witness (*a*).

Affidavit of due execution of will or codicil by an attesting witness.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

I, C. D., of , in the county of , baker, make oath and say that I am one of the subscribing witnesses to the last will and testament of A. B., of , formerly of , deceased, the said will being hereunto annexed, bearing date the day of , 19 , and that the said deceased executed the said will on the day of the date thereof by signing his name at the foot or end thereof, meaning and intending the same as his final signature to the said will as the same now appears thereon, in the presence of me and of E. F., the other subscribing witness thereto, both of us being present at the same time, and we thereupon (to wit, after the deceased had so signed) attested and subscribed the said will in the presence of the said deceased.

Sworn by the said C. D.
at on the day of
, 19 , before me, } (Signed) C. D.
A Commissioner for Oaths.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 3.

Affidavit of Execution where a Will is signed in the Attestation or Testimonium Clause (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit of execution where a will is signed in the attestation or testimonium clause.

I, C. D., of , auctioneer's clerk, make oath that I am one of the subscribing witnesses to the last will and testament of A. B., of , formerly of , deceased, the said will being now hereunto annexed, bearing date the day of , 19 , and that the said deceased executed the said will on the day of the date thereof by signing his name in the attestation [*or* testimonium] clause thereof, as the same now appears thereon, meaning and intending the same for his final signature to his will, in the presence of me and of E. F., the other subscribed witness thereto, both of us being present at the same time, and we thereupon (to wit, after the deceased had so signed) attested and subscribed the said will in the presence of the said deceased.

Sworn, etc. (Signed) C. D.

FORM NO. 4.

Affidavit as to a Testator's Knowledge of the Contents of his Will (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit as to a testator's knowledge of the contents of his will.

I, C. D., of , baker, make oath and say that I am one of the subscribing witnesses to the last will and testament of the said A. B., of , deceased, the said will being now hereunto annexed, bearing date the day of , 19 .

1. And I further make oath and say, that the said testator duly executed his said will on the day of the date thereof by signing his name [*or* making his mark] at the foot or end thereof, as the same now appears thereon, in the presence of me the said C. D. and of E. F., the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will in the presence of the said testator.

2. And I further make oath, that previously to the execution of the said will by the said testator, the same was read over to him by me [*or* by E. F. in my presence, *or* by himself in my presence], and he the said deceased at such time seemed thoroughly to understand the same [*or* had full knowledge of the contents thereof].

Sworn, etc.

(Signed) C. D.

FORM NO. 5.

Affidavit verifying Alterations in a Will (made by Subscribed Witness) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit verifying alterations in a will (made by a subscribed witness).

I, C. D., of , farmer, make oath and say, that I am one of the attesting witnesses to the last will and testament of the said A. B., of , deceased, the said will being now hereunto annexed and bearing date the day of , 19 , and having particularly observed the words interlined between the and lines of the sheet of the said will, make oath and say as follows:—

That the said testator executed the said will on the day of the date thereof by signing his name at the foot or end thereof as the same now appears thereon, in the presence of me the said C. D. and of E. F., the other subscribed witness

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will in the presence of the said testator.

And I further make oath and say, that the said recited interlineation was written and made in the said will previously to the execution thereof.

Sworn, etc.

(Signed) C. D.

FORM NO. 6.

Affidavit verifying Alteration in Will (by Writer of the Will) (*a*).

Affidavit verifying alteration in will (by writer of the will).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of X. Y., deceased.

I, W. V., of , stockbroker's clerk, make oath and say as follows :—

That I was the writer of the last will and testament of X. Y., of , deceased, bearing date the day of , 19 (the same being now hereunto annexed), and referring to the said will and the interlineations appearing thereon between the and the lines, and between the and the lines thereof respectively, and the erasures appearing in the and the lines thereof, I make oath and say, that the said interlineations and erasures were made by me in the said will previously to the execution of the said will as they now appear.

Sworn, etc. (Signed) W. V.

FORM NO. 7.

Affidavit of Death of Attesting Witnesses (*a*).

Affidavit of death of attesting witnesses.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. The Principal Probate Registry.

In the Estate of A. B., deceased.

We, C. D., of , baker, E. F., of , butcher, and G. H., of , confectioner, having severally inspected the last will and testament of the said A. B., of , deceased, hereunto annexed and dated , and having also observed the names I. J. and K. L. subscribed to the said will as witnesses attesting the due execution thereof, severally make oath and say as follows :—

I, the said C. D., for myself, say that I am the natural and lawful father of the said deceased and the sole executor named in the said will.

That I have made inquiries and have caused inquiries to be made respecting the execution of the said will, and by means of such inquiries I have ascertained that no person or persons, save and except the said testator and the said I. J. and K. L., was or were present at the execution of the said will.

And I, the said E. F., for myself say, that I knew and was well acquainted with the said A. B., who died on the day of , 19 , at , for many years before and down to the time of his death, and that during such period I have frequently seen him write and subscribe his name to writing, and I have thereby become well acquainted with his manner and character of handwriting, and I say that I verily believe the name A. B. subscribed to the said will as aforesaid to be the true and proper handwriting of the said A. B., deceased.

And I, the said E. F., further say that I am the brother of the said I. J., whose name appears subscribed to the said will as one of the attesting witnesses thereto, and that the said I. J. died on the day of , 19 , and that I frequently saw him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting; and I further say that I verily believe that the names I. J. now appearing subscribed to the said will, are of the true and proper handwriting of the said I. J.

And I, the said G. H., for myself say, that I knew and was well acquainted with the said K. L., whose name appears subscribed to the said will as one of

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

the attesting witnesses thereto, and that the said K. L. died on the day of , 19 .

And I, the said G. H., further say that, during the period of my acquaintance with the said K. L., I frequently saw him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting; and I further say that I verily believe that the names K. L. appearing subscribed to the said will are of the true and proper handwriting of the said K. L.

Sworn, etc. (Signed) C. D.
E. F.
G. H.

FORM No. 8.

Affidavit as to Absence of Attesting Witnesses (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit as to absence of attesting witnesses.

We, C. D., of , in the county of , baker, and E. F., of , in the county of , butcher, jointly and severally make oath and say as follows:—

We have carefully inspected the last will and testament of the said A. B., of , in the county of , spinster, deceased, the said will being now hereunto annexed, and bearing date the and subscribed A. B., and have also observed the names G. H. and I. J. subscribed to the said will as witnesses attesting the due execution thereof.

And I, the said E. F., for myself say, that I knew and was well acquainted with the said testatrix, who died on the day of , 19 , at , for many years before and down to the time of her death, and that during such period I have frequently seen her write and subscribe her name to writings, and I have thereby become well acquainted with her manner and character of handwriting, and I say that I verily believe the names A. B. subscribed to the said will as aforesaid to be of the true and proper handwriting of the said A. B., deceased.

And I, the said C. D., for myself say, that I am the sole executor named in the said will, and that I have made inquiries and have caused inquiries to be made respecting the execution of the said will, and I have ascertained that no person was present at the execution of the said will, save and except the said testatrix and the said G. H. and I. J.

And I, the said E. F., for myself say, that I am the uncle of the said I. J., and that the said I. J. in the month of , 19 , left this country for some place unknown to this deponent, and has not since been heard of.

And I, the said E. F., further say, that I have frequently seen the said I. J. write and subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting; and I further say, that I verily believe that the names I. J. now appearing subscribed to the said will, are of the true and proper handwriting of the said I. J.

[*Account for the other attesting witness in a similar way.*]

Sworn, etc.

(Signed) C. D.
E. F.

FORM No. 9.

Affidavit of Search (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit of search.

I, C. D., of , in the county of , grocer, make oath that I am the sole executor named in the paper writing hereunto annexed, purporting to be and contain the last will and testament of A. B., of , deceased, who died on the day of , in the year 19 , at , the said will beginning thus,

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

" ," ending thus, "In witness whereof I have hereunto set my hand this day of in the year of our Lord 19 " [*or as the case may be*], and being thus subscribed, "A. B." And referring particularly to the fact that the blank spaces originally left in the said will for the insertion of the day and month of the date thereof have never been supplied [*or* that the said will is without date, *or as the case may be*], I further make oath, that I have made inquiry of E. F., the solicitor of the said deceased, and that I have also made diligent and careful search in all places where he the said deceased usually kept his papers of moment and concern, and in his depositories, in order to ascertain whether he had or had not left any other will, but that I have been unable to discover any such will. And I lastly make oath, that I verily believe the said deceased died without having left any will, codicil, or testamentary paper whatever, other than the said will hereinbefore referred to by me.

Sworn, etc.

(Signed) C. D.

FORM NO. 10.

Affidavit of Handwriting (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit of handwriting.

I, C. D., of , in the county of , widow, make oath that I knew and was well acquainted with , late of , in the county of , deceased, who died on the day of , 19 , at , for many years before and down to the time of his death, and that during such period I have frequently seen him write and also subscribe his name to writings, whereby I have become well acquainted with his manner and character of handwriting and subscription, and having now with care and attention perused and inspected the paper writing hereunto annexed purporting to be and contain the last will and testament of the said deceased, bearing date , beginning thus, " ," ending thus, " ;" and being subscribed thus, " ," I further make oath, that I verily and in my conscience believe the whole body, series, and contents of the said will, together with the names subscribed thereto as aforesaid, to be of the true and proper handwriting and subscription of the said , deceased.

Sworn, etc. (Signed) C. D.

FORM NO. 11.

Affidavit of Plight and Condition of Finding (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit of plight and condition of finding.

I, C. D., of , baker, make oath that I am sole executor named in the paper writing now hereunto annexed purporting to be and contain the last will and testament of A. B., late of , in the county of , deceased, who died on the day of at , the said will bearing date the day of , beginning thus, " ," ending thus, " ," and being subscribed thus, " ," and having viewed and perused the said will and particularly observed that (1) lastly make oath that the same is now in all respects in the same state, plight, and condition as when found [*or as the case may be*] by me as aforesaid.

Sworn, etc. (Signed) C. D.

[1] Here recite the finding of the will, and the various obliterations, interlineations, erasures, and alterations (if any), and the general plight and condition of the will or any other matters requiring to be accounted for, and clearly trace the will from the possession of the deceased in his lifetime up to the time of making this affidavit.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 12.

Affidavit of Agent as to Plight and Condition (Deposit of Living Person's Will) (*a*).

Affidavit of agent as to plight and condition (deposit of living person's will).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

I, A. B., of , solicitor, make oath and say as follows :—

That the sealed packet I produce for the purpose of the same being deposited for safe custody in the Principal Probate Registry of the High Court of Justice, and on the back of which I have signed my name, is now precisely in the same plight and condition as when received by me from the hands of C. D., of .

Sworn, etc. (Signed) A. B.

FORM NO. 13.

Affidavit of Agent as to Handwriting (Deposit of Living Person's Will) (*a*).

Affidavit of agent as to handwriting (deposit of living person's will).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

I, A. B., of , solicitor, make oath and say as follows :—

1st. That the signature at the foot of the endorsement on the packet containing the last will of C. D. and witnessed by me is in the proper handwriting of the said C. D. and was by him signed in my presence on the day of , One Thousand Nine Hundred and .

2nd. That the signature thereto is the proper handwriting of me this deponent.

Sworn, etc. (Signed) A. B.

FORM NO. 14.

Affidavit for Alias (*a*).

Affidavit for alias.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

In the Estate of A. B., otherwise C. D., deceased.

I, E. F., of , shoemaker, make oath and say as follows :—

That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament bearing date the day of , 19 , and thereof appointed me, this deponent, sole executor.

2. That the said deceased in his said will is described as and subscribed his name thereto in execution thereof as , and was generally known by that name.

3. That the birth of the deceased was registered in the names of , as appears by the certificate of birth now produced, and that the person therein referred to as is the said deceased.

4. That the deceased became the owner of certain securities, namely :— , which were purchased by him in the name of , and the certificates of the holding of such securities in such name are produced herewith, and that the person referred to in the said certificates as is the said deceased.

5. That the said deceased purchased certain freehold property at , in the year , and such property was conveyed to him in the name of , and the person described as in the conveyance of the said property dated the day of , 19 , produced herewith is the said deceased.

6. Under the circumstances it is necessary that the grant of probate of the will of the said deceased should issue in the names of A. B., otherwise C. D.

Sworn, etc. (Signed) E. F.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 15.

Affidavit as to Identity of Executor named in Will (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

I, C. D., of , tobacconist, make oath and say as follows :—

Affidavit as to identity of executor named in will.

1. That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament bearing date the day of , 19 , whereof he appointed me, this deponent, sole executor.

2. That the said deceased described me in his said will as his nephew, whereas, in fact, I am not the nephew of the said deceased but the nephew of E. F., the lawful wife of the said deceased.

3. That the said deceased in his lifetime always spoke of and referred to me as his nephew, and that he, during his lifetime, informed me that he had appointed me the executor of his will.

4. That I am well acquainted with the family and relatives of the said deceased, and that the said deceased has not and never had a nephew of the name of .

5. That I am the only person of the name of , residing at , as described in the said will, and was the only person of that name residing there at the date of the said will.

Sworn, etc. (Signed) C. D.

FORM NO. 16.

Affidavit as to Domicil (*a*).

In the Estate of A. B., deceased.

I, C. D., of , surgeon, make oath and say as follows :—

Affidavit as to domicil.

That I knew and was well acquainted with A. B., of , deceased, who died on the day of , 19 , at .

That the said A. B., was at the time of his death domiciled in .

That [*give grounds for above statement*].

Sworn, etc. (Signed) C. D.

FORM NO. 17.

Affidavit as to Foreign Law (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

I, C. D., of , an advocate of , make oath and say as follows :—

Affidavit as to foreign law.

I am conversant with the laws and constitutions of , [*state how*]. I have referred to the last will and testament of the said A. B., of , deceased, bearing date the , and now hereunto annexed, and I say that the said will is made in conformity with and is valid by the aforesaid laws and constitutions.

Sworn, etc. (Signed) C. D.

FORM NO. 18.

Affidavit as to British Status of Testator (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say as follows :—

Affidavit as to British status of testator.

That I am sole executor named in the last will and testament of A. B., of

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

, formerly of , deceased, the said will being now hereunto annexed bearing date the day of , 19 .

That the said will was made at .

That the said deceased was a British subject and born of English parents at , and that his domicile of origin was English.

Sworn, etc. (Signed) C. D.

FORM No. 19.

Affidavit as to Validity of Scotch Copy Will which has not been Confirmed (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

Affidavit as to validity of Scotch copy will which has not been confirmed.

I, C. D., of , Writer to the Signet in Scotland [*or* Advocate of the Scottish Bar] make oath and say as follows :—

1. That I have full knowledge of the laws and constitutions of Scotland, and have perused the copy of the will of A. B., of , deceased, now hereunto annexed, which will is on record in the books of the for the county of .

2. That the said will is duly made in accordance with and conforms to, and is valid by the said laws and constitutions of Scotland.

3. That the said official copy hereunto annexed is by the said laws and constitutions equivalent in all respects to the original, and that such copy would be received in all courts in Scotland as making faith in judgment equally with the original, and that confirmation by the Commissary Court of Scotland is granted on the production of such official copy.

Sworn, etc. (Signed) C. D.

FORM No. 20.

Affidavit in Proof of Lunacy (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit in proof of lunacy.

We, C. D., of , physician, and E. F., of , hospital nurse, make oath and say respectively as follows :—

And I, the said C. D., for myself make oath that for the space of years now last past I have attended in my professional capacity G. B. (who is as I am informed and believe the natural and lawful father of the said A. B., of , deceased), the said G. B. being a patient under the charge of my fellow deponent the said E. F., at the asylum or house for the reception of lunatics at , aforesaid, and that the said G. B. has been for many years, and now is, a lunatic and totally incapable of managing himself or his affairs, or of doing any act whatever requiring thought, judgment or reflection, and is not likely soon to recover the use of his mental faculties. And I, the said E. F. for myself make oath that I am a nurse at the said asylum or house for the reception of lunatics where the said G. B. has been for years last past confined and has been under my care as a person of unsound mind and that he is a lunatic and totally incapable of managing himself or his affairs.

Sworn, etc. (Signed) C. D.
E. F.

FORM No. 21.

Affidavit as to Delay in Applying for a Grant (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit as to delay in applying for a grant.

I, C. D., of , baker, the party applying for letters of adminis-

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

tration of the estate of A. B., late of , deceased, who died on the day of , 19 , make oath and say as follows :—

That the only estate and effects which the said deceased died possessed of consisted of a sum of £ , bequeathed to him by the will of E. F., deceased, proved in the month of , 19 , in this Division, subject to the life interest of G. H., who died in the month of last.

That I am now applying for the said letters of administration for the purpose only of enabling me to give a legal discharge for the said sum.

Sworn, etc.

(Signed) C. D.

(*See also Form No.* 77.)

FORM NO. 22.

Affidavit Proving Heirship at Law (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

Affidavit proving heirship-at-law.

I, C. D., of , baker, make oath and say that A. B., of , died on the day of , 19 , without leaving any parent or other ancestor and without having ever had any issue.

That the said A. B. was married once only, namely, to E. F., who predeceased the said A. B.

That I am the eldest brother and heir-at-law of the said A. B., being the natural and lawful and eldest born child of G. H. and I. J., the natural and lawful father and mother of the said A. B.

That the said A. B. died possessed of certain real estate which he purchased in the year [*or state in what other way the deceased became possessed of the real estate*].

Sworn, etc.

(Signed) C. D.

FORM NO. 23.

Affidavit Proving Heirship by Custom of Gavelkind (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

Affidavit proving heirship by custom of gavelkind.

I, C. D., of , in the county of Kent, farmer, make oath and say that A. B., of , died on the day of , 19 , intestate, a bachelor, without parent or other ancestor.

That the said A. B. died possessed of certain freehold property situate at , in the county of Kent, which he purchased on or about the day of , 19 .

That I am the natural and lawful brother and one of the heirs of the said A. B., by the custom of gavelkind, being the natural and lawful and eldest born son of G. H. and I. J., the natural and lawful father and mother of the said A. B.

And I do further make oath and say that on the day of , 19 , notice of this application was given to K. L., who with myself is the only heir of the said A. B., by the said custom of gavelkind.

Sworn, etc.

(Signed) C. D.

FORM NO. 24.

Affidavit of Justification of Sureties (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit of justification of sureties.

We, C. D., of , banker, and E. F., of , merchant, jointly and severally make oath, that we are the proposed sureties on behalf of G. H.,

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

the intended administrator of all and singular the estate of the said A. B., of , deceased, in the penal sum of pounds, for his faithful administration of the said estate of the said deceased; and I, the said C. D., for myself, further make oath that I am, after payment of all my just debts, well and truly worth in real and personal estate the sum of pounds, and I, the said E. F., for myself, further make oath that I am, after payment of all my just debts, well and truly worth in real and personal estate the sum of pounds.

Sworn, etc.

(Signed) C. D.
E. F.

FORM NO. 25.

Affidavit of Justification—Guarantee Society (*a*).

Affidavit of justification guarantee society.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

I, C. D., of , in the City of London, to the Insurance Office, make oath and say as follows :—

1. I am now and have been for years and upwards of the Insurance Office, which carries on business at aforesaid.

2. The Insurance Office was established under its present name by virtue of the Insurance Office Act, 18 , having previously carried on business under the name of .

3. The subscribed capital of the Insurance Office is £ held in shares of £ each (of which shillings have been paid on each of such shares) by and standing in the names of a responsible body of proprietors so that there is an uncalled capital of £ , which, together with the whole of the invested assets of the Insurance Office (amounting to the sum of £ and upwards), are now available for the settlement of claims and demands on the insurance office in respect of its guarantees.

The funds of the Insurance Office are invested as follows :—

(*Set out list and amounts of securities.*)

And I further say that all claims and demands properly arising out of the business of the Insurance Office have been regularly paid and satisfied. The present outstanding unsettled claims of every kind against the said office do not exceed the sum of £ .

The balance sheet of the Insurance Office for the year ending 31st December, 19 , read to the shareholders of the Insurance Office at the annual meeting held on the day of , 19 , is now produced and shown to me marked "A," and the statements therein contained are true as of the date of the said balance sheet.

4. By section of the Insurance Office Act, 18 , it is provided that :—

> "It shall be lawful for the directors, subject to the approval of a general meeting of the office, specially summoned for the purpose, to repeal all or any of the existing deeds, minutes, orders, and resolutions regulating the affairs of the office, and to adopt new regulations for the government of the office and the management of its affairs."

5. By section of the same Act it is provided (*inter alia*) :—

> "The objects of the office and its fundamental laws shall from the commencement of this Act be those defined and set forth in the First Schedule to this Act."

By the First Schedule of the same Act :—

Clause :—

"The objects of the office are to carry on all or any one or more of the

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

following businesses in all or any one or more of their respective branches, namely (*inter alia*):—

"Insurance against contingencies of all descriptions or by way of guarantee or security."

By article of the regulations of the Insurance Office (which regulations were duly approved at a general meeting of the Insurance Office specially summoned for that purpose and adopted by the directors in accordance with section of the said Act) it is provided as follows (*inter alia*):—

"Policies if signed by one director shall be well and sufficiently signed; and all other documents the execution or signature of which is not otherwise expressly provided for shall be well and sufficiently executed or signed if executed or signed by the secretary acting under the authority of a general or special resolution of a meeting of directors."

By a resolution duly passed at an extraordinary meeting of the directors of the Insurance Office held on the it was resolved as follows:—

"That the secretary be authorised to execute or sign all documents the execution or signature of which is not otherwise expressly provided for by the regulations or by resolution of the directors."

The said resolution has not been rescinded.

6. Save as hereinbefore is mentioned there is no provision contained in the said Act of Parliament or regulations as to the due execution of the bonds or guarantees issued by the Insurance Office. The Insurance Office has no common seal, and all bonds or guarantees which are signed by the secretary are binding on the Insurance Office.

7. The bond now produced and shown to me marked "B" was duly executed in my presence by , who is the secretary of the Insurance Office, and the signature " " to the said bond is of the proper handwriting of the said and the signature " " set and subscribed to the attestation of the said bond is of my proper handwriting.

8. No petition or other proceeding is pending in any court for the purpose of winding up the said Insurance Office.

Sworn, etc.

(Signed) C. D.

FORM NO. 26.

Affidavit of Increase of Estate—Further Security (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit of increase of estate—further security.

I, C. D., of , baker, make oath and say as follows:—

That on the day of , 19 , letters of administration of the estate of A. B., of , deceased, were granted to me by the High Court of Justice at the Principal Probate Registry thereof.

That the gross value of the said estate in the United Kingdom was then sworn to amount to £ .

That I have since discovered that the value of the said estate exceeds that amount, and that the true gross value thereof is £ .

Sworn, etc.

(Signed) C. D.

FORM NO. 27.

Affidavit—Increase of Estate *de bonis non*—Further Security (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit—Increase of estate *de bonis non*—further security.

I, C. D., of , engine-driver, make oath and say that on the day of , 19 , letters of administration [*with the will annexed*] of the unad-

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

ministered estate of the said A. B., of , deceased, were granted to me, this deponent, in this Division at the registry thereof, I having previously made oath that the whole of the estate of the said deceased left unadministered was of the gross value of £ .

And I further make oath and say that it has since been discovered that the said estate of the said deceased left unadministered exceeds in value the sum of £ , and is of the gross value of £ .

Sworn, etc. (Signed) C. D.

Form No. 28.

Affidavit—Increase of Estate—Further Security—Before Application for Grant *de bonis non* (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit—Increase of estate—further security—before application for grant *de bonis non.*

I, C. D., of , chemist, make oath and say that in the month of , 19 , letters of administration of the estate of A. B., deceased, were granted to E. F. as the lawful widow and relict of the said deceased by the authority of this division at the registry thereof, and that the said estate was then sworn to be of the gross value of £ and no more.

And I further make oath and say that the said E. F. for some time intermeddled in the said estate, but has since died, to wit, on the day of , 19 , leaving part thereof unadministered.

And I further make oath and say that it has since been discovered that the said estate exceeds the said sum of £ , being of the value of £ and no more.

That I am [*here insert the character in which the grant* de bonis non *will be taken*] of the said A. B., deceased, and am about to apply for administration of the said estate left unadministered as aforesaid to be granted to me.

Sworn, etc.

(Signed) C. D.

Form No. 29.

Affidavit to lead Certificate that Estate in Ireland is covered by Bond given (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit to lead certificate that estate in Ireland is covered by bond given.

I, C. D., of , farmer, make oath and say as follows :—

That A. B. of , deceased, died on the day of , 19 .

That on the day of , 19 , letters of administration [*with the will annexed*] of the estate of the said deceased were granted to me by the High Court of Justice at the Principal Probate Registry thereof :

That the gross value of the estate in the United Kingdom in respect of which the grant was made was then sworn to be £ .

That no additional estate has since come to my knowledge :

That part of the said estate amounting to £ (further particulars of which are set forth in the Schedule hereto annexed) is in Ireland.

Sworn, etc.

(Signed) C. D.

SCHEDULE.

[*To be signed by the Deponent.*]

. . . . . .
. . . . . .
. . . . . .

(Signed) C. D.

[Note.—*For certificate of bond being given sufficient to cover property in Ireland, see Form No.* 79.]

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM No. 30.

Affidavit of Service of Citation.

Affidavit of service of citation.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
Between C. D. and E. F., plaintiffs,
and
H. G., defendant.

I, I. J., of , solicitor's clerk, make oath and say as follows:—

That I did on the day of , duly serve the above-named H. G. with a true copy of a citation issued out of this Division in the above-named action or matter, and now hereunto annexed and marked "A," by delivering to and leaving the same with him at , and at the same time, at his desire and request, I showed him the original thereof.

Sworn, etc.

(Signed) I. J.

FORM No. 31.

Affidavit of Service of Warning, and of Search and Non-appearance.

Affidavit of service of warning, and of search and non-appearance.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

I, C. D., of , solicitor's clerk, make oath and say as follows:—

1. That on the day of , 19 , I duly served Messrs. , of , with a true copy of the warning now hereunto annexed and marked "A," by delivering to and leaving the same with a clerk of the said Messrs. at their office aforesaid.

2. That I did on the day of , 19 , duly and carefully search the book kept in the Principal Probate Registry of this Division for entering appearance from the said day of to the present day inclusive, to ascertain whether or not any appearance to the said warning had been entered, and I say, that no appearance to the said warning has been entered either by or on behalf of any person or persons whomsoever.

Sworn, etc.

(Signed) C. D.

FORM No. 32.

Affidavit of Search and Non-appearance to Citation to Accept or Refuse Grant (*a*).

Affidavit of search and non-appearance to citation to accept or refuse grant.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate).
The Principal Probate Registry.
In the Estate of L. D., deceased.

I, L. P., of , clerk to F. E., of , solicitor, make oath and say as follows:—

On the day of , 19 , the said F. E. extracted a citation on behalf of I. J., citing T. S. to accept or refuse probate of the will dated the day of , 19 [*or* letters of administration of the estate] of L. D., deceased.

On the day of , 19 , I duly and carefully searched the book kept in the Principal Probate Registry of this Division for the entry of appearances to citations from the said day of , to the present day [*give date*], to ascertain whether or not any appearance to the said citation had been entered either by or on behalf of the above-named T. S., and I say that no appearance to the said citation has been entered either by or on behalf of the above-named T. S.

Sworn, etc.

(Signed) L. P.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 33.

Affidavit of Service of Summons and of Non-appearance [O. 54, r. 5; O. 67, r. 9.] (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Between C. D. and E. F., plaintiffs,
and
G. H., defendant.

Affidavit of service of summons and of non-appearance. [O. 54, r. 5; O. 67, r. 9.]

I, I. J., of , clerk to Messrs. , the solicitors for the , make oath and say as follows:—

1. I did, on the day of , 19 , before the hour of six [*or* two *if served on a Saturday*] in the afternoon serve K. L., the solicitor for the above-named in this action with a true copy of the summons hereunto annexed marked "A," by leaving it at the office of the said K. L., situate at , being the address for service in this action.

2. And I further make oath and say that on the day of , 19 , at o'clock in the noon, the day and hour upon which the said summons was returnable, I attended at the chambers of the President [*or* Judge] of this Division at the Royal Courts of Justice [*or* of the Registrar at the Principal Probate Registry, Somerset House], sitting to hear summonses, and that neither the nor his solicitor, nor any one on his behalf, attended to oppose the said summons between the said hour of [12] o'clock and [12.30].

Sworn, etc. (Signed) I. J.

FORM NO. 34.

Affidavit of Personal Service of Writ of Summons (whether within or without the Jurisdiction.) [O. 13, r. 2.] (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of F. E., deceased,

G. H. against I. J.

Affidavit of personal service of writ of summons (whether within or without the jurisdiction). [O. 13, r. 2.]

I, A. B., of , clerk to C. D. and P., solicitors, make oath and say as follows:—

1. I did, on the day of , 19 , at , personally serve I. J., the above-named defendant with a true copy of the writ of summons in this action which appeared to me to have been regularly issued out of the Central Office of the Supreme Court against the above-named plaintiff, and which was dated the day of , 19 .

2. At the time of the said service the said writ and the copy thereof were subscribed in the manner and form prescribed by the Rules of the Supreme Court.

3. I did, on the day of , endorse on the said writ the day of the month and the week of the said service on the said defendant.

Sworn, etc. (Signed) A. B.

This affidavit is filed on behalf of the .

FORM NO. 35.

Service on Officer of a Corporation. [O. 9, r. 8.] (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased,

E. F. against G. H.

Service on officer of a corporation. [O. 9, r. 8.]

I, C. D., of , clerk to Messrs. I. J. and Co., solicitors, make oath and say as follows:—

1. I did, on the day of , 19 , at , personally serve K. L. [Mayor, *or* Town Clerk, *or* Treasurer, *or* Secretary], being the head officer of the above-named defendant Corporation, with a true copy of the writ of summons in this action which appeared to me to have been regularly issued out of the Central Office of the Supreme Court against the above-named defendant Corporation at the suit of the above-named plaintiff, and which was dated the

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

day of , 19 , by leaving the same at [*or* by sending the same by post in a prepaid letter or envelope addressed to the said Corporation].

2. At the time of the said service the said writ and the copy thereof were subscribed and indorsed in the manner and form prescribed by the Rules of the Supreme Court.

3. I did, on the day of , 19 , indorse on the said writ the day of the month and the week of the said service on the said defendant Corporation.

Sworn, etc. (Signed) C. D.

[NOTE.—This form may be used with necessary alterations for a foreign corporation served with a notice of a writ, but the affidavit must state that the defendants are a corporate body according to the law of the country in which service is effected, and service must be made at the principal place of business of the corporation.]

FORM No. 36.

Affidavit for Leave to Serve Writ Abroad. [O. 2, r. 4.] (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of M. J., deceased,

C. D. against B. B.

I, C. D., of , in the county of , draper, the above-named intended plaintiff, make oath and say as follows :—

Affidavit for leave to serve writ abroad. [O. 2, r. 4.]

1. [*Give particulars of nature of action.*]

2. I am advised and believe that I have a good cause of action against B. B., the intended defendant in respect of the matters aforesaid.

3. The said intended defendant is at present residing at , and is not [*or* is] a British subject.

Sworn, etc. (Signed) C. D.

FORM No. 37.

Affidavit on Application for Substituted Service. [O. 10.] (*a*.)

In the High Court of Justice. Probate, Divorce and Admiralty Divisions. (Probate.)

In the Estate of A. B., deceased,

C. D. against E. F.

I, G. H., of , clerk to , of , solicitor for the above-named plaintiff, make oath and say as follows :—

Affidavit on application for substituted service. [O. 10.]

1. Having been directed by to serve the above-named defendant with a copy of the writ of summons in this action which appeared to me to have been regularly issued out of and under the seal of the Central Office of the Supreme Court of Judicature by the above-named plaintiff against the above-named defendant, and dated the day of , 19 , which said writ and copy were subscribed and endorsed in the manner and form prescribed by the Rules of the Supreme Court, and a true copy of which said writ is now produced and shown to me, marked "A," I did on the day of 19 , attend for the purpose of serving a copy of the said writ at [*describe efforts to effect service, as to which see Ord.* 10 (*n.*) "*Essential Preliminaries to Application*"].

I have made all reasonable efforts and use all due means in my power to serve the said defendant personally with a true copy of the said writ, but I have not been able to do so.

Sworn, etc. (Signed) G. H.

This affidavit is filed on behalf of the .

FORM No. 38.

Affidavit of Service of Notice to Produce and Admit. [O. 67.] (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Divisions. (Probate.)

In the Estate of A. B., deceased,

C. D. against E. F.

I, C. D., of , solicitor for the above-named , make oath and say as follows :—

Affidavit of service of notice to produce and admit. [O. 67.]

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

1. I did, on the day of , 19 , between the hours of and serve the above-named with a notice to produce in this action a true copy whereof is hereto annexed and marked "A," by delivering the same to and leaving it with , at h office or place of business situate at , in the of .

2. I did also, on the day of aforesaid, between the hours of and , serve the said with a notice to admit in this action, a true copy whereof is hereto annexed and marked "B" by delivering the same to and leaving it with , at , h office or place of business as aforesaid.

3. The notice to produce mentioned and referred to in the said notice to admit is the notice to produce, a copy whereof is hereto annexed and marked "A."

Sworn, etc. (Signed) C. D.

Form No. 39.

Affidavit of Insertion of Advertisements for Next of Kin (*a*).

Affidavit of insertion of advertisements for next of kin.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the estate of A. B., deceased.

I, C. D., of , solicitor, make oath and say as follows :—

That, I am the solicitor for E. F., the party applying for letters of administration of the estate of A. B., of , deceased.

That, acting on behalf of the said E. F., I caused an advertisement, calling upon the relatives (if any) of the said A. B. to apply to me, to be inserted once in the newspaper of the day of , 19 , and once in the newspaper for the day of , 19 , and once in the newspaper for the day of , 19 , copies of which are hereto annexed and marked C. D. 1, C. D. 2, and C. D. 3, respectively, but that no application whatever has been made to me in consequence of or in answer to the said advertisements, nor have I been able to obtain any information as to the relatives (if any) of the said A. B., deceased.

Sworn, etc. (Signed) C. D.

Form No. 40.

Affidavit as to Insertion of Advertisements for Recovery of a Lost Will (*a*).

Affidavit as to insertion of advertisements for recovery of a lost will.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the estate of A. B., deceased.

I, C. D., of , make oath and say as follows :—

That I am the solicitor of E. F. and G. H., the executors named in the last will and testament of A. B., of , deceased, and the parties applying for probate of a completed draft of the said will.

On the day of , 19 , I caused an advertisement to be inserted in the newspaper in the words following :—

In the High Court of Justice. Probate Division.
The Principal Probate Registry.

A. B., deceased.

A. B., of , butcher, made and duly executed his will on the day of , 19 , in the presence of I. J., of , baker, and K. L., of , spinster. By this will the said A. B. [*state briefly how the deceased's property was disposed of by the said will*], and appointed E. F. and G. H. executors. The said A. B. died on the day of , 19 . The aforesaid will cannot now be found. Whoever shall bring the original will or give such information as shall lead to its recovery to C. D., of , solicitor, will be rewarded.

The said newspaper is hereto annexed marked C. D. 1.

[*Set out any further advertisements that have been made.*]

No application has been made to me in consequence of or in answer to the said advertisements, nor have I been able to obtain any information as to the will of the said A. B., deceased, above referred to.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 41.

Affidavit to lead Citation to Accept or Refuse Administration (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit to lead citation to accept or refuse administration.

I, C. D., of , saddler, make oath and say, that A. B., of , deceased, died on the day of , 19 , at , intestate, without child or parent, leaving E. F., his lawful widow and relict him surviving. And I further make oath and say that the said E. F. has not taken upon her as yet the letters of administration of the estate of the said deceased.

And I further make oath and say, that I am the natural and lawful brother and one of the next of kin of the said deceased, and am desirous of obtaining letters of administration of the estate of the said deceased.

And I further make oath and say, that the estate left by the said deceased consists of [*give nature of property and value*].

Sworn, etc. (Signed) C. D.

FORM NO. 42.

Affidavit to lead Citation by Creditor (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

In the Estate of A. B., deceased.

Affidavit to lead citation by creditor.

I, C. D., of , newsagent, make oath and say that A. B., of , deceased, died on the day of at , intestate, a bachelor without parent, or any other known relation and not possessed of real estate.

[*State what efforts have been made to discover the next of kin of the deceased.*]

That the said deceased was at the time of his death justly and truly indebted to me in the sum of £ of lawful money of Great Britain for work and labour done, materials found, and goods sold and delivered by me to the said A. B., between the day of , and the day of , and that no part of such sum has been since received by me or by any person on my behalf, but that the whole thereof still remains justly due and owing to me, and that I hold or have held no security whatever for the same or any part thereof.

That the estate of the said A. B. consists of [*give amount and details*].

Sworn, etc.

(Signed) C. D.

FORM NO. 43.

Affidavit of Widow to lead a Joint Grant (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

Affidavit of widow to lead a joint grant.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, leaving me his lawful widow and relict and E. F. and G. H., spinster, his natural and lawful and only children and next of kin, the said E. F. being also his heir-at-law.

That I have been advised that I, as the lawful widow and relict of the said A. B., am entitled primarily and by preference to have letters of administration of the estate of the said A. B. granted to myself alone, but I am desirous that the said E. F., who is the eldest son of myself and of the said A. B., be joined with me in the letters of administration of the estate of the said A. B., deceased.

Sworn, etc.

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 44.

Affidavit to lead a Joint Grant of Administration to Guardians (Next of Kin and Stranger) of Minors (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Affidavit to lead a joint grant of administration to guardians (next of kin and stranger) of minors.

I, C. D., of , farmer, make oath and say as follows :—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, and not possessed of real estate,* leaving him surviving E. F. and G. H., his natural and lawful and only children, and only next of kin who are now minors of the ages of and years respectively. That there is no testamentary or other lawful guardian of the said minors.

That the said E. F. and G. H., have by an instrument in writing under their respective hands bearing date the day of , 19 , duly elected me, this deponent, their lawful uncle and only next of kin, and I. J., of , to be their curators or guardians for the purpose of obtaining letters of administration of the estate of the said A. B., deceased, to be granted to us for the use and benefit of the said E. F. and G. H., and until one of them shall attain the age of twenty-one years.

That I have been advised that by the law and practice of this Division as the lawful uncle and only next of kin of the said minors duly elected by them, I am entitled primarily and by preference to have the letters of administration of the personal estate of the said A. B. for the use and benefit of the said minors granted to myself alone; but I am, notwithstanding, desirous and consenting that the said I. J., who is a , carrying on business at and who was for years a friend of the said A. B., and is well acquainted with his affairs, joined with me in the letters of administration of the estate.

That I am upwards of years old and in an infirm state of health and unable to transact business, and I verily believe that it will be for the benefit and advantage of the said estate and of the said minors if the said I. J. be joined with me in the said letters of administration.

Sworn, etc.

(Signed) C. D.

[*NOTE.—*If the said deceased was possessed of real estate the heir-at-law must be cleared off.*]

FORM NO. 45.

Affidavit to lead Order assigning a Guardian to an Infant to take Grant of Letters of Administration (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

Affidavit to lead order assigning a guardian to an infant to take grant of letters of administration.

I, C. D., of , confectioner, make oath and say as follows :—

1. That A. B., of , deceased, died on the , day of , 19 , at , intestate, a widower, and not possessed of real estate,* leaving E. F. his natural and lawful and only child who is now an infant, to wit, of the age of four years and upwards, but under the age of seven years, and who, as I am advised, is therefore by law incapable of acting in his own name, and of electing a guardian to act on his part and behalf.

2. That there is no testamentary or other lawfully appointed guardian of the said infant.

3. That I am the lawful grandfather and only next of kin of the said infant and I am ready and willing to undertake the guardianship of the said infant for the purpose of taking letters of administration of the estate of the said A. B.,

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

deceased, for the use and benefit of the said infant until he shall attain the age of twenty-one years.

Sworn, etc.

(Signed) C. D.

[*NOTE.—*If the said deceased died possessed of real estate, the heir-at-law must be cleared off.*]

FORM NO. 46.

Affidavit to lead Order assigning a Guardian to an Infant to Renounce (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Affidavit to lead order assigning a guardian to an infant to renounce.

I, C. D., of , baker, make oath and say as follows :—

1. That A. B., of , deceased, died there on the day of 19 , a widower and intestate, and not possessed of real estate,* leaving, him surviving, E. F., spinster, his natural and lawful and only child, who is an infant, to wit, of the age of three years and upwards, but under the age of seven years.

2. That there is no testamentary or other lawfully appointed guardian of the said E. F.

3. That I am the lawful grandfather, and one of the next of kin of the said E. F., and am ready and willing to undertake the guardianship of the said E. F. for the purpose of renouncing on her part and behalf all her right, title and interest to and in the letters of administration of the estate of the said A. B., deceased.

Sworn, etc.

(Signed) C. D.

[*NOTE.—*If the said deceased was possessed of real estate the heir-at-law must be cleared off.*]

FORM NO. 47.

Affidavit to lead Order assigning a Guardian to an Infant appointed Executor or Residuary Legatee and Devisee (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Affidavit to lead order assigning a guardian to an infant appointed executor or residuary legatee and devisee.

I, C. D., of , auctioneer, make oath and say as follows :—

1. That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, and thereof appointed his son E. F. sole executor [*or*, did not in his said will name any executor and appointed his son E. F. residuary legatee and devisee].

2. That the said E. F. is now an infant, to wit, of the age of four years and upwards, but under the age of seven years, and as I am advised is therefore by law incapable of acting in his own name and of electing a guardian to act on his part and behalf.

3. That there is no testamentary or other lawfully appointed guardian of the said E. F.

4. That I am the lawful grandfather and one of the next of kin of the said E. F., and I am willing to undertake the guardianship of the said infant for the purpose of taking letters of administration with the said will annexed of the said estate of the said deceased for the use and benefit of the said E. F., and until he shall attain the age of twenty-one years.

Sworn, etc.

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 48.

Affidavit to lead Order assigning Guardians (Next of Kin and Stranger) to Infants for the Purpose of their taking a Joint Grant of Administration (*a*).

Affidavit to lead order assigning guardians (next of kin and stranger) to infants for the purpose of their taking a joint grant of administration.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A.B., deceased.

I, C. D., of , linendraper, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a widow, and not possessed of real estate,* leaving her surviving E. F., G. H., and I. J., her natural and lawful and only children and only next of kin. who are now infants and of the ages of , , and years respectively. That there is no testamentary or other guardian of the said infants.

That I am the lawful grandfather and only next of kin of the said infants, that I am ready and willing to undertake the guardianship of the said infants for the purpose of taking letters of administration of the estate of the said A. B., deceased, jointly with K. L., for the use and benefit of the said infants, and until one of them shall attain the age of twenty-one years.

That I am aware that according to the law and practice of this Division, as lawful grandfather and only next of kin of the said infants, I am entitled primarily and by preference to be assigned guardian to the said infants for the purpose of taking letters of administration of the estate of the said deceased for the use and benefit of the said infants alone; but I am, nevertheless, desirous and consenting that K. L., of , be joined with me in the letters of administration of the estate of the said deceased.

That I am upwards of years of age, in infirm health and unable to transact business. That the said K. L. is of the age of years only, and that he is by profession a . That the said K. L. was for many years an intimate friend of the said deceased and is well acquainted with her affairs, and I verily believe that it will be to the advantage and benefit of the said estate, and of the said infants if the said K. L. be joined with me in the said letters of administration.

Sworn, etc. (Signed) C. D.

[*NOTE.—*If the said deceased was possessed of real estate, the heir-at-law must be cleared off.*]

FORM NO. 49.

Affidavit to lead Revocation of Probate by Consent (a later Will having been found (*a*).

Affidavit to lead revocation of probate by consent (a later will having been found).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

I., C. D., of , baker, make oath and say as follows:—

1. The said A. B., of , deceased, died on the day of , 19 , at , having duly made and executed a will bearing date the day of , 19 , whereof I the said C. D. was appointed the sole executor.

2. I verily believed (until I had as hereinafter deposed ascertained to the contrary) that the said will was the last will and testament of the said deceased, and I applied to this Division at the Registry thereof for and obtained on the day of , 19 , a part of probate of the said will on the suggestion that such will was the last will and testament of the said deceased.

3. That since the date last mentioned I have discovered [*state how*] a will duly made and executed by the said deceased of a later date than the date of the above-mentioned will, to wit, a will bearing date the day of , 19 , whereof the said deceased appointed E. F. sole executor, and whereby the said deceased revoked all wills previously made by him.

4. I am therefore desirous that the probate, heretofore granted to me, shall be

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

revoked and declared null and void by this Division, and I have instructed , my solicitors, to pray and procure the said probate to be revoked, declared null and void and cancelled accordingly.

Sworn, etc. (Signed) C. D.

FORM NO. 50.

Affidavit to lead Revocation of Letters of Administration by Consent (a Will having been found) (*a*).

Affidavit to lead revocation of letters of administration by consent (a will having been found).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

I, C. D., of , fishmonger, make oath and say as follows :—

1. The said A. B., of , died on the day of , 19 , at , a widower.

2. I verily believed (until I had as hereinafter deposed ascertained to the contrary) that the said deceased died intestate, and being the natural and lawful son and one of the next of kin of the said deceased, I applied to this Division at the Registry thereof for, and on the day of , 19 , obtained therefrom, letters of administration of the estate of the said deceased on the suggestion that he died intestate a widower.

3. Since the date last mentioned I have found the original last will and testament of the deceased [*state how*] which said will is duly made and executed by the said deceased and bears date the day of , 19 .

4. [*State reasons why the will was not discovered earlier.*]

5. I am therefore desirous that the letters of administration granted to me as before stated, shall be declared null and void by this Division, and I have instructed Messrs. E. F. and Co., my solicitors, to pray and procure the said letters of administration to be revoked, declared null and void, and cancelled accordingly.

Sworn, etc. (Signed) C. D.

FORM NO. 51.

Affidavit to lead Revocation of Grant of Administration by Consent of Administrator (wrongly supposed to be Next of Kin of Deceased) (*a*).

Affidavit to lead revocation of grant of administration by consent of administrator (wrongly supposed to be next of kin of deceased).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

I, C. D., of , farmer, make oath and say as follows :—

1. That A. B., of , died on the , at , intestate, a bachelor, without parent.

I verily believed (until I had, as hereinafter deposed, ascertained to the contrary) that the said deceased left him surviving no brother or sister, and being the lawful nephew of the said deceased, I applied to this Division for and, on the day of , 19 , obtained therefrom, letters of administration of the estate of the said deceased, which were granted to me in my character of nephew on the suggestion that I was one of the next of kin of the said deceased.

Since the date last mentioned I have caused inquiries to be made and advertisements to be inserted in the public newspapers for and respecting the relations of the said deceased, and I have thereby ascertained that , of , is the lawful brother, and only next of kin of the said deceased.

I am therefore desirous that the letters of administration heretofore granted to me shall be revoked and declared null and void.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

FORM NO. 52.

Affidavit to lead Summons to Exhibit an Inventory (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Affidavit to lead summons to exhibit an inventory.

I, C. D., of , saddler, make oath and say as follows :—

1. The said A. B., of , deceased, died on the day of , 19 , at , leaving him surviving E. F., his lawful widow and relict, and G. H., and I. J. and me this deponent his natural and lawful and only children, and only next of kin and together the only persons entitled in distribution to his personal estate. I am also the heir-at-law of the said deceased.

2. On the day of , 19 , letters of administration of the estate of the said deceased were granted by authority of this Division at the registry thereof to the said E. F., the lawful widow and relict of the said deceased.

3. The said E. F. has sworn the value of the estate of the said deceased to amount to £ , but I verily believe the same to be considerably less than the true amount and value thereof.

4. Part of the said estate consists of stock and growing crops, which should be forthwith valued and appraised, before the same are removed or sold, in order that the true value thereof as assets belonging to the said estate may be satisfactorily ascertained.

5. Under the circumstances mentioned in the preceding paragraphs of this affidavit, and upon other grounds, I am desirous of obtaining from this division an order calling upon the said E. F. to exhibit upon and by virtue of her corporal oath a true and perfect inventory of all and singular the estate of the said deceased.

Sworn, etc.

(Signed) C. D.

FORM NO. 53.

Affidavit to lead Alteration in Grant (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Affidavit to lead alteration in grant.

I, C. D., of , dentist, make oath and say that on the day of , 19 , letters of administration of the estate of the said A. B., of , deceased, were granted by the High Court of Justice to me this deponent, the natural and lawful father and next of kin of the said deceased.

That in the said letters of administration the date of the deceased's death is stated to be the day of , 19 , whereas the true date was the day of the same month and year as appears by the certificate of death hereunto annexed.

That the error arose by my not observing when the oath to lead the grant was read over to me that the wrong day, namely, the day, had been inadvertently inserted in that document.

That I desire that the said letters of administration may be altered by substituting for the in the date of death of the deceased.

Sworn, etc. (Signed) C. D.

FORM NO. 54.

Affidavit to lead Order for Notation of Domicil, after Grant has passed the Seal (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

In the Estate of A. B., deceased.

Affidavit to lead order for notation of domicil after grant has passed the seal.

I, C. D., of , confectioner, make oath and say as follows :—

1. That A. B., of , deceased, died on the day of , 19, at , domiciled in England.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

2. That on the day of 19 , probate of the will [*or* letters of administration of the estate] of the said deceased was granted to me [*or as the case may be*] by this division at the registry thereof.

3. That the gross value of the estate in the United Kingdom in respect of which the grant was made was then sworn to be £ .

4. That no additional estate has since come to my knowledge.

5. That part of the said estate amounting to £ (further particulars of which are set forth in the schedule hereunto annexed) is in Scotland.

[*If the property in Scotland was trust property, insert instead of paragraph* 5 *the following*:—

5. That the whole of the said estate was in England, and that the said deceased was at the time of his death entitled as trustee and not beneficially to certain personal estate amounting to the value of £ (further particulars of which are set forth in the schedule hereunto annexed) the whole of which is in Scotland.]

Sworn, etc. (Signed) C. D.

The schedule referred to.

[*Here set out particulars of the estate in Scotland.*]

(Signed) C. D. (Signed) E. F.,
Commissioner.

FORM NO. 55.

Affidavit to lead Writ of Summons (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Affidavit to lead writ of summons.

I, C. D., of , butcher, make oath and say as follows:—

1. That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , whereof he appointed me, this deponent, sole executor.

2. That a caveat having been entered in the estate of the above-named deceased on the day of , 19 , was duly warned on the day of , 19 .

3. That an appearance has been entered to the said warning on behalf of E. F., of , and G. H., of , who are therein described as the executors of an alleged later will of the said deceased, bearing date the day of , 19 .

Sworn, etc.

(Signed) C. D.

FORM NO. 56.

Affidavit to lead Subpœna to bring in a Script (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division, (Probate.)

In the Estate of A. B., deceased.

Affidavit to lead subpœna to bring in a script.

I, C. D., of , stockbroker, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , and thereof he appointed E. F. and G. H. executors, and me, this deponent, residuary legatee.

That the said will is now in the possession, within the power, or under the control of the said E. F. and G. H. or of one of them, and that the said E. F. and G. H. have neglected or declined to prove the said will, or renounce the execution thereof, and I am desirous that the said will should be brought into the

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

Principal Registry of this Division that I may prove the same or otherwise act as I may be advised.

And I further make oath and say that the said E. F. resides at , and that the said G. H. resides at .

Sworn, etc. (Signed) C. D.

FORM NO. 57.

Affidavit of Scripts. (Rules 30 and 31, Contentious Business.) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of D. P., deceased.

N. O. against P. L.

Affidavit of scripts. (Rules 30 & 31, Contentious Business.)

I, N. O., of , in the county of , party in this action, make oath and say, that no paper or parchment writing, being or purporting to be or having the form or effect of a will or codicil or other testamentary disposition of D.P., late of , in the county of , deceased, the deceased in this action, or being or purporting to be instructions for, or the draft of, any will, codicil, or other testamentary disposition of the said D. P. has at any time either before or since his death come to the hands, possession or knowledge of me this deponent or the hands, possession, or knowledge of , my solicitors in this action, so far as is known to me, this deponent, save and except the true and original last will of the said deceased now remaining in the Principal Probate Registry of this Court [*or* hereto annexed] the said will bearing date the day of , 19 , also save and except [*Give dates and particulars of any other testamentary papers of which deponent has any knowledge*].

Sworn, etc.

(Signed) N. O.

FORM NO. 58.

Affidavit as to Documents. (O. 31, r. 13.) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B.

C. D. *v.* E. F.

Affidavit as to documents. (O. 31, s. 13.)

I, the above-named [*plaintiff or*] defendant C. D., make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the [*if deponent objects to produce any document, add* first and second parts of the] first schedule hereto.

2. [*State objection, if any, to produce documents in second part of first schedule and grounds thereof.*]

3. I have had, but have not now, in my possession or power the documents relating to the matter in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power [*state when, and what has since become of them, and in whose possession they now are*].

5. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

of them, or other than and except the documents set forth in the said first and second schedules hereto.

THE FIRST SCHEDULE.

Part I.

Description of Document.	Date.

Part II.

Description of Document.	Date.

THE SECOND SCHEDULE.

Description of Document.	Date.

Sworn, etc. (Signed) C. D.

FORM NO. 59.

Affidavit verifying Account of Administrator and Receiver *pendente lite* (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. and another against G. H. and others.

I, K. L., of , chartered accountant, the administrator and receiver *pendente lite*, appointed in this action by order on motion dated the day of , 19 , make oath and say as follows :—

Affidavit verifying account of administrator and receiver *pendente lite.*

1. The account marked " A " produced and shown to me is my account of the rents and profits of the real and personal estate of A. B., of , deceased, from the day of , 19 , to the day of , 19 , both inclusive.

2. That the said account contains a true statement of all and every sum of money received by me or by any other person or persons by my order or to my knowledge or belief pursuant to the said order on motion dated the day of , 19 .

3. The several sums of money mentioned in the said account hereby verified

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

AFFIDAVITS—*continued.*

to have been paid and allowed, have been actually and truly so paid and allowed for the several purposes in the said account mentioned.

4. The said account is just and true in all and every the items and particulars therein contained, according to the best of my knowledge, information, and belief.

5. E. F. and L. M., the sureties named in the recognizance dated the day of , 19 , are both alive, and neither of them has become bankrupt or insolvent.

Sworn, etc. (Signed) K. L.

ANSWERS TO INTERROGATORIES—*See* INTERROGATORIES: ANSWERS TO.

APPEARANCES.

FORM No. 60.

Appearance to Writ of Summons, Memorandum of. (O. 12, r. 9.) (*a*).

Appearance to writ of summons, memorandum of. (O. 12, r. 9.)

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Between C. D., plaintiff,
and
E. F. and G. H., defendants.

Enter an appearance for E. F. and G. H., defendants, in this action.

Dated the day of , 19 .

Signed , of ,
Solicitor for the defendants.

FORM No. 61.

Appearance to Writ of Summons, Notice of Entry of. (O. 12, r. 9.) (*a*).

Appearance to writ of summons, notice of entry of. (O. 12, r. 9.)

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Between C. D., plaintiff,
and
E. F., defendant.

Take notice that have this day entered an appearance at the Central Office, Royal Courts of Justice, for the defendant E. F. to the writ of summons in this action.

[*If the defendant requires a statement of claim, add a note to that effect.*]

Dated the day of , 19 .

Signed , of ,
Solicitors for the defendant.

FORM No. 62.

Appearance to Warning or Citation (*a*).

Appearance to warning or citation.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

Caveat No. dated the day of , 19 .

Citation dated the day of , 19 .

In the Estate of A. B., late of .

PLAINTIFFS [*the parties warning or citing*].

Name [*in full*] C. D., of , and E. F., of , the executors of the last will and testament of A. B., deceased, dated .

DEFENDANT [*the party warned or cited*].

Name [*in full*] G. H., of , the natural and lawful and only son and only next of kin of the said A. B.

Name and address (within three miles of the Central Hall of the Royal Courts of Justice) of solicitor or party appearing.

Dated the day of , 19 .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

APPOINTMENTS.

FORM No. 63.

Appointment of Receiver of Real Estate (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B.

C. D. against E. F.

Appointment of receiver of real estate.

Whereas there is now depending in the Probate, Divorce, and Admiralty Division of the High Court of Justice a certain action touching the validity of the will of A. B., late of , deceased, wherein C. D. is plaintiff, and E. F. defendant; and whereas the said will affects the real estate of the said deceased. Now I, the Right Honourable Sir Samuel Thomas Evans, Knight, the President of the said Division of the Court, do hereby appoint G. H., of , to be the receiver of the rents and profits of the real estate of the said deceased pending the said action, he having given sufficient security for the faithful performance of the duties committed to him.

Dated this day of , 19 .

(Signed) S. T. EVANS.

FORM No. 64.

Appointment of Nominee of the Guardians of the Poor to take a Grant of Letters of Administration (after Citation) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Appointment of nominee of the guardians of the poor to take a grant of letters of administration after citation.

At a meeting of the guardians of the poor of the Union, held at on the day of , 19 ,

Present:—

C. D., chairman, and other guardians out of a total number of .

It was resolved that E. F., the clerk to the guardians, be, and he is hereby, appointed nominee of the said guardians for the purpose of taking out letters of administration of the personal estate of A. B., of asylum, in the county of , who died at on the day of , 19 , and of whom the said guardians are creditors.

I certify that the above is a true copy of the minute of the resolution duly passed as aforesaid.

(Signed) E. F.,
Clerk to the Guardians of the Poor of the Union.

ASSIGNMENT.

FORM No. 65.

Assignment of Bond (*a*).

In the estate of A. B. deceased.

Assignment of bond.

KNOW all men by these presents, that I, C. D., one of the registrars of the Principal Probate Registry of the High Court of Justice, pursuant to the 83rd section of the Court of Probate Act, 1857, and by virtue of an order made on the day of 19 , have assigned, and by these presents do assign to E. F., of , in the county of , baker, the annexed bond bearing date the day of 19 , for the due administration of the estate of A. B., of , deceased, and all benefit and advantage arising therefrom.

(Signed) C. D.
Registrar.

Signed, sealed, and delivered
in the presence of
of

[NOTE.—*The assignment must have a stamp for 5s. impressed on it.*]

ASSIGNMENT OF GUARDIANS.—*See* Forms 262—265.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS.

Form No. 66.

Bond—Administration (*a*).

Bond—Administration.

Know all men by these presents, that we, A. B., of , butcher, C. D., of baker, and E. F., of , greengrocer, are jointly and severally bound unto The Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals.

Dated the day of, 19 .

The condition of this obligation is such, that if the above-named A. B., the lawful husband of G. H., of , deceased, who died on the day of , 19 , and the intended administrator of all the estate which by law devolves to and vests in the personal representative of the said deceased , do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the said estate which has or shall come to the hands, possession, or knowledge, of the said intended administrator and the same so made do exhibit, or cause to be exhibited, into the Principal Probate Registry of the said Division, whenever required by law so to do. And the said estate do well and truly administer according to law; And further do make, or cause to be made, a true and just account of the administration of the said estate, whenever required by law so to do. And if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors or other persons therein named do exhibit the same into the said Division of the said Court, making request to have it allowed and approved accordingly, if the said intended administrator being thereunto required, do render and deliver the letters of administration (approbation of such testament being first had and made) in the said Court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within-named A. B., C. D., and E. F., in the presence of
A commissioner for oaths.

(Signed) A. B.
C. D.
E. F.

Form No. 67.

Bond—Administration (with Will) (*a*).

Bond—Administration (with will).

Know all men by these presents, that we, A. B., of , banker, C. D., of , merchant, and E. F., of , auctioneer, are jointly and severally bound unto The Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals.

Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the residuary legatee named in the will [*or as the case may be*] of G. H., deceased, who died on the day of , 19 , and the intended administrator (with the will) of all the estate which by law devolves to and vests in the personal representative of the said deceased, do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the said

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

estate, which has or shall come to the hands, possession, or knowledge, of the said intended administrator , and the same so made do exhibit, or cause to be exhibited, into the Principal Probate Registry of the said Division, whenever required by law so to do. And the said estate do well and truly administer according to law; And further do make, or cause to be made, a just and true account of the administration of the said estate whenever required by law so to do, then this obligation to be void, and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within-named A. B., C. D., and E. F., in the presence of ,
A commissioner for oaths.

(Signed) A. B.
C. D.
E. F.

FORM No. 68.

Bond—Administration (with or without Will). Application to Re-seal Colonial Grant (*a*).

Bond—Administration (with or without will) application to re-seal Colonial grant.

KNOW all men by these presents, that we, A. B., of , C. D., of , and E. F., of , are jointly and severally bound unto G. H., the President of the Probate, Divorce and Admiralty Division of His Majesty's High Court of Justice, in the sum of pounds, of good and lawful money of Great Britain, to be paid to the said G. H., or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals.

Dated the day of in the year of our Lord One thousand nine hundred and .

The condition of this obligation is such, that if the above-named A. B., the administrator (with the will dated the day of , annexed) by authority of the Court at , acting under letters of administration granted to on the day of , and now about to be sealed in England under the Colonial Probates Act, 1892, of the personal estate of K. L., late of , deceased, who died on the day of , 19 , do, when lawfully called on in that behalf, make, or cause to be made, true and perfect inventory of the personal estate of the said deceased in England which has or shall come to hands, possession, or knowledge, or into the hands and possession of any other person for , and the same so made do exhibit, or cause to be exhibited, into the Principal Probate Registry of His Majesty's High Court of Justice, whenever required by law so to do, and the same personal estate do well and truly administer according to law; And further do make, or cause to be made, a true and just account of said administration, whenever required by law so to do, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within-named in the presence of ,

A commissioner of oaths.

[NOTE.—*See Rules* 92—105, *N.-C. B.; Colonial Probates Act*, 1892.]

FORM No. 69.

Bond—Administration (with or without Will) on Application by Attorney to Re-seal Colonial Grant (*a*).

Bond—Administration (with or without will) on application by attorney to re-seal Colonial grant.

KNOW all men by these presents, that we, A. B., of , C. D., of , and E. F., of , are jointly and severally bound unto G. H., the President of the Probate, Divorce, and Admiralty Division of His Majesty's High

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

Court of Justice, in the sum of pounds, of good and lawful money of Great Britain, to be paid to the said G. H., or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals.

Dated the day of in the year of our Lord One thousand nine hundred and .

The condition of this obligation is such, that if K. L., of , the administrator (with the will dated the day of annexed) by authority of the Court at , acting under letters of administration granted to on the day of , and now about to be sealed in England under the Colonial Probates Act, 1892, of the personal estate of M. N., late of , deceased, who died on the day of , 19 , do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the personal estate of the said deceased in England which has or shall come to hands, possession, or knowledge, or into the hands and possession of any other person for , and the same so made do exhibit, or cause to be exhibited, into the Principal Probate Registry of His Majesty's High Court of Justice, whenever required by law so to do, and the same personal estate do well and truly administer according to law; And further do make, or cause to be made, a true and just account of said administration, whenever required by law so to do, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within-named , in the presence of ,

A commissioner for oaths.

[NOTE.—*See Rules* 92—105, *N.-C. B.; Colonial Probates Act*, 1892.]

FORM NO. 70.

Bond of Administrator (Creditor) (*a*).

Bond of administrator (creditor).

KNOW all men by these presents, that we, A. B., of , photographer, C. D., of , chemist, and E. F., of , pawnbroker, are jointly and severally bound unto the Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., a creditor, and the intended administrator of all the estate which by law devolves to and vests in the personal representative of G. H., of , deceased, who died on the day of , 19 , do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the said estate which has or shall come to his hands, possession, or knowledge, and, the same so made, do exhibit, or cause to be exhibited, into the principal probate registry of the said division whenever required by law so to do, and the said estate do well and truly administer according to law, paying all and singular the debts which he, the said deceased, did owe at his decease in due course of administration rateably and proportionably and according to the priority required by law, not, however, preferring his own debt or the debt of any other person by reason of his being administrator as aforesaid.

And further do make, etc. [*complete as in Form No.* 66].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

FORM No. 71.

Bond. Administration under the 73rd Section of the Court of Probate Act, 1857 (*a*).

Bond. Administration under the 73rd section of the Court of Probate Act, 1857.

KNOW all men by these presents, that we A. B., of , hatter, C. D., of , provision merchant, and E. F., of , fishmonger, are jointly and severally bound unto The Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the person appointed by the Right Honourable Sir Samuel Thomas Evans, Knight, the President of the said Division, under and by virtue of the 73rd section of the Court of Probate Act, 1857, to be the administrator of all the estate which devolves to and vests in the personal representative of G. H., of , deceased, who died on the day of , 19 , do when lawfully called on in that behalf, etc. [*complete as in Form No.* 66].

FORM No. 72.

Bond—Guarantee Society (*a*).

Bond—Guarantee society.

KNOW all men by these presents that we A. B., of , dentist, and the Society, having its registered offices at , are jointly and severally bound unto the Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us for the whole, our heirs, executors, and administrators, and successors and assigns, firmly by these presents.

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the natural and lawful father and next of kin of C. D., of , deceased, who died on the day of , 19 , and the intended administrator [*continue as in Form No.* 66 *down to* "*full force and virtue*"].

Signed, sealed, and delivered by the within-named A. B. in the presence of E. F., (Signed) A. B.

A commissioner for oaths.

(Signed) G. H. }
I. J. } Directors. (Seal of the Guarantee Society.)
K. L., Secretary.

This seal of the Society, and the signatures G. H. and I. J., two of the directors, and of K. L., the secretary of the said Society, were hereunto affixed in the presence of

(Signed) E. F.,
A commissioner for oaths.

Exhibit on Bond.

This is the bond marked "A," referred to in the affidavit of K. L., sworn before me this day of , 19 .

(Signed) E. F.,
A commissioner for oaths.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

FORM No. 73.

Bond—Guarantee Society with Registered Office in Scotland and having a Branch Office in London.

Bond—guarantee society with registered office in Scotland, and having a branch office in London.

In the estate of , deceased.

KNOW all men by these presents, that I and we the Assurance Corporation, Ltd., whose registered office is situate (Glasgow), and whose branch office, for the purposes hereinafter mentioned, is situate at , in the City of London, are jointly and severally bound unto the Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, and successors and assigns, firmly by these presents, and we, the Assurance Corporation, Ltd., hereby further agree to submit to the jurisdiction of this honourable Court for all the purposes in connection with this bond or any proceedings thereunder or in reference thereto, and appoint , aforesaid [*the London address*], as the address for service of all writs, proceedings or notices that may be issued.

Sealed with our seals. Dated the day of , 19 .

The condition of this obligation is such, etc. [*continue as in form No.* 72].

FORM No. 74.

Bond to be Executed by a Receiver of Real Estate Pending Suit (*a*).

Bond to be executed by a receiver of real estate pending suit

KNOW all men by these presents that we, A. B., of , merchant, C. D., of , auctioneer, and E. F., of , estate agent, are jointly and severally bound unto the Right Honourable Sir G. H., Knight, the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Right Honourable Sir G. H., Knight, or to the President of the Probate, Divorce, and Admiralty Division of the said Court for the time being, for which payment well and truly to be made we bind ourselves and every of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the day of in the year of our Lord One thousand nine hundred and

WHEREAS I. J., late of , died on the day of One thousand nine hundred and , at , having, as asserted, made and duly executed last will and testament, with codicil thereto, bearing date respectively the . And whereas there is now pending in judgment in the Probate, Divorce, and Admiralty Division of the High Court of Justice a certain probate action instituted by K. L., as one of the executors named in the said will, against M. N., the natural and lawful and next of kin of the said deceased, touching and concerning the validity of the said will and codicil , in which said probate action O. P. as the heir-at-law of the said has been cited to see proceedings, and has entered an appearance, and become a party to the said probate action : And whereas the above-bounden A. B. has been duly appointed to be receiver of the real estate of the said deceased pending the said probate action :

Now the condition of this obligation is such, that if the above-bounden A. B., the receiver of the real estate of the said I. J., deceased, pending the aforesaid probate action, do make a true and perfect inventory of all the rents, issues, and profits of the said real estate which have or shall come to his hands, possession, or knowledge, or into the hands, possession, or knowledge

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

of any other person for him, and the same so made do exhibit, or cause to be exhibited, into the Principal Probate Registry of the High Court of Justice, when lawfully required so to do, and the same rents, issues, and profits do well and truly pay and appropriate according to law, that is to say, in payment and satisfaction of all charges and expenses which are or may be or become legally charged upon and payable out of the said rents, issues, and profits, and in the letting and managing the said real estate, and in performing other the duties committed to him by the President aforesaid, and further do make, or cause to be made, a true and just account of his administration of the said rents, issues and profits, which shall be allowed by the said Court, and all the rest and residue of the said rents, issues, and profits do deliver and pay under the direction of the said Court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the within-named in the presence of , } (Signed) A. B.
C. D.
E. F.

A commissioner for oaths.

FORM NO. 75.

Bond of Administrator and Receiver *pendente lite* (*a*).

Bond of administrator and receiver *pendente lite.*

KNOW all men by these presents that we, A. B., of , banker, C. D., of , merchant, and E. F., of , stockbroker, are jointly and severally bound unto the Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate Division of His Majesty's High Court of Justice, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division of the said Court for the time being, for which payment well and truly to be made, we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the day of , in the year of our Lord

WHEREAS G. H., of , died on the day of , 19 , at , having, as asserted, made and duly executed his last will and testament dated the day of , 19 : And whereas there is now depending in the High Court of Justice a probate action, entitled I. J. against K. L., J. 19 , No. , touching the validity of the said will: And whereas on the , day of , 19 , the Right Honourable Sir Samuel Thomas Evans, Knight, ordered [*or as the case may be*] that the said A. B. be appointed administrator of all the estate which by law devolves to and vests in the personal representative of the said G. H. pending the said action [*set out the limitations in the said order, if any*].

Now the condition of this obligation is such, that if the above-named A. B., the intended administrator of all the estate which by law devolves to and vests in the personal representative of the said deceased [*limited as aforesaid*] do, pending the said action, well and truly administer the said estate, save distributing the residue thereof, under the direction and control of the said Court; and also do make or cause to be made a true and perfect inventory of such estate, and do exhibit the same into the Principal Probate Registry of the said Court, together with a just and true account of his administration thereof, whenever thereunto lawfully required, then this obligation to be void and of none effect, or else to remain in full force and virtue.

Signed, sealed, and delivered by the above-named A. B., C. D., and E. F., in the presence of } (Signed) A. B.
C. D.
E. F.

A commissioner for oaths.

CASE ON MOTION.—*See* Motion—Case on.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CAVEAT.

FORM NO. 76.

Caveat (*a*).

In the High Court of Justice, Probate, Divorce, and Admiralty Division.
(Probate.) The Principal Probate Registry.

Caveat.

Let nothing be done in the estate of C. E., late of , deceased, who died on or about the day of , at , unknown to F. C., of , having interest [*or* to H. G. & Co., of , solicitors for the parties having interest].

Dated this day of , 19 .

(Signed)
[*Signature of person entering caveat.*]

CERTIFICATES.

FORM NO. 77.

Certificate of Reason of Delay (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In Estate of A.B., deceased.

Certificate of reason of delay.

I, C. D., of , the party applying for probate of the will of the said A. B., late of , deceased, who died on the , 19 , do hereby certify that the reason why I have not sooner applied for the said probate is that the only estate and effects which the said deceased died possessed of or entitled to consisted of the sum of £ , bequeathed to her by the will of E. F., of , deceased, subject to the life interest therein of G. H., who died on the day of last, and that the said probate is required to enable me to give a legal discharge for the said sum, and for that purpose only.

Dated the day of , 19 .

(Signed) C. D.

I believe the above to be true,

(Signed) I. J., Solicitor.

[N.B.—*In personal application cases an affidavit of delay is required from the applicant instead of the above certificate. See Form No.* 21.]

FORM NO. 78.

Certificate of Further Security (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

In the Estate of A. B., deceased.

Certificate of further security.

I, the undersigned Registrar of the Principal Probate Registry of the High Court of Justice, do hereby certify that the gross value of the estate of A. B., deceased, originally sworn to amount to the sum of £ , has now been sworn to amount to the sum of £ , and full security has been given for the increased amount.

Dated the day of 19 .

(Signed) W. Y., Registrar.

Letters of administration ( )
were granted at the Principal Probate
Registry on the day of .

FORM NO. 79.

Certificate of Bond being Given Sufficient to Cover Property in Ireland (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

In the Estate of A. B., deceased.

Certificate of bond being given sufficient to cover property in Ireland.

I, the undersigned Registrar of the Principal Probate Registry of the High Court of Justice in England, do hereby certify that letters of administration

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CERTIFICATES—*continued.*

( ) of the estate of A. B., of , deceased, were granted at the said registry on the , day of 19 , to C. D., of . And I further certify that a bond has been given to the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England in the sum of £ the same being sufficient in amount to cover the estate of the said deceased in Ireland as well as in England.

Dated the day of 19 .
Estate £

(Signed) W. Y., Registrar.

FORM NO. 80.

Certificate of Service to be Endorsed on Citation (*a*).

Certificate of service to be endorsed on citation.

This citation was served by G. E., on the within-named M. N. at on the day of 19 .

(Signed) G. E.

CITATIONS.

FORM NO. 81.

Citation to Accept or Refuse Probate (*a*).

Citation to accept or refuse probate.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

GEORGE V. by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith: To A. B., of , in the county of .

Whereas it appears by an affidavit of C. D., sworn the day of 19 , that E. F., of , in the county of , died on the day of , 19 , at , having made and duly executed his last will and testament dated the day of , 19 , and thereof appointed you, the said A. B., executor, but did not therein name any residuary legatee or devisee: And whereas it further appears by the said affidavit that the said deceased died a bachelor and that the said C. D. is the natural and lawful father and next of kin of the said deceased:

Now this is to command you the said A. B., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice, at Somerset House, Strand, London, and accept or refuse Probate of the said will, or show cause why letters of administration with the said will annexed, of all estate which by law devolves to and vests in the personal representative of the said deceased, should not be granted to the said C. D. And take notice, that in default of your so appearing and accepting and extracting probate of the said will, our said Court will proceed to grant letters of administration with the said will annexed of the said estate to the said C. D., your absence notwithstanding.

Dated at London this day of 19 , and in the year of our reign.

Extracted by of ,
Solicitor. (Signed) G. H., Registrar.

FORM NO. 82.

Citation by Executor of an Executor who Proved, to an Executor to whom Power was Reserved to Accept or Refuse Probate (*a*).

Citation by executor of an executor who proved, to an executor to whom power was reserved to accept or refuse probate.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

GEORGE V. by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith: To A. B. of in the county of .

Whereas it appears by an affidavit of C. D., sworn the day of 19 , that probate of the will of E. F., of , deceased was on the day of 19 , granted at the Principal Probate Registry of our High Court of Justice to

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

G. H. one of the executors named in the said will, power being reserved of making a like grant to A. B., the other executor named in the said will: And whereas it further appears by the said affidavit that the said G. H. for some time intermeddled in the estate of the said E. F., deceased and died on the day of , 19 , leaving part thereof unadministered, and that on the day of , 19 , probate of the will of the said G. H. was granted by our said Court at the said registry to the said C. D., the sole executor named in the said will:

Now this is to command you the said A. B. that within eight days after the service hereof upon you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said Court at Somerset House, Strand, London, and accept or refuse probate of the will of the said E. F., deceased; and take notice that, in default of your so appearing and accepting and extracting probate of the said will, your rights as such executor will wholly cease, and the representation to the said E. F., deceased, will devolve as if you had not been appointed executor.

Dated at London this day of 19 , and in the year of our reign.

Extracted by of ,
Solicitors. (Signed) I. J., Registrar.

FORM No. 83.

Citation by Creditor to Executors and Residuary Legatees, etc., to Accept or Refuse Probate or Administration (Will) Disposition of Residue being Contingent (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

Citation by creditor to executors and residuary legatees, etc., to accept or refuse probate or administration (will), disposition of residue being contingent.

GEORGE V. by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith.

To A. B., of in the county of , C. D., of , spinster, E.F., of , widow, G. F., of , H. F., of , spinster, I. F., of , J. F., of K. F., of , and L. F., of : WHEREAS it appears by an affidavit of M. N., of solicitor, sworn on the day of 19 , that O. P., of deceased, died on the day of 19 , at ,having made and duly executed his last will and testament with a codicil thereto bearing date respectively the day of 19 , and the day of 19 , and now remaining in the Principal Probate Registry of our High Court of Justice, and thereof appointed you the said A. B. and C. D. executors and residuary legatees and devisees in trust, and did therein name you the said C. D. residuary legatee and devisee for life, and you the said E. F. residuary legatee and devisee substituted for life: And whereas it further appears by the said affidavit that you the said G. F., H. F., I. F., J. F., K. F., and L. F., are the natural and lawful and only children of the said E. F. by Q. F., and as such (having attained the age of twenty-one years) the residuary legatees and devisees substituted in the said will contingently on your surviving the said E. F.: And whereas it further appears by the said affidavit that you the said E. F. are also the lawful niece and only next of kin of the said deceased and the only person entitled in distribution to his personal estate in case he died intestate and are also his heiress-at-law: And whereas it further appears by the said affidavit that the said M. N. is a creditor of the deceased: Now this is to command you the said A. B., C. D., E. F., G. F., H. F., I. F., J. F., K. F., and L. F., that within eight days after service hereof on you, inclusive of the day of such service, you do respectively cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and respectively accept or refuse probate of the said will and codicil or letters of administration with the said will and codicil annexed of all the estate which by law devolves to and vests in the personal representative of the said deceased, or show cause why the said letters of administration with the will and codicil annexed of the said estate should not be granted to the said M. N.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

And take notice that in default of your so appearing and extracting the said probate of the said will and codicil or letters of administration with the said will and codicil annexed, our said Court will proceed to grant letters of administration (with the said will and codicil annexed) of the said estate to the said M. N., your absence notwithstanding.

Dated at London this day of 19 , and in the year of our reign.

(Signed) W. Y. Registrar.

Extracted by , of ,
Solicitor.

FORM No. 84.

Citation by Executor who has Proved (and wishes to Transfer Real Estate) to an Executor to whom Power has been Reserved to Accept or Refuse Probate (*a*).

Citation by executor who has proved (and wishes to transfer real estate) to an executor to whom power has been reserved to accept or refuse probate.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith.

To A. B.

WHEREAS it appears by an affidavit of C. D. sworn on the day of , 19 , that E. F., of , died there on the day of , having by his will, dated the day of , appointed the said C. D. and you the said A. B. executors thereof, and that probate of the said will was granted on the day of by our High Court of Justice at the Principal Probate Registry thereof to the said C. D., one of the executors, power being reserved of making a like grant to you the said A. B. the other executor named in the said will: And whereas it further appears by the said affidavit that the estate of the said E. F. consisted of certain freehold property: Now this is to command you, the said A. B., that within two months after service hereof upon you inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said Court at Somerset House, Strand, London, and accept or refuse probate of the said will. And take notice that in default of your so appearing and accepting and extracting such probate your right in respect of the executorship will wholly cease.

Dated at London this day of , 19 , and in the year of our reign.

(Signed) W. Y.,
Registrar.

Extracted by of ,
Solicitor.

FORM No. 85.

Citation by Residuary Legatee for Life to Executrix of Executor of Will under which her Rights arise to Accept or Refuse Probate (*a*).

Citation by residuary legatee for life to executrix of executor of will under which her rights arise to accept or refuse probate.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith.

To A. B., of , widow.

WHEREAS it appears by an affidavit of C. D., widow, sworn on the day of , 19 , that E. B. of , in the county of , died there on the day of , having made and duly executed her last will and testament bearing date the day of (now remaining in the Principal Probate Registry), and thereof appointed her son F. B. sole executor (who duly proved the said will and for some time intermeddled in the estate of the said deceased,

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

and is since deceased, leaving part thereof unadministered) and the said C. D. residuary legatee for life: And whereas it further appears by the said affidavit that the said F. B. made and duly executed his last will and testament dated the day of , 19 , and thereof appointed you sole executrix: Now this is to command you the said A. B., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said Court at Somerset House, Strand, London, and accept or refuse probate and execution of the will of the said F. B., or show cause why letters of administration with will annexed of the unadministered estate and effects of the said E. B., deceased, should not be granted to the said C. D. And take notice that in default of your so appearing and accepting and extracting the said probate, your rights as executrix of the will of the said F. B. shall wholly cease, and our said Court will proceed to grant letters of administration with will annexed as aforesaid to the said C. D., your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

(Signed) W. Y.,
Registrar.

Extracted by of ,
Solicitor.

FORM No. 86.

Citation to Accept or Refuse Letters of Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)

Citation to accept or refuse letters of administration.

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith.

To A. B. of , in the county of .

WHEREAS it appears by an affidavit of C. D., spinster, sworn the day of , 19 , that E. F., of , in the county of , died on the day of 19 , at , intestate, a widower without child or parent and not possessed of any real estate, leaving your the said A. B. his natural and lawful brother and only next of kin: And whereas it further appears by the said affidavit that the said C. D. is the lawful niece and one of the persons entitled in distribution to the personal estate of the said deceased, being the natural and lawful daughter of , the natural and lawful brother of the said deceased, who died in the lifetime of the said deceased:

Now this is to command you the said A. B., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and accept or refuse letters of administration of all the estate which by law devolves to and vest in the personal representative of the said deceased, or show cause why the same should not be granted to the said C. D., and take notice that in default of your so appearing and accepting and extracting the said letters of administration, our said Court will proceed to grant letters of administration of the said estate to the said C. D., your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

(Signed) W. Y.,
Solicitor.

Extracted by of ,
Solicitor.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

Form No. 87.

Citation by Creditor to Next of Kin (if any) to Accept or Refuse Administration (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To the next of kin (if any) and all other persons having or claiming any interest in the estate of deceased.

Citation by creditor to next of kin (if any) to accept or refuse administration.

Whereas it appears by the affidavit of , sworn the day of that of in the county of , died on the 1st day of January, 19 , at , intestate, a widower without child or parent, brother or sister, uncle or aunt, nephew or niece, cousin-german or any known relation, and that the said is a creditor of the said deceased:

Now this is to command you, that within one month after service by publication hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, or show cause why letters of administration of his personal estate should not be granted to the said ; and take notice that in default of your so appearing and accepting and extracting letters of administration as aforesaid, our said Court will proceed to grant letters of administration of the personal estate of the said deceased to the said , your absence notwithstanding.

Dated at London this day of 19 , and in the year of our reign.

(Signed)
Registrar.

Extracted by of ,
Solicitor.

Form No. 88.

Citation to a Minor to Accept or Refuse Letters of Administration (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

Citation to a minor to accept or refuse letters of administration.

To A. B. of , in the county of .

Whereas it appears by an affidavit of C. D. sworn on the day of , 19 , that E. F. of , in the county of , died on the day of , 19 , at , intestate, a widower and not possessed of real estate, leaving you the said A. B. his natural and lawful son and only next of kin and the only person entitled to his personal estate:

And whereas it further appears by the said affidavit that the said C. D. is a creditor of the said deceased, and that you the said A. B. are in your minority and that G. H. is your lawful uncle and only next of kin:

Now this is to command you the said A. B., etc. [*complete as in Form No.* 86].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

FORM No. 89.

Citation by Attorney of Aunt to Brother (Next of Kin) and Children (if any) of Deceased Brothers to Accept or Refuse Administration (*a*).

Citation by attorney of aunt to brother (next of kin) and children (if any) of deceased brothers to accept or refuse administration.

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of , and to the children (if any) of C. D. and E. F.

WHEREAS it appears by an affidavit of G. H., sworn that I. J., of died there on intestate, a spinster without parent and not possessed of any real estate, and that the said A. B. if he survived her is her natural and lawful brother and only next of kin, and that C. D. and E. F., her only other brothers and in their lifetime her only other next of kin, predeceased the said I. J. and it is not known whether they left any issue. And whereas it further appears by the said affidavit that the said G. H. is the lawfully appointed attorney of K. L., the lawful aunt of the said I. J. deceased, and in the event of the said A. B. having predeceased the said I. J., one of the next of kin of the deceased and one of the persons entitled in distribution to her personal estate:

Now this is to command you that within after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of the High Court of Justice at Somerset House, Strand, London, and accept or refuse letters of administration of the estate which by law devolves to and vests in the personal representative of the said deceased, or show cause why the same should not be granted to the said G. H. as the lawful attorney of the said K. L. the lawful aunt of the said deceased, for the use and benefit of the said K. L., and until she shall duly apply for and obtain letters of administration of the said estate. And take notice that in default of your so appearing and accepting and extracting the said letters of administration our said Court will proceed in the premises according to law, your absence notwithstanding.

Dated at London this and in the year of our reign.

Extracted by of , Solicitors.

(Signed) W. Y., Registrar.

FORM No. 90.

Citation by Brother to Father and Heir-at-Law to Accept or Refuse Administration (*a*).

Citation by brother to father and heir-at-law to accept or refuse administration.

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., formerly of and afterwards of .

WHEREAS it appears by an affidavit of C. B., sworn on the day of , 19 , that A. E. B., of , died there on the day of , 19 , a bachelor without a mother and intestate, leaving you the said A. B. his natural and lawful father and next of kin and heir-at-law. And whereas it also appears that C. B. is the natural and lawful brother of the said A. E. B. deceased and the natural and lawful son of you A. B.:

Now this is to command you the said A. B. that within one month after service hereof, including the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and accept or refuse letters of administration of all the estate which by law devolves to and

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

vests in the personal representative of the said deceased, or show cause why the same should not be granted to the said C. B. And take notice that in default of your so appearing and accepting and extracting the said letters of administration our said Court will proceed in the premises according to law, your absence notwithstanding.

Dated in London this day of , 19 , and in the year of our reign.

Extracted by of , (Signed) W. Y.,
Solicitor. Registrar.

FORM NO. 91.

Citation by Nephew and Contingent Heir-at-Law to Brother and Contingent Heir-at-Law also to Accept or Refuse Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of in the Dominion of New Zealand, and to C. B., whose place of abode is believed to be in one of the Colonies.

Citation by nephew and contingent heir-at-law to brother and contingent heir-at-law also to accept or refuse administration.

WHEREAS it appears by an affidavit of E. B., sworn on the day of , 19 , that F. B., of died there on the day of , 19 , intestate, a widower without child or parent, leaving you the said A. B. his natural and lawful brother and only next of kin, and that the said C. B. in the event of his having survived the said intestate is the heir-at-law of the said intestate. And whereas it further appears by the said affidavit that the said E. B. is the lawful nephew and one of the persons entitled in distribution to the personal estate of the said intestate, being the natural and lawful son of D. B., the natural and lawful brother of the said intestate, who died in the lifetime of the said intestate, and that the said E. B. is also the heir-at-law of the said intestate in the event of the said C. B. having predeceased the said intestate.

Now this is to command you the said A. B. and C. B. that within [three months] after the service hereof on you respectively, inclusive of the day of such service, you do respectively cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, England, and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said intestate or show cause why the same should not be granted to the said E. B. And take notice that in default of your so appearing and accepting and extracting the said letters of administration our said Court will proceed in the premises according to law, your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , (Signed) W. Y.,
Solicitor. Registrar.

FORM NO. 92.

Citation by the Guardians of the Poor (Creditors) to Widow, a Lunatic without known Relations, to the Next of Kin of the said Widow, and all Persons having an Interest in the Estate of the Deceased to Accept or Refuse Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., an inmate of the Asylum. To the next of kin of the

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

said A. B., and to the next of kin, if any, and all other persons having an interest in the estate of C. B. deceased, late an inmate of the county asylum in the county of .

Citation by the guardians of the poor (creditors) to widow, a lunatic without known relations, to the next of kin of the said widow, and all persons having an interest in the estate of the deceased, to accept or refuse administration.

WHEREAS it appears by an affidavit of D. E. of the guardians' offices of in the county of , collector to the board of guardians of the poor of the parish of , sworn the day of , 19 , that C. B., of the county asylum in the county of , died on the day of , 19 , intestate and not possessed of real estate, without child or parent, brother or sister, uncle or aunt, cousin german, or other known relative, leaving you the said A. B. his lawful widow and relict. And whereas it further appears by the said affidavit that the said A. B. is a lunatic and that there is no committee of her estate and that she has no known relations. And whereas it also further appears by the same affidavit that the said D. E. is the nominee of the guardians of the poor of the parish of , creditors of the deceased :

Now this is to command you that within days after the service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, or show cause why the same should not be granted by the authority of our said Court to the said guardians of the poor, creditors of the said deceased, for the use and benefit of the said A. B. until she become of sound mind. And take notice that in default of your so appearing and accepting and extracting the said letters of administration, our High Court of Justice will proceed to grant letters of administration of the estate of the said deceased to the said D. E. as aforesaid, your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , (Signed) W. Y.,
Solicitors. Registrar.

FORM NO. 93.

Citation to Accept or Refuse General Grant of Letters of Administration. In Default Grant to Applicant Limited to a Policy of Insurance (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith :

To A. B., of in the county of .

Citation to accept or refuse general grant of letters of administration. In default grant to applicant limited to a policy of insurance.

WHEREAS it appears by an affidavit of C. D., sworn on the day of , 19 , that E. F., of in the county of , died on the day of , 19 , at , a bachelor, intestate and not possessed of any real estate, leaving G. H. his natural and lawful father and next of kin the person entitled to his personal estate, who died on the day of , 19 , without having taken upon himself letters of administration of the estate of the said E. F., having made and duly executed his will dated day of , 19 . That on the day of , 19 , probate of the will of the said G. H. deceased was granted by our High Court of Justice at the Principal Probate Registry thereof to you the said A. B., one of the executors therein named. And whereas it further appears by the said affidavit that the said C. D. is the sole person beneficially entitled to the sum of £ , secured by a certain policy of

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

assurance effected by the said deceased E. F. for the benefit of the said C. D., bearing date the day of and numbered under the hands of three directors of the Assurance Association :

Now this is to command you, the said A. B., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the said Principal Probate Registry at Somerset House, Strand, London, and accept or refuse letters of administration of all the estate which by law devolves to or vests in the personal representative of the said deceased or show cause why the same should not be granted to the said C. D., limited so far only as concerns all her right, title and interest in and to the said policy of assurance and all profits arising therefrom but no further or otherwise. And take notice that, in default of your so appearing and accepting and extracting the said letters of administration, our said Court will proceed to grant letters of administration of the said estate, limited as aforesaid or under such other limitations as to our said Court shall seem meet, your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , (Signed) W. Y.,
Solicitor. Registrar.

FORM No. 94.

Citation to only Persons entitled to Accept or Refuse Administration. In Default Limited Grant to be made to Trustee of Settlement (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith :

To A. M., of , C. D., of (wife of E. D.), F. G., of (wife of H. G.), I. J., of (wife of K. J.), and L. M., of , spinster.

Citation to only persons entitled to accept or refuse administration. In default, limited grant to be made to trustee of settlement.

WHEREAS it appears by an affidavit of N. O., of , solicitor, sworn on the day of , 19 , that P. M., of , died on the day of , 19 , at , intestate, a widower and not possessed of any real estate, leaving you the said A. M., C. D., F. G., I. J., and L. M., his natural and lawful children and only next of kin, and together the only persons entitled in distribution to his personal estate. And whereas it appears that by an indenture bearing date the day of , 18 , and made between P. Q., of the first part, R. Q., of the second part, S. T. and U. T. his wife, of the third part, V. T., spinster, of the fourth part, and W. Q. and X. T., of the fifth part, certain property was vested in the trustees therein mentioned upon the trusts therein mentioned, and that by an indenture dated the day of , 18 , and made between the said P. Q. and V. Q., of the first part, the said W. Q. and Y. Z., of the second part, and P. M. (the above-named deceased) and B. A., of , land agent and surveyor, of the third part, the said P. M. and C. A. were appointed the trustees under the indenture of day of , 18 , and that the said C. A. is now the sole trustee under the indenture dated day of , 18 . And whereas it appears that the sum of £ New Consols, forming part of the said trust property, is now standing in the name of the said P. M., but he had no beneficial interest in the same or any part thereof :

Now this is to command you the said A. M., C. D., F. G., I. J., and L. M., that within eight days after the service hereof on you, inclusive

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said Court at Somerset House, Strand, London, and accept or refuse letters of administration of the estate of the said P. M., deceased, or show cause why the same should not be granted to the said C. A., limited so far only as concerns all the right, title and interest of him the said deceased in and to the aforesaid sum of £ New Consols, and to the dividends and interest due or to grow due thereof but no further or otherwise. And take notice that, in default of your so appearing and accepting and extracting the said letters of administration, our said Court will proceed to grant letters of administration to the said C. A., limited as aforesaid or otherwise as to our said Court may seem proper.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitor. (Signed) W. Y., Registrar.

Form No. 95.

Citation by Beneficial Owner of Shares (transfer of which has not been registered) to Next of Kin of Deceased to Accept or Refuse Administration. In default Grant to be made to Applicant Limited to such Shares (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of .

Citation by beneficial owner of shares (transfer of which has not been registered) to next of kin of deceased to accept or refuse administration. In default grant to be made to applicant limited to such shares.

Whereas it appears by an affidavit of C. D., sworn that E. F., of , deceased, died at , on the , intestate, a bachelor, and not possessed of real estate, leaving you the said A. B. his natural and lawful father and next of kin. And whereas it further appears by the said affidavit that the said C. D. is the sole person entitled to or beneficially interested in ordinary shares of £ each fully paid of the Co., Ltd., Nos. to inclusive, and all dividends now due and to grow due thereon, sold and transferred under the instructions of the deceased, and that the transfer of the said shares has never been registered:

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the said Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased or show cause why letters of administration of the said estate of the said deceased, limited to all his right, title and interest in and to the said shares and the dividends due and to accrue thereon, should not be granted to the said C. D. And take notice that, in default of your so appearing and accepting and extracting the said letters of administration as aforesaid, our said Court will proceed to grant letters of administration of the said estate of the said deceased, limited as aforesaid or under such other limitations as to our Court shall seem meet, your absence notwithstanding.

Dated at London this and in the year of our reign.

Extracted by of , Solicitors. (Signed) W. Y., Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

FORM No. 96.

Citation by Person Beneficially Entitled to Leasehold Property (of which Deceased was Sole Trustee) to Widow and Children to Accept or Refuse Administration. In Default a Grant Limited to the said Leasehold Property to Applicant (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To C. T. of Asylum, widow, and C. E. S. (wife of E. S.) of and others, children of J. A. T. deceased.

Citation by person beneficially entitled to leasehold property (of which deceased was sole trustee) to widow and children to accept or refuse administration. In default a grant limited to the said leasehold property to applicant.

WHEREAS it appears by an affidavit of A. B., of spinster, sworn that J. A. T., of died on the at , intestate, not possessed of any real estate, leaving you the said C. T. his lawful widow and relict, and you the said C. E. S. and other children whose names and whereabouts are unknown, his only next of kin together the only persons entitled in distribution to his estate. And whereas it appears by the said affidavit that the said A. B. is the only person beneficially interested in and entitled to certain leasehold premises contained in an indenture of settlement dated of which the said deceased was the surviving trustee. And whereas it further appears that you the said C. T. are of unsound mind and that the said C. E. S. is your natural and lawful daughter and one of your next of kin:

Now this is to command you that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said Court at Somerset House, Strand, London, and accept or refuse letters of administration of the estate of the said deceased, or show cause why the same limited so far as concerns her right, title, and interest in the said leasehold premises should not be granted to the said A. B. And take notice that in default of your so appearing and accepting and extracting the said letters of administration, our said Court will proceed to grant the letters of administration of the personal estate of the said deceased, limited as aforesaid, to the said A. B., your absence notwithstanding.

Dated at London this day of 19 , in the year of our reign.

Extracted by , Solicitor. (Signed) W. Y., Registrar.

FORM No. 97.

Citation against Widow and Children of Defendant in Chancery Action to Accept or Refuse Administration. In Default Grant to be made to Nominee of Applicants Limited for the Purpose of Carrying on the said Action (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of , widow, C. D., of , and E. F., of .

Citation against widow and children of defendant in Chancery action to accept or refuse administration.

WHEREAS it appears by an affidavit of G. H., sworn on the day of , 19 , that I. J., of , died on the day of at , intestate, and not possessed of any real estate, leaving you the said A. B. his lawful widow and relict, and you the said C. D. and E. F. his natural and lawful children and only next of kin together the only persons entitled to his personal estate. And whereas it further appears by the

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

In default grant to be made to nominee of applicants, limited for the purpose of carrying on the said action.

said affidavit that K. L. and M. N. are the plaintiffs in an action pending in the Chancery Division of our High Court of Justice, entitled "L., and another against J., and others, L. 1910, No. 365," and that the said deceased was one of the defendants therein, and that it is necessary that a legal personal representative of the said deceased should be appointed for the purpose of carrying on the said action.

Now this is to command you the said A. B., C. D., and E. F., that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of the Probate, Divorce and Admiralty Division of our High Court of Justice at Somerset House, Strand, London, and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said I. J. deceased or show cause why the same, limited so far only as to substantiate and carry on the said action, should not be granted to the nominee of the said K. L. and M. N. And take notice that in default of your so appearing and accepting, and extracting, the said letters of administration, our said Court will proceed to grant to such nominee letters of administration of the said estate, limited as aforesaid, or under such other limitations as to our said Court shall seem meet, your absence notwithstanding.

Dated at London this day of 19 , in the year of our reign.

Extracted by of , Solicitor. (Signed) W. Y., Registrar.

Form No. 98.

Citation by Persons Beneficially Entitled to Sum of Money, Secured by Mortgage, to Widow and Children of Deceased to Accept or Refuse Letters of Administration. In Default Grant to be made to Applicants Limited to the said Sum and Interest thereon (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To M. C., of , in the county of , widow, H. L. C., of , and M. C. C., L. F. C., and T. A. C., all of , spinsters.

Citation by persons beneficially entitled to sum of money, secured by mortgage, to widow and children of deceased to accept or refuse letters of administration.

In default grant to be made to applicants, limited to the said sum and interest thereon.

Whereas it appears by the joint affidavit of H. F. B., of , and M. E. B., of , spinster, sworn on the day of , 19 , that H. C. of , in the county of , died there on the day of , 18 , intestate, not possessed of real estate, leaving you the said M. C. his lawful widow and relict, and you the said H. L. C., M. C. C., L. F. C. and T. A. C., his natural and lawful children and only next of kin, and together the only persons entitled in distribution to his estate. And whereas it further appears by the said affidavit that the said H. F. B., and M. E. B., are entitled under certain trusts to the sum of £ secured by an indenture of mortgage bearing date the day of made between E. B., since deceased, of the one part, and the said H. C. and J. T. S., who predeceased the said H. C., of the other part.

Now this is to command you the said M. C., H. L. C., M. C. C., L. F. C., and T. A. C. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice, at Somerset House, Strand, London, and accept or refuse letters of administration of all the estate which devolves to and vests in the personal representatives of the said deceased, or show

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

cause why the letters of administration of the said estate of the said deceased, limited to all their right, title and interest in and to the said sum of £ with interest due and to become due thereon, should not be granted to the said H. F. B. and M. E. B. or one of them. And take notice that in default of your so appearing, and accepting and extracting the said letters of administration our said Court will proceed to grant letters of administration of the said estate of the said deceased, limited as aforesaid, to the said H. F. B. and M. E. B. or one of them, your absence notwithstanding.

Dated at London this day of 19 , in the year of our reign.

Extracted by of , Solicitor.
(Signed) W. Y., Registrar.

Form No. 99.

Citation by Legatee to Executor of Residuary Legatee and Devisee (surviving Executor of Deceased having Died without Appointing an Executor) to Accept or Refuse Administration (with Will) of the Unadministered Estate (*a*).

Citation by legatee to executor of residuary legatee and devisee (surviving executor of deceased having died without appointing an executor) to accept or refuse administration (with will) of the unadministered estate.

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B.

Whereas it appears by an affidavit of C. D. sworn on the day of , 19 , that E. F. of , in the county of , widow, died on the day of , having made and duly executed her last will and testament bearing date the day of , and thereof appointed G. H. and I. J. executors and the said G. H. residuary legatee and devisee. And whereas it further appears by the said affidavit that probate of the said will was granted by our High Court of Justice at the Principal Probate Registry thereof to the said G. H. on the day of , power being reserved of making the like grant to the said I. J., and that the said G. H. died on the day of , and that double probate of the said will was granted to the said I. J. on the day of , who intermeddled in the personal estate of the said E. F. deceased, and died on the day of leaving part thereof unadministered, having made and duly executed her last will and testament dated the day of , 19 , but not having therein appointed any executor. And whereas it further appears by the said affidavit that the said G. H. made and duly executed his last will and testament bearing date the day of , and thereby appointed his daughter you the said A. B. (then A. H. spinster) sole executrix and residuary legatee, who proved the said will on the day of . And whereas it further appears by the said affidavit that the said C. D. is a legatee under the will of the said E. F., deceased, and that his legacy remains unsatisfied.

Now this is to command you the said A. B. that within one month after service by publication hereof you do cause an appearance to be entered for you in the said Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and accept or refuse letters of administration with the will annexed of the unadministered estate of the said E. F. deceased, or show cause why the same should not be granted to the said C. D. And take notice that in default of your so appearing and accepting and extracting the said letters of administration with the said will annexed our said Court will proceed to grant

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

letters of administration with the said will annexed of the unadministered estate of the said E. F. deceased, to the said C. D., your absence notwithstanding.

Dated at London this day of 19 , in the . year of our reign.

Extracted by of , Solicitor. (Signed) W. Y., Registrar.

Form No. 100.

Citation by Creditor to Executors, Residuary Legatees and Devisees in Trust, Residuary Legatees and Devisees for Life, Residuary Legatees and Devisees Substituted for Life, Contingent Residuary Legatees and Devisees Substituted, Husband of Deceased and Heir-at-Law to Accept or Refuse Probate or Administration (Will) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To G. B. D., of , H. E. A., of , G. D. B., of , G. W. B., of , E. D., B. D., M. E. D., and G. M. D., all of , and B. H. D., of .

Citation by creditor to executors, residuary legatees, and devisees in trust, residuary legatees and devisees for life, residuary legatees and devisees substituted for life, contingent residuary legatees and devisees substituted, husband of deceased and heir-at-law to accept or refuse probate or administration (will).

Whereas it appears by an affidavit of P. C., sworn on the day of , 19 , that E. B. D., of , in the county of , died on the day of , 19 , at , having made and duly executed her last will and testament dated (now remaining in the Principal Probate Registry of our High Court of Justice), and therein appointed you the said G. B. D. and H. E. A. executors and residuary legatees and devisees in trust, and you the said G. B. D. residuary legatee and devisee for life. And whereas it further appears by the said affidavit that you the said G. D. B., G. W. B., E. D., B. D., M. E. D., G. M. D. and B. H. D., are the residuary legatees and devisees for life substituted on the death of the said G. B. D., and that on your death your children (if any) are the residuary legatees and devisees substituted on their attaining the age of 21 years. And whereas it further appears by the said affidavit that you the said G. D. B., G. W. B., E. D., M. E. D., and G. M. D. are unmarried, and that you the said B. H. D. are married and have not any issue, and that you the said G. B. D. are the lawful husband of the said deceased, and that you the said G. D. B. are her heir-at-law, and that the said P. C. is a creditor of the said deceased:

Now this is to command you the said G. B. D., H. E. A., G. D. B., G. W. B., E. D., B. D., M. E. D., G. M. D., and B. H. D., that within eight days after service hereof on you, inclusive of the day of such service, you do respectively cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and you the said G. B. D. and H. E. A. accept or refuse probate of the said will, and you the said G. D. B., G. W. B., E. D., B. D., M. E. D., G. M. D., and B. H. D. accept or refuse letters of administration with the will annexed of all the estate which by law devolves to and vests in the personal representative of the said deceased, or show cause why such letters of administration, with the will annexed, should not be granted to the said P. C. And take notice that in default of your so respectively appearing and accepting and extracting the said probate or letters of administration with the will annexed, our said Court will proceed to grant letters of administration with the will annexed of the said estate to the said P. C., your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitors. (Signed) W. Y., Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

FORM No. 101.

Citation by Representative of Husband to Heir-at-Law to Accept or Refuse Administration *de bonis non* (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of , in the county of .

Citation by representative of husband to heir-at-law to accept or refuse administration *de bonis non.*

WHEREAS it appears by an affidavit of C. D., sworn the day of , 19 , that E. F., of , in the county of , died on the day of , 19 , at , intestate, and that letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, were on the day of , 19 , granted by our High Court of Justice at the Principal Probate Registry thereof to G. H., the lawful husband of the said deceased, who for some time intermeddled in the said estate, and died on the day of , leaving part thereof unadministered. And whereas it further appears by the said affidavit that the said C. D. is the personal representative of the said G. H. deceased, letters of administration of the estate of the said G. H. having been granted to him at the Principal Probate Registry on the day of , 19 , and that you the said A. B. are the heir-at-law of the said deceased:

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our said Court at Somerset House, Strand, London, and accept or refuse letters of administration of the said unadministered estate, or show cause why the same should not be granted to the said C. D., and take notice that in default of your so appearing and accepting and extracting the said letters of administration our said Court will proceed to grant letters of administration of the said unadministered estate to the said C. D., your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitor. (Signed) W. Y., Registrar.

FORM No. 102.

Citation by Guardian of Minor Children of Deceased Person to Widow to Propound Paper Writing (as being Executrix thereof) or to Accept or Refuse Letters of Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of , widow.

Citation by guardian of minor children of deceased person to widow to propound paper writing (as being executrix thereof) or to accept or refuse letters of administration.

WHEREAS it appears by an affidavit of C. D., sworn on the day of , 19 , that E. F., of , died there on the day of , 19 , not possessed of any real estate, and leaving you the said A. B. his lawful widow and relict and G. H., spinster, and I. J., his natural and lawful children and only next of kin; and whereas it further appears by the said affidavit that the said G. H. and I. J. are in their minority and have elected their uncle the said C. D. to be their guardian; and whereas it further appears by the said affidavit that the said deceased

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

left a certain paper writing purporting to be a will whereby he appointed you the said A. B. sole executrix and residuary legatee:

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and propound the said paper writing, should you think it for your interest so to do, or accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased as having died intestate, or show cause why the same should not be granted to the said C. D. for the use and benefit of the said minors. And take notice that, in default of your so appearing and doing as aforesaid, our said Court will proceed to grant letters of administration of the said estate to the said C. D., your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitors. (Signed) W. Y., Registrar.

FORM No. 103.

Citation to Bring in Probate (another Will being set up) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To L. D., of , in the county of .

Citation to bring in probate (another will being set up).

WHEREAS it appears by an affidavit of D. P., sworn the day of , 19 , that probate of the alleged last will and testament of I. J. of , deceased, was on the day of , 19 , granted to you by our High Court of Justice at the Principal Probate Registry thereof. And whereas it is alleged in the said affidavit that the said deceased made and duly executed his last will and testament dated the day of , 19 , and thereof appointed the said D. P. executor, and that the said probate ought to be called in, revoked and declared null and void in law:

Now this is to command you the said L. D. that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court at Somerset House, Strand, London, the aforesaid probate in order that the said D. P. may proceed in due course of law for the revocation of the same.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitors. (Signed) W. Y., Registrar.

FORM No. 104.

Citation to Bring in Probate (Intestacy alleged) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God, etc.

To A. B., of , in the county of .

Citation to bring in probate (intestacy alleged).

WHEREAS it appears by the affidavit of C. D., sworn the day of , 19 , that probate of the alleged last will and testament of E. F., of , deceased, was on the day of , 19 , granted to

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

you by our High Court of Justice at the Principal Probate Registry thereof, and that the said deceased died a bachelor, leaving the said C. D. his natural and lawful father and next of kin. And whereas it is alleged in the said affidavit that the said deceased died intestate, and that the said probate ought to be called in, revoked, and declared null and void in law :

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court at Somerset House, Strand, London, the aforesaid probate in order that the said C. D. may proceed in due course of law for the revocation of the same.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitor. (Signed) G. H., Registrar.

FORM No. 105.

Citation to Bring in Administration (Will set up) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God, etc.

To A. B., of , in the county of .

Citation to bring in administration (will set up).

WHEREAS it appears by the affidavit of C. D., sworn the day of , 19 , that letters of administration of all the estate which by law devolves to and vests in the personal representative of E. F., of , deceased, were on the day of granted to you by our High Court of Justice at the Principal Probate Registry thereof. And whereas it is alleged in the said affidavit that the said deceased made and duly executed his last will and testament dated the day of , 19 , and thereof appointed the said C. D. executor [*or as the case may be*], and that the said letters of administration ought to be called in, revoked, and declared null and void in law :

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court at Somerset House, Strand, London, the aforesaid letters of administration in order that the said C. D. may proceed in due course of law for the revocation of the same.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitor. (Signed) G. H., Registrar.

FORM No. 106.

Citation to Bring in Administration (Administrator alleged not to be Entitled) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God, etc.

To A. B., of , in the county of .

Citation to bring in administration (administrator alleged not to be entitled).

WHEREAS it appears by the affidavit of C. D., sworn the day of , 19 , that letters of administration of all the estate which by law devolves to and vests in the personal representative of E. F., of , deceased, were on the day of granted to you by our High Court of Justice at the Principal Probate Registry thereof as the natural and lawful brother and one of the next of kin of the said deceased. And whereas it is alleged in the said affidavit that you are not one of the next of kin of the said deceased, and that the said deceased died a

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

widower leaving the said C. D., his natural and lawful son and only next of kin [*or as the case may be*], and that the said letters of administration ought to be called in, revoked, and declared null and void in law:

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court at Somerset House, Strand, London, the aforesaid letters of administration in order that the said C. D. may proceed in due course of law for the revocation of the same.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitor. (Signed) G. H., Registrar.

FORM No. 107.

Citation to see Proceedings (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God, etc.

To A. B., of in the county of .

Citation to see proceedings.

WHEREAS it appears by the affidavit of C. D., sworn the day of , 19 , that there is now depending in our High Court of Justice a probate action entitled "A. and another against B., 1900, F. No. 336," wherein the plaintiffs are proceeding to prove in solemn form of law the alleged last will and testament dated the day of , 19 , of E. F., of , who died on the day of , 19 , at . And whereas it further appears by the said affidavit that you are the natural and lawful and one of the next of kin of the said deceased [*or* a legatee under an alleged will dated , *or as the case may be*]:

Now this is to give notice to you the said A. B., to appear in the said action, either personally or by your solicitor, should you think it for your interest so to do, at any time during the dependence of the said action and before final judgment shall be given therein. And take notice that, in default of your so doing, our said Court will proceed to hear the said will proved in solemn form of law and pronounce judgment in the said action, your absence notwithstanding.

Dated at London this day of , 19 , and in the year of our reign.

Extracted by of , Solicitor. (Signed) G. H., Registrar.

FORM No. 108.

Citation to Legal Representative of Uncle and other Uncles and Aunts (if any) etc. to see Proceedings (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B. (who left England for Australia in or about the year 1854), or his legal representative, and to the other lawful uncles and aunts (if any), and all persons having or claiming any interest in the estate of C. D. (formerly C. B.), late of , in the county of , widow, deceased.

Citation to legal representative of uncle and other uncles and aunts (if any), etc., to see proceedings.

WHEREAS it appears by the affidavit of E. F., sworn the day of , 19 , that there is now depending in our High Court of Justice a probate action entitled, "In the estate of C. D., deceased, between

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

E. F. (the wife of G. F.) and H. I., plaintiffs, and K. L. and J. L., defendants, 19 , F. No. ," wherein the plaintiffs are proceeding to prove in solemn form of law the alleged last will and testament dated the day of , 1894, of C. D., late of , in the county of , who died on the day of , 19 , at the Asylum, in the county of , and the said defendant K. L. is the sole executor of an alleged last will bearing date of , 1902. And whereas it further appears by the said affidavit that the said deceased died a widow without child or parent, brother or sister, nephew or niece, and that the said A. B., a lawful uncle of the said deceased, went to Australia in or about the year 1854 and has not since been heard of, and that the said deceased had other lawful uncles and aunts but it is not known whether the said A. B. or any other of the aforesaid uncles or aunts survived the said deceased.

Now this is to give notice to you the said A. B., or your legal representative, and to you the said lawful uncles and aunts (if any), and other persons having or claiming any interest in the estate of the said deceased, to appear in the said action either personally or by your solicitor should you think it in your interest so to do at any time during the dependence of the said action and before final judgment shall be given therein. And take notice that in default of your so doing our said Court will proceed to hear the said action and pronounce judgment therein, your absence notwithstanding.

Dated at London this day of 19 , and in the year of our reign.

Extracted by of ,
Solicitor.
(Signed) W. Y.,
Registrar.

FORM No. 109.

Citation to Bring in Probate (Words having been Inserted in the Will without the Knowledge or Approval of the Testator) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of , in the county of , and C. D. of , in the county of .

Citation to bring in probate (words having been inserted in the will without the knowledge or approval of the testator).

WHEREAS it appears by an affidavit of E. D., sworn the day of , 19 , that probate of the last will and testament of F. D., of , in the county of , deceased, was on or about the day of , 19 , granted to you by our High Court of Justice at the District Probate Registry thereof at , and whereas it appears by the said affidavit that there is contained in the said will a gift to the nephews and nieces of the deceased, the children of his late brothers G. D. and H. D., such nephews and nieces taking *per stirpes* and not *per capita,* and whereas it is alleged in the said affidavit that the words "such nephews and nieces taking *per stirpes* and not *per capita,*" were inserted in the said will of the deceased *without his knowledge or approval,* and that such words should be omitted from the said probate.

Now this is to command you the said A. B. and C. D. that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court at Somerset House, Strand, London, the aforesaid probate in order that the said E. D. may proceed in due course of law for the amendment of the same or to take such other steps as he may be advised.

Dated at London this day of 19 , and in the year of our reign.

Extracted by of ,
Solicitor.
(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

FORM No. 110.

Citation by Legatee to Administrator (with Will) to bring in Grant for Amendment (*a*).

Citation by legatee to administrator (with will) to bring in grant for amendment.

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of , in the county of .

WHEREAS it appears by an affidavit of C. D., sworn the day of , 19 , that letters of administration with the will annexed of all the estate which by law devolves to and vests in the personal representative of E. B., deceased, were on the day of , 19 , granted to you by our High Court of Justice at the Principal Probate Registry thereof as the lawful husband of the said deceased, no executor or residuary legatee or devisee being named in the said will. And whereas it appears from the said affidavit that in the will as admitted to probate without alterations the amount of legacy to the said C. D. is £10 (ten pounds). And it is alleged that the amount of such legacy in the said will was originally £100 (one hundred pounds).

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry of our said Court at Somerset House, Strand, London, the aforesaid letters of administration with the will annexed in order that the said C. D. may proceed in due course of law to obtain amendment of the aforesaid letters of administration with the will annexed.

Dated at London this day of 19 , and in the year of our reign.

Extracted by of , Solicitor. (Signed) W. Y., Registrar.

FORM No. 111.

Citation by Person Interested under Codicil to Executor who Proved Will only to Bring in Probate to Await Further Order of the Court (*a*).

Citation by person interested under codicil to executor who proved will only to bring in probate to await further order of the Court.

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of , in the county of .

WHEREAS it appears by an affidavit of C. D., of , in the county of , sworn on the day of , 19 , that probate of the alleged last will and testament of E. D., of , in the county of , deceased, was on the day of , 19 , granted to you by our High Court of Justice at the Principal Probate Registry thereof, and whereas it is further alleged in the said affidavit that the said deceased made and duly executed a codicil to the said will on the day of , 19 , and that the said C. D. is interested in the estate of the said deceased under the said codicil.

Now this is to command you the said A. B. that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the said Principal Probate Registry at Somerset

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

House, Strand, London, the aforesaid probate there to await the further order of our said Court.

Dated at London this day of 19 , in the year of our reign.

Extracted by of , (Signed) W. Y.,
Solicitor. Registrar.

Form No. 112.

Citation by Guardian (elected) to only Next of Kin of Minors to show Cause why Grant should not be made to him (the Guardian) for the Use of the said Minors (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., spinster, and C. B., both of , in the county of .

Citation by guardian (elected) to only next of kin of minors to show cause why grant should not be made to him (the guardian) for the use of the said minors.

Whereas it appears by an affidavit of E. F., sworn the day of , 19 , that D. B., of , died there on the day of , intestate, a widow, and not possessed of or entitled to any real estate, leaving G. B., H. B., I. B., J. B., and K. B. her natural and lawful children and only next of kin, and together the only persons entitled in distribution to her personal estate. And whereas it further appears by the said affidavit that the said G. B., H. B., I. B., J. B., and K. B., are in their minority, and that you the said C. B. and A. B. are their natural and lawful brother and sister by the half blood and only next of kin. And whereas it further appears by the said affidavit that the said minors have elected the said E. F., their lawful uncle, to be their guardian for the purpose of obtaining letters of administration of the estate of the said deceased.

Now this is to command you the said A. B. and C. B. that within eight days after service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Principal Probate Registry of our High Court of Justice at Somerset House, Strand, London, and show cause why letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased should not be granted to the said E. F. for the use and benefit of the said minors. And take notice that in default of your so appearing and showing cause as aforesaid our said Court will proceed to grant letters of administration of the said estate to the said E. F. for the use and benefit of the said minors, your absence notwithstanding.

Dated at London this day of 19 , in the year of our reign.

Extracted by of , (Signed) W. Y.,
Solicitor. Registrar.

Form No. 113.

Citation against an Executor who has Intermeddled (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To A. B., of , in the county of .

Citation against an executor who has intermeddled.

Whereas it appears by an affidavit of C. D., sworn the day of , 19 , that E. F., of , in the county of , died there on the day of , 19 , having made and duly executed his last will

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CITATIONS—*continued.*

and testament bearing date the day of (now remaining in the Principal Probate Registry of our High Court of Justice), whereof you the said A. B. are the sole surviving executor, and that the said C. D. is interested in the estate of the said deceased under the said will. And whereas it is alleged in the said affidavit that you the said A. B. have intermeddled in the estate of the said deceased.*

Now this is to command you the said A. B. that within eight days after the service hereof on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the said Principal Probate Registry at Somerset House, Strand, London, and show cause why you should not be ordered to take probate of the said will under pain of the law and contempt thereof.

Dated at London this day of 19 , in the year of our reign.

Extracted by G. and H. of , (Signed) W. Y.,
Solicitors. Registrar.

* *The affidavit must contain instances of the intermeddling. It must appear that the testator has been dead at least six calendar months at the date of swearing of the affidavit.*

FORM NO. 114.

Citation, Abstract of, for Advertisement (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

To A. B.

Citation, abstract of, for advertisement.

TAKE NOTICE that a citation has issued citing you to cause an appearance to be entered for you within days after publication hereof in the Principal Probate Registry of the Court, situate at Somerset House, Strand, in the county of Middlesex, and accept or refuse letters of administration of the estate of C. D., of , late of , in the county of , deceased, or show cause why letters of administration of the said estate should not be granted to E. F. as , with an intimation that in default of your appearance letters of administration will be granted to the said E. F.

(Signed) W. Y.
Solicitors. Registrar.

To be advertised in the following newspapers:—

COMMISSION.

FORM NO. 115.

Commission to Examine Witnesses. (O. 37, r. 6) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God, etc.

To , of , and , of , commissioners named by and on behalf of , and to , of , and , of , commissioners named by and on behalf of the , greeting:

Commission to examine witnesses. (O. 37, r. 6.)

KNOW ye that we in confidence of your prudence and fidelity have appointed you and by these presents give you power and authority to examine on interrogatories and *vivâ voce* as hereinafter mentioned witnesses on behalf of the said and respectively at , before you or any two of you, so that one commissioner only on each side be present and act at the examination.—And we command you as follows:

1. Both the said and the said shall be at liberty to examine on interrogatories and *vivâ voce* on the subject-matter thereof or arising out of the answers thereto such witnesses as shall be produced on their

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

COMMISSION—*continued.*

behalf with liberty to the other party to cross-examine the said witnesses on cross-interrogatories and *vivâ voce,* the party producing any witness for examination being at liberty to re-examine him *vivâ voce:* and all such additional *vivâ voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing, and with the answers thereto shall be returned with the said commission.

2. Not less than days before the examination of any witness on behalf of either of the said parties, notice in writing, signed by any one of you, the commissioners of the party on whose behalf the witness is to be examined, and stating the time and place of the intended examination and the names of the witnesses to be examined, shall be given to the commissioners of the other party by delivering the notice to them, or by leaving it at their usual place of abode or business, and if the commissioners or commissioner of that party neglect to attend pursuant to the notice, then one of you, the commissioners of the party on whose behalf the notice is given, shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte,* and adjourn any meeting or meetings, or continue the same from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present and acting to be a true and correct copy or extract, shall be annexed to the witness's deposition.

4. Each witness to be examined under this commission shall be examined on oath, affirmation, or otherwise in accordance with his religion by or before the commissioners or commissioner present at the examination.

5. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *vivâ voce* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the commissioners or commissioner present at the examination, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Senior Registrar, the Principal Probate Registry, Somerset House, on or before the day of , enclosed in a cover under the seals or seal of the commissioners or commissioner.

8. Before you or any of you, in any manner act in the execution hereof, you shall severally take the oath hereon indorsed on the Holy Evangelists or otherwise in such other manner as is sanctioned by the form of your several religions and is considered by you respectively to be binding on your respective consciences. In the absence of any other commissioner a commissioner may himself take the oath.

And we give you or any one of you authority to administer such oath to the other or others of you.

Witness, etc.

Witnesses' Oath.

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth.

So help you God.

COMMISSION—*continued.*

Commissioners' Oath.

You [*or* I] shall, according to the best of your [*or* my] skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission within written. So help you [*or* me] God.

[Where there is only a single commissioner, he may be authorised to administer this oath to himself. (*Wilson* v. *De Coulon,* 22 C. D. 841.)]

Interpreter's Oath.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which he shall administer to, and all and every the questions which shall be exhibited or put to, all and every witness and witnesses produced before and examined by the commissioners named in the commission within written, as far forth as you are directed and employed by the said commissioners, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

Clerk's Oath.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said commissioners named in the commission within written, as far forth as you are directed and employed by the commissioners to take, write down, transcribe or engross the said questions and depositions. So help you God.

Direction of Interrogatories, etc., when returned by the Commissioners.

THE SENIOR REGISTRAR, PRINCIPAL PROBATE REGISTRY,
SOMERSET HOUSE, LONDON.

[Letters so addressed travel post free from any part of the United Kingdom.]

FORM No. 116.

Commission for the Examination of Witnesses. (Alternative Form.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith :

To A. B. [*here set forth the name and proper description of the Commissioner*], Greeting.

Commission for the examination of witnesses. (Alternative form).

WHEREAS a certain action is now depending in the Probate, Divorce and Admiralty Division of our High Court of Justice entitled in the estate of C. D. deceased, between E. F. plaintiff and G. H. defendant. And whereas by an order made in the said cause on the day of , 19 , on the application of the said E. F., it was ordered that a commission should issue under seal of our said Court for the examination of

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

COMMISSION—*continued.*

[*here insert name and address of one of the persons to be examined*] and others as witnesses to be produced on the part of the said E. F., the plaintiff (saving all just exceptions).

Now know ye that we do by virtue of this commission to you directed, authorize you within thirty days after the receipt of this commission at a certain time and place to be by you appointed for that purpose with power of adjournment to such other time and place as to you shall seem convenient to cause the said witnesses to come before you and to administer to the said witnesses respectively an oath truly to answer such questions as shall be put to them touching the matters set forth in the pleadings in the said action (true and authentic copies whereof sealed with the seal of our said Court are hereunto annexed), and such oath being administered we do hereby authorize and empower you to take the examination of the said witnesses touching the matters set forth in the said pleadings, and to reduce the said examination or cause the same to be reduced into writing. And that for the purpose aforesaid you do assume to yourself some notary public or other lawful scribe as and for your actuary in that behalf if to you it should seem meet and convenient so to do. And the said examination being so taken and reduced into writing as aforesaid, and subscribed by you, we do require you forthwith to transmit the said examination, closely sealed up, to the Probate Registry of our said Court at Somerset House, Strand, in the county of Middlesex, England, together with these presents. And we do hereby give you full power and authority to do all such acts, matters, and things as may be necessary, lawful, and expedient for the due execution of this our commission.

Dated at London the day of in the year of our Lord, 19 , and in the year of our reign.

Solicitor's name and address. (Signed) X. Y.,
Registrar.

CONSENTS.

FORM NO. 117.

Consent of Next of Kin to another Next of Kin taking Grant (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Consent of next of kin to another next of kin taking grant.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, without child or parent, leaving C. D. and me the undersigned E. F. his natural and lawful brothers and only next of kin:

Now I the said E. F. do hereby declare that I do consent to letters of administration of the estate of the said deceased being granted to the said C. D., one of the natural and lawful brothers and next of kin of the said deceased, as aforesaid.

In witness whereof I have hereunto set my hand this day of , 19 .

Signed by the said E. F.
in the presence of
witness.
(Signed) E. F.

FORM NO. 118.

Consent of other Next of Kin to Joint Grant being made to Widow and one Next of Kin (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Consent of other next of kin to joint grant being made to widow and one next of kin.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , intestate, not possessed of any real estate, leaving C. D., his lawful widow and relict, and E. F., G. H. and I. J., his natural

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

CONSENTS—*continued.*

and lawful children and only next of kin. And whereas the said C. D. is consenting and desirous that letters of administration of the estate of the said deceased be committed and granted to her jointly with the said E. F.:

Now we the said G. H. and I. J., both of , do hereby severally declare that we expressly consent that letters of administration of the personal estate of the said deceased be committed and granted to the said C. D., widow, and the said E. F. jointly.

In witness whereof we have hereunto set our hands this day of , 19 .

Signed by the said G. H. and I. J.
in the presence of ,
witness.

(Signed) G. H.
I. J.

DECLARATION.

FORM No. 119.

Declaration of the Estate of a Testator (or an Intestate) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Declaration of the estate of a testator (or an intestate).

A TRUE DECLARATION of all and singular the estate which devolves to and vests in the personal representative of A. B., of , deceased, who died on the day of , 19 , at which has at any time since his death come to the hands, possession, or knowledge of the intended administrator of the said estate made and exhibited upon and by virtue of the corporal oath of the said as follows, to wit:—

	£	*s.*	*d.*
First.—This declarant declares the said estate to be as follows:—			
Cash in the house			
Cash at bankers			
Household goods, furniture, plate, linen, china, jewellery, trinkets, etc., valued by of Licensed Appraiser at			
Policy of insurance, viz.:—			
Leasehold property:			
Description			
Years unexpired			
Gross rents			
Ground rent			
Outgoings paid by lessee			
Value of property			
Other personal property			
Real property			
Total......£			

Lastly—This declarant saith, that no estate devolving to or vesting as aforesaid in the personal representative of the said deceased has at any time come to the hands, possession, or knowledge of this declarant, save as hereinbefore set forth.

On the day of , 19 ,
the said C. D. was sworn to
the truth of the above declaration
at , before me
A commissioner for oaths.

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

DECREES.

FORM No. 120.

Decree for or against a Will (without jury) (*a*).

Decree for or against a will (without jury).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the county of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

C. D. against E. F.

THE President having taken the oral evidence of the plaintiff and defendant and of the witnesses produced on their behalf, and having heard counsel thereon on behalf of both parties, pronounced $\frac{\text{for}}{\text{against}}$ the force and validity of the last will and testament and codicil thereto of A. B., the deceased in this action, being the scripts, bearing date respectively now remaining in this Court referred to in the affidavit of scripts of and marked , and propounded in this action on behalf of the , the therein named, and on further application of counsel for the condemned the in the costs incurred or to be incurred in this action on behalf of the

(Signed) W. Y.,
Registrar.

FORM No. 121.

Decree for a Will Probate of which has been Granted in Common Form (without jury) (*a*).

Decree for a will, probate of which has been granted in common form (without jury).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the county of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

C. D. against E. F.

THE President having taken the oral evidence of the plaintiff and defendant and of the witnesses produced on their behalf, and having heard counsel thereon on behalf of both parties, pronounced for the force and validity of the last will and testament [and codicil thereto] of A. B. the deceased in this action, being the scripts, bearing date [respectively] Probate whereof was granted at the Registry of this division on now remaining in this Court referred to in the affidavit of scripts of and marked , and propounded in this action on behalf of the , the therein named, and on further application of counsel for the condemned the in the costs incurred or to be incurred in this action on behalf of the , and it is further ordered that the probate be handed out to the executors.

(Signed) W. Y.,
Registrar.

FORM No. 122.

Decree for Revocation of Grant of Administration—Grantee not entitled (without jury) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the county of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

C. D. against E. F.

Decree for revocation of grant of administration—Grantee not entitled (without jury).

THE President having taken the oral evidence of the plaintiff and defendant and of the witnesses produced on their behalf, and having heard

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

DECREES—*continued.*

counsel thereon on behalf of both parties, pronounced that E. F. (otherwise E. G.) the defendant was not the lawful son of the deceased in this action [*or as the case may be*] and ordered that the letters of administration of the estate of the said deceased granted to the said defendant at the Registry on the be revoked, and on further application of counsel for the plaintiff condemned the said defendant in the costs incurred or to be incurred in this action on behalf of the plaintiff.

(Signed) W. Y.,
Registrar.

FORM No. 123.

Decree against one Will and for Another and for Revocation of Grant (without Jury) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the county of Middlesex.
On the day of , 19 .
In the Estate of A. B., deceased.
C. D. against E. F.

Decree against one will and for another, and for revocation of grant (without jury).

THE President having taken the oral evidence of the plaintiff and defendant and of the witnesses produced on their behalf, and having heard counsel thereon on behalf of both parties, pronounced against the force and validity of the alleged last will and testament of A. B. deceased bearing date , probate whereof was granted at the Principal Registry of this Division on , and pronounced for the force and validity of the last will and testament of A. B., the deceased in this action, being the scripts, bearing date now remaining in this Court referred to in the affidavit of scripts of and marked , and propounded in this action on behalf of the , the therein named, and on further application of counsel for the revoked the said probate and condemned the in the costs incurred or to be incurred in this action on behalf of the .

(Signed) W. Y.,
Registrar.

FORM No. 124.

Decree—Jury (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the county of Middlesex.
On the day of , 19 .
In the Estate of A. B., deceased.
C. D. against E. F.

Decree—jury.

A jury having been sworn to try the questions of fact arising from the pleadings in this action, and the President having in their presence taken the oral evidence of the plaintiff and defendant, and of the witnesses produced on their behalf, and having heard counsel thereon on behalf of both parties, the jury aforesaid by their verdict found:—

(1) That the paper writing bearing date the day of , and purporting to be the last will and testament of the deceased, was duly executed in accordance with the provisions of the statute 1 Vict. cap. 26.

(2) That at the time of such execution the testator was of sound mind, memory and understanding.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

DECREES—*continued.*

(3) That at the time of such execution the testator knew and approved of the contents of the said will.

(4) That such execution was not obtained by the undue influence or coercion of .

Whereupon the President on the application of counsel for the by his final decree pronounced for the force and validity of the last will and testament [and codicil thereto] of A. B., the deceased in this action, being the scripts bearing date [respectively] now remaining in this Court and referred to in the affidavit of scripts of the and marked and propounded in this action on behalf of the , the therein named .

(Signed) W. Y.,
Registrar.

FORM No. 125.

Decree—Judgment after Trial at Assizes without Jury (*a*).

Decree—Judgment after trial at assizes without jury.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
The day of 19 .
In the Estate of A. B., deceased.
C. D. against E. F.

THIS action having on the day of 19 been tried before the Honourable Mr. Justice at . in the county of and the said Mr. Justice having ordered that judgment be entered for the this Court doth on the application of the pronounce the force and validity of the last will and testament and codicil thereto of A. B., the deceased in this action, being the scripts bearing date respectively now remaining in the Principal Probate Registry of this Court, referred to in the affidavit of scripts of and marked , and propounded in this action on behalf of the , the therein named, and adjudged that , the recover costs incurred or to be incurred in this action against the .

(Signed) W. Y.,
Registrar.

FORM No. 126.

Decree—Judgment after Trial at Assizes with Jury (*a*).

Decree—Judgment after trial at assizes with jury.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
The day of 19 .
In the Estate of A. B., deceased.
C. D. against E. F.

THE issues of fact raised in the pleadings in this action having been tried before the Honourable Mr. Justice with a jury of the county of on the day of 19 , and the jury having found and the said Mr. Justice having ordered that judgment should be entered for the on the issues raised on the pleadings this Court doth on the application of pronounce the force and validity of the last will and testament and codicil thereto of A. B., deceased, the deceased in this action, being the scripts bearing date respectively and now remaining in the Principal Probate Registry of this Court, referred to in the affidavit of scripts of the and propounded in this action on behalf of the , the therein named, and adjudged that the recover costs incurred or to be incurred in this action against the .

(Signed) W. Y.,
Registrar.

DEFENCE (STATEMENT OF). *See* "PLEADINGS."

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ELECTIONS.

FORM NO. 127.

Election by Minors of Guardian to take Grant (*a*).

Election by minors of guardian to take grant.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , intestate, a widower and not possessed of real estate*, leaving C. B. and D. B., spinster, his natural lawful and only children and only next of kin being now minors of the ages of years and years respectively.

Now we, the said C. B. and D. B., of , do hereby make choice of and elect E. F., of , our lawful grandfather and only next of kin, to be our curator or guardian for the purpose of obtaining letters of administration of the estate of the said A. B., deceased, to be granted to him, for our use and benefit and until one of us attain the age of twenty-one years.

In witness whereof we have hereunto set hand and seal , this day of 19 .

Signed, by the said C. B. and D. B. in the presence of } (Signed) C. B.
D. B.

(One disinterested witness to sign his or her name, adding address) } . . . . . .
. . . . . .

* *If the deceased left real estate, the heir-at-law must be cleared off.*

FORM NO. 128.

Election by Minors of Guardian to Renounce (*a*).

Election by minors of guardian to renounce.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

WHEREAS A. B., of , deceased, died on the day of , 19 , at aforesaid, intestate, a widower, leaving C. B. and D. B., spinster, his natural and lawful children and only next of kin, the said C. B. being also his heir-at-law.

Now we, the said C. B. and D. B., of , do hereby make choice of and elect E. F., of , our lawful grandfather and only next of kin, to be our curator or guardian for the purpose of renouncing for us and on our behalf all our right, title, and interest to and in the letters of administration of the estate of the said A. B.

In witness whereof we have hereunto set hand and seal , this day of 19 .

Signed, by the said C. B. and D. B. in the presence of } (Signed) C. B.
D. B.

(One disinterested witness to sign his or her name, adding address) } . . . . . .
. . . . . .

INTERROGATORIES.

FORM NO. 129.

Interrogatories. (O. 31, r. 4.) (*a*).

19 , B. No. 374.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)

In the Estate of X. Y. deceased.

Between A. B., plaintiff.
and
C. D., and E. F., defendants.

Interrogatories. (O. 31, r. 4.)

Interrogatories on behalf of the above-named plaintiff for the examination of the above-named defendants.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

INTERROGATORIES—*continued.*

1.
2.
3. etc.

[The defendant C. D. is required to answer the interrogatories numbered .]

[The defendant E. F. is required to answer the interrogatories numbered .]

FORM NO. 129A.

Interrogatories—Answers to. (O. 31, r. 9.) (*a*).

19 , B. No. 374.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)

In the Estate of X. Y. deceased.

Between A. B., plaintiff.
and
C. D., and E. F., defendants.

Interrogatories—answers to. (O. 31, r. 9.)

The answer of the above-named defendant to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named , make oath and say as follows :—

1.
2. etc.

INVENTORY.

FORM NO. 130.

Inventory (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

Between E. F., plaintiff,
and
C. D., defendant.

In the Estate of , deceased.

Inventory.

A true, full and particular inventory of the estate of , of deceased, which has at any time since his death come to the hands, possession or knowledge of , the sole executor of the last will and testament of the said deceased [*or* administrator of the estate of the said deceased, *as the case may be*], made and exhibited upon and by virtue of the corporal oath of the said , follows, to wit :— £ *s.* *d.*

First, this exhibitant saith that the said deceased was at the time of his death possessed of or entitled to certain household goods and furniture, plate and jewellery, in and about his dwelling-house, situate at , which have since his death been valued and appraised by of , licensed appraiser, at the sum of pounds shillings and pence ....

Second, this exhibitant saith that the said deceased was at the time of his death possessed of or entitled to a freehold messuage or dwelling-house and premises situate at , and that the said messuage and premises have been valued and appraised by the said at the sum of pounds shillings and pence..

Third, this exhibitant saith that the said deceased was at the time of his death possessed of or entitled to the sum of in the hands of his bankers, the Bank...........

Fourth, this exhibitant saith that the said deceased was at the time of his death possessed of or entitled to the sum of £ of the stock of the Company, which sum is of the value of pounds shillings and pence

Total .... £

Lastly, this exhibitant saith that no estate of or belonging to the said

---

(*a*) These forms are specimens only, and must be altered to suit individual cases.

INVENTORY—*continued.*

deceased has at any time since his death come to the hands, possession or knowledge of this exhibitant, save as is hereinbefore set forth.

(Signed)

On the day of 19 , the said was duly sworn to the truth of the above inventory at .

Before me,

A commissioner for oaths.

MEMORIAL.

Form No. 131.

Memorial to the Commissioners of Inland Revenue for a Duty-paid Stamp or Certificate as to Duty for a Cessate Grant or a Grant *de bonis non* (*a*).

Memorial to the Commissioners of Inland Revenue for a duty-paid stamp or certificate as to duty for a cessate grant or a grant *de bonis non.*

To the Honourable The Commissioners of Inland Revenue.

The memorial of A. B. of , solicitor (*or agent*) for C. D. of .

Sheweth that E. F. late of in the of deceased, died on the day of 19 .

1. That on the day of 19 , a grant of probate of the will [*or as the case may be*] of the said deceased was granted by the Registry of the Probate Division of the High Court of Justice to G. H. of the sole executor [*or as the case may be*], who died on the day of leaving part of the estate of the deceased unadministered, by reason whereof a further grant is necessary.

2. That the said G. H. swore the estate to be of the gross value of £ and paid a stamp duty of £ on the inland revenue affidavit [*or* "*on the said grant,*" *as the case may be*].

[3. That the said G. H., by a corrective affidavit dated day of 19 , re-swore the value of the said estate at £ , and paid further stamp duty of £ .

4. That the above-named C. D. as the intended administrator (with the will) of the unadministered estate of the said deceased, has, by a corrective affidavit, dated 19 , re-sworn the said estate at £ and paid further stamp duty of £ .]

5. That the estate of the said deceased within the operation of the said grant consisted of the items set forth in the following account No. 1:—

Account No. 1.

[*Insert full particulars of estate referred to in paragraphs* 2, 3, *and* 4 *above.*]			
£			

6. That the estate of the said deceased remaining unadministered consists of the items in the following account No. 2:—

Account No. 2.

[*Insert full particulars of unadministered estate, and if not fresh assets, state which asset in Account No.* 1 *each represents.*]			
£			

(*a*) These forms are specimens only, and must be altered to suit individual cases.

MEMORIAL—*continued.*

7. That the said C. D., who is the residuary legatee named in the said will [*or as the case may be*] of the said deceased, is now applying for a grant of administration with the will annexed of the said unadministered estate [*or as the case may be*], and has sworn the said estate to be of the value of £ .

Your memorialist therefore humbly pray that your honourable board will be pleased to grant the usual duty-paid stamp or certificate on the inland revenue affidavit for the proposed grant.

Dated this day of 19 .

(Signed) A. B.

MINUTES.

FORM No. 132.

Minute to found Jurisdiction of the County Court (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

Minute to found jurisdiction of the County Court.

On reading the affidavit of sworn on the day of 19 , it appears to the satisfaction of the undersigned Registrar of the Principal Probate Registry of this Court, that A. B., late of , in respect of whose estate a grant of $\frac{\text{probate}}{\text{letters of administration}}$ is applied for, had at the time of his death, which happened on the day of 19 , a fixed place of abode in the district of , and that the personal estate of the said deceased which he died possessed of or entitled to, exclusive of what the said deceased may have been possessed of or entitled to as a trustee for any other person and not beneficially, and without deducting anything on account of the debts due and owing from the said deceased, were at the time of his death under the value of two hundred pounds, and that the said deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of three hundred pounds or upwards.

Dated the day of 19 .

(Signed) C. D.,
Registrar.

FORM No. 133.

Minute on Opening Commission (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Minute on opening commission.

The undersigned Registrar of this Division of the Court, on the day hereunder written, opened a sealed packet addressed , which was transmitted to the Principal Probate Registry and delivered at the said registry on the day of 19 , and the same, on being opened, was found to contain the order bearing date the day of 19 , issued in this action for the examination of witness on behalf of the together with , and the said registrar thereupon ordered the said depositions and other documents to be filed.

Dated the day of 19 .

(Signed) G. H.,
Registrar.

FORM No. 134.

Minute on bringing in a Paper in obedience to a Subpœna (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

Minute on bringing in a paper in obedience to a subpœna.

On this day, in obedience to a subpœna issued by and bearing date the day of , 19 , whereby C. D., of , was commanded to

(*a*) These forms are specimens only, and must be altered to suit individual cases.

MINUTES—*continued.*

bring into and leave in the Principal Registry a certain original paper or script , being or purporting to be testamentary, to wit, the last will and testament of the said A. B., of , deceased, bearing date the day of , 19 , the said C. D. brought into and left in the said registry the said will and testament.

Dated the day of 19 .

(Signed) Y. Z.,
Registrar.

FORM No. 135.

Minute on Receipt of Living Person's Will (deposited by Testator) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

Minute on receipt of living person's will (deposited by testator).

PERSONALLY appeared A. B., of , who produced a sealed packet which he declared to contain his last will and testament with an indorsement thereon in the words and figures following, to wit:—

> "The day of 19 .
>
> "This sealed packet contains the last WILL AND TESTAMENT of A. B., of , bearing date the day of , 19 , and the same was brought into the PRINCIPAL PROBATE REGISTRY OF THE HIGH COURT OF JUSTICE by me for SAFE CUSTODY, there to remain deposited until after my decease, unless previously revoked by destruction in my presence and by my direction."

and subscribed in his own handwriting as he then acknowledged. And he then declared that he deposited the said sealed packet in this registry for safe custody, whereupon the said packet was received and deposited in this registry accordingly.

Dated the day of 19 .

(Signed) W. F.,
Registrar.

FORM No. 136.

Minute on Receipt of Living Person's Will (deposited by Agent) (*c*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

Minute on receipt of living person's will (deposited by agent).

PERSONALLY appeared A. B., of , solicitor, who produced a sealed packet which he declared to contain the last will and testament of C. D., of , with an indorsement thereon in the words and figures following, to wit:—

> "The day of 19 .
>
> "This sealed packet contains the last WILL AND TESTAMENT of me, C. D., of , bearing date the day of 19 , and I authorize A. B., of , solicitor, to deposit the same for safe custody in the PRINCIPAL PROBATE REGISTRY OF THE HIGH COURT OF JUSTICE, there to remain deposited until after my decease, unless previously revoked by destruction in my presence and by my direction."

and subscribed in his own handwriting as he then acknowledged. And he then declared that he deposited the said sealed packet in this registry for safe custody, whereupon the said packet was received and deposited in this registry accordingly.

Dated the day of 19 .

(Signed) W. F.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

MINUTES—*continued.*

FORM No. 137.

Minute on Opening Will Deposited during Testator's Lifetime (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Minute on opening will deposited during testator's lifetime.

APPEARED before the undersigned Registrar of the Principal Probate Registry C. D., who alleged that A. B., late of , died on the day of 19 , and further alleged that he was the executor named in the will of the said A. B., bearing date the day of which had been deposited in the registry by the deceased in his lifetime for safe custody. The undersigned registrar on his application ordered that the envelope containing the said will be opened that the appearer might be sworn as the executor named therein.

Dated the day of 19 .

(Signed) J. E.,
Registrar.

FORM No. 138.

Minute on Destruction of Will Deposited during Testator's Lifetime (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.
On the day of 19 .

Minute on destruction of will deposited during testator's lifetime.

BEFORE the undersigned Registrar of the Principal Registry, appeared personally A. B., of , who stated that on the day of 19 , he deposited in this registry a will bearing date the day of . And that he now wished to withdraw the same in order that it might be cancelled and destroyed.

The undersigned registrar, being satisfied of the identity of the testator, thereupon ordered that the said A. B. be at liberty to destroy the said will , and the said A. B. did thereupon, in the presence of the registrar, destroy the said will by burning the same.

(Signed) A. G.,
Registrar.

MOTION.

FORM No. 139.

Motion, Case on (Specimen of) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.) 1910. C. No. 160.
In the Estate of A. B., deceased.
Between T. C., plaintiff,
and
E. M., defendant.

Motion, case on (specimen of).

THE above-named deceased A. B. died on the , at , intestate, leaving her husband, the above-named defendant, her surviving.

The plaintiff claims to be the executor of an alleged will of the said A. B. bearing date , and claims to have the said will established. The above-named defendant disputes the validity of the said will. The writ in this action was issued on the . The estate of the said deceased consists largely of freehold houses, viz., , all the said houses being subject to mortgages.

It is necessary that a receiver of the rents and profits of the said real estate *pendente lite* be appointed to collect the rents of the said property, and to keep down the interest upon the mortgages thereon.

It is proposed to appoint J. D., of , auctioneer and estate agent, as such receiver, and an affidavit of his fitness has been filed.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

MOTION—*continued.*

The Court will be moved by counsel on behalf of the for the appointment of the said J. D. as such receiver *pendente lite,* and for that purpose that all proper directions may be given.

NOMINATION. *See* "APPOINTMENT."

NOTICES.

FORM No. 140.

Notice of Change of Country Solicitor and London Agent. (O. 7, r. 3.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
In the Estate of A. B., deceased.
Between C. D., plaintiff,
and
E. F., defendant.

Notice of change of country solicitor and London agent. (O. 7, r. 3.)

TAKE notice that of has been appointed to act as the solicitor of the above-named in this action, in the place of , and that the undersigned of has been appointed to act as the London agents of the said in this action in the place of .

The address for service of the above-named is .

Dated this day of 19 .

Yours, etc., .

To the above-named or his solicitor.

FORM No. 141.

Notice of Change of Solicitor. (O. 7, r. 3.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.
Between C. D., and E. F., plaintiffs,
and
G. H., defendant.

Notice of change of solicitor. (O. 7, r. 3.)

TAKE notice that of has been appointed to act as the solicitor of the above-named in the place of .

The address for service of the above-named is .

Dated this day of 19 .

Yours, etc., .

To the above-named or his solicitor.

FORM No. 142.

Notice of Change of Town Agent of Country Solicitor. (O. 7, r. 3.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.
Between C. D., plaintiff,
and
E. F., defendant.

Notice of change of town agent of country solicitor. (O. 7, r. 3.)

TAKE notice that of has been appointed by the undersigned of , the solicitors of the above-named , to act as his London agents in this action, in the place of .

The address for service of the above-named is .

Dated this day of 19 .

Yours, etc., .

To the above-named or his solicitor.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

NOTICES—*continued.*

Form No. 143.

Notice of Change of Solicitor, Plaintiff or Defendant, in Person, in Place of Acting Solicitor. (O. 7, r. 3.) (*a*).

Notice of change of solicitor, plaintiff or defendant, in person, in place of acting solicitor. (O. 7, r. 3.)

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Take notice that I [*name*] the above-named plaintiff [*or* defendant] intend to act in person in this action in the place of [*name of solicitor*] and that my address for service is [*this must be within three miles of Temple Bar*].

Dated the day of 19 .

Yours, etc.,
[*Signature of plaintiff or defendant.*]

To the above-named defendant [*or* plaintiff].

Form No. 144.

Notice of Motion (Specimen of) (*a*).

Notice of motion (specimen of).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of C. E., deceased.
Between M. E. (widow) plaintiff,
and
C. B. and B. A., defendants.

Take notice that the Court will be moved on Monday the day of , 19 , at 11 o'clock in the forenoon, or so soon thereafter as counsel can be heard by counsel on behalf of the above-named plaintiff, to appoint T. W., of , chartered accountant, or some other fit and proper person administrator *pendente lite* and receiver of the estate of the said C. E. deceased, and to make such further and other order as may be just.

Dated the day of 19 .

Yours, etc.,
D. W. and Co.,
of
Solicitors for the applicant.

To Messrs. L. and M.
of
Solicitors for the defendants.

Form No. 145.

Notice of Trial. (O. 36, r. 13.) (*a*).

Notice of trial. (O. 36, r. 13.)

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
Between C. D., plaintiff,
and
E. F., defendant.

Take notice of trial of this action [*or* of the issues in this action ordered to be tried] in for the day of next.

G. H., plaintiff's solicitor,
Dated

To defendant's solicitor.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

NOTICES—*continued.*

Form No. 146.

Notice to Produce. (O. 32, r. 8.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Notice to produce. (O. 32, r. 8.)

Take notice that you are hereby required to produce and show to the Court on the trial of this action all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this action, and particularly .

Dated the day of 19 .

To the above named his solicitor *or* agent
(Signed)
of .
Solicitor for the above named .

Form No. 147.

Notice to Admit Facts. (O. 32, r. 5.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Notice to admit facts. (O. 32, r. 5.)

Take notice that the in this cause requires the to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Dated, etc. (Signed, etc.)

The facts, the admission of which is required, are—

1. That .
2. That .
3. That .
4. That .
5. That .

Form No. 147a.

Admission of Facts, pursuant to Notice. (O. 32, r. 5.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Admission of facts, pursuant to notice. (O. 32, r. 5.)

The in this cause, for the purposes of this cause only hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this cause.

Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the on any other occasion, or by anyone other than the [*or party requiring the admission*].

Delivered, the
To, etc. (Signed, etc.)

(*a*) These forms are specimens only, and must be altered to suit individual cases

NOTICES—*continued.*

Facts admitted.	Qualifications or Limitations, if any, subject to which they are admitted.
1. That .	1.
2. That .	2.
3. That .	3. But not that .
4. That .	4. But not that .
5. That .	5.

FORM No. 148.

Notice to Produce Documents. (O. 31, r. 16.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Notice to produce documents. (O. 31, r. 16.)

TAKE notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim,* or *defence,* or *affidavit, dated the day of* 19].
Describe documents required.

X. Y., Solicitor to the .

To Z., Solicitor for .

FORM No. 149.

Notice to Inspect Documents. (O. 31, r. 17.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Notice to inspect documents. (O. 31, r. 17.)

TAKE notice that you can inspect the documents mentioned in your notice of the day of 19 [*except the deed numbered in that notice*] at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of 19 , on the ground that [*state the ground*] :—

FORM No. 150.

Notice to Admit Documents. (O. 32, r. 3.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

Notice to admit documents. (O. 32, r. 3.)

TAKE notice that the plaintiff [*or* defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff], his solicitor or

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

NOTICES—*continued.*

agent, at , on , between the hours of ; and the defendant [*or* plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, etc. (Signed)
G. H., solicitor [*or* agent] for plaintiff [*or* defendant].
To E. F., solicitor [*or* agent] for defendant [*or* plaintiff].

[*Here describe the documents, the manner of doing which may be as follows:*—]

ORIGINALS.

Description of Documents.	Dates.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.

FORM NO. 150A.

Notice to Prove Will in Solemn Form, and of Intention merely to Cross-examine Witnesses. To be Delivered with the Defence. (O. 31, r. 18.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)
In the Estate of A. B., deceased.
Between C. D., plaintiff,
and
E. F., defendant.

Notice to prove will in solemn form, and of intention merely to cross-examine witnesses. To be delivered with the defence. (O. 31, r. 18.)

TAKE notice that upon the hearing of this action the defendant will merely insist upon the plaintiff proving the will propounded in solemn form of law, and that he only intends to cross-examine the witnesses produced by the plaintiff in support of the said will.

X. and Y., solicitors for the defendant.
Dated the day of 19 .
To Messrs. L. and M.,
Solicitors for the plaintiff.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS.

[NOTE.—*The following examples of oaths will be found to meet all ordinary cases. Oaths of a complicated character are not included, such being settled if desired at the seats.*]

FORM No. 151.

Oath—Probate (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oaths—Probate.

I, C. D., of , upholsterer, make oath and say, that I believe the paper writing hereto annexed, and marked by me to contain the true and original last will and testament [with a codicil *or* as the case may be] of A. B., of , formerly of , deceased, who died on the day of , 19 , at , and that I am the son of the said deceased and the sole executor named in the said will , and will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ : : and no more, to the best of my knowledge, information, and belief.

Sworn by , the above-named deponent at this day of 19 . Before me
A commissioner for oaths.

(Signed) C. D.

FORM No. 152.

Oath—Double Probate (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Double Probate.

I, C. D., of , butcher, make oath and say, that I believe the paper writing hereto annexed and marked by me to contain the true original last will and testament of A. B., of , formerly of , deceased, who died on the at ; that in the month of , 19 , probate of the said will was granted at to E. F., one of the executors named in the said will , power being reserved of making the like grant to C. D., the other executor therein named; That I am the other executor named in the said will , and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate now unadministered amounts to £ and no more, to the best of knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 153.

Oath—Probate of Draft Will Pronounced for in Action (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Probate of draft will pronounced for in action.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , whereof he appointed his sister, me this deponent, sole executrix.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

That at the time of the death of the said A. B. the said will was whole and unrevoked, but that since the death of the said A. B. the said will has been lost and cannot now be found.

That on the day of , 19 , the Right Honourable Sir , Knight, the President of this Division, in an action entitled, "E. F. against G. H. and others," pronounced for the force and validity of the said will as contained in a draft thereof, and ordered that probate of the said will as contained in the said draft be granted and committed to me the sole executrix therein named, limited until the original will or a more authentic copy thereof be brought into and left in the said registry.

That I believe the said paper writing now hereto annexed and marked by me to contain the true last will and testament (the same being the original draft thereof) of the said testator; that I am the sole executrix therein named, and that I will administer according to law all the estate which by law devolve to and vests in the personal representative of the said deceased until the said original will or a more authentic copy thereof shall be brought into and left in the said registry; that I will exhibit a true and perfect inventory, etc. [*continue as in Form No.* 151].

FORM No. 154.

Oath—Probate of Copy Will—Original Abroad (*a*).

Oath—Probate of copy will—Original abroad.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say as follows:—

That A. B., of , deceased, died on the day of 19 , at , having made and duly executed his last will and testament bearing date the day of , 19 , whereof he appointed his relict, me the deponent, sole executrix. That the said will was executed by the said A. B. when he was resident at , in the kingdom of , and the same was deposited by the said A. B. after the execution thereof with E. F., of aforesaid, who still retains possession of the said will.

That on the day of , a copy of the said will was handed to me by the said E. F., the same having been examined by him with the original and found to agree therewith.

That I further make oath and say that there is not now in Great Britain a more authentic copy of the said will than the aforesaid copy, and that it is essential to the interest of the estate of the said A. B. that probate of the said will should be granted without waiting for the arrival of the said original will or a more authentic copy thereof.

That I believe the paper writing hereto annexed and marked by me to contain the true last will and testament (being the aforesaid copy) of the said A. B., and that I am the sole executrix therein named; that I will, until the original will or a more authentic copy thereof shall be brought into and left in the Principal Probate Registry aforesaid, administer according to law all the estate, etc. [*continue as in Form No.* 151].

FORM No. 155.

Oath—Probate of Copy of Lost Will (*a*).

Oath—Probate of copy of lost will.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

We, C. D., of , baker, and E. F., of , widow, make oath and say as follows:—

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

That A. B., of , deceased, died on the day of , 19 , having made and duly executed his last will and testament bearing date the day of , 19 , whereof he appointed us the said C. D. and E. F. executors.

That at the time of the death of the said A. B. the said will was whole and unrevoked and in the same state as when executed, but that since the death of the said A. B. the said will has been lost and cannot now be found.

That during the lifetime of the said A. B., and at his request, a copy of the said will was made by G. H. of , solicitor, and the same was by him examined with the original will and found to agree therewith.

That we believe the paper writing hereto annexed and marked by us to contain the true last will and testament (being the copy thereof as aforesaid) of the said A. B.; that we are the executors named in the said will; that we will administer according to law all the estate which by law devolves to and vests in the personal representatives of the said deceased, until the original will or a more authentic copy thereof be brought into the Principal Probate Registry of this Division. That we will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate amounts to the sum of £ , and no more, to the best of our knowledge, information and belief.

Sworn, etc. (Signed) E. F.
G. H.

FORM No. 156.

Oath—Probate—Probate of Earlier Will Revoked (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Probate—Probate of earlier will revoked.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died on the day of , 19 , at having made and duly executed his last will and testament bearing date the day of , 19 , whereof he appointed me, this deponent, sole executor, that probate of an earlier will of the said A. B. bearing date the day of , 19 , was on the day of , 19 , granted at the Principal Probate Registry to E. F. and G. H., the executors therein named; that the said probate has since been voluntarily brought into the said registry by the said E. F. and G. H., and revoked.

That I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said A. B.; that I am the sole executor named in the said will; that I will administer according to law all the estate, etc. [*continue as in Form No.* 151].

FORM No. 157.

Oath—Probate—*Save and Except* (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , coachbuilder, make oath and say as follows:—

Oath—Probate—*Save and except.*

That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , whereby he did appoint his son, me this deponent, executor, save and except as regards such property as was held by him as trustee under the will of E. F. deceased.

That I believe the paper writing hereto annexed and marked by me

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

to contain the true and original last will and testament of the said A. B. deceased, and that I am the executor therein named as aforesaid; and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, save and except so far as relates to the property aforesaid; that I will exhibit a true and perfect inventory of the said estate save and except as aforesaid, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate of the said A. B., under the exceptions aforesaid, amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM NO. 158.

Oath—Probate—*Cœterorum* (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Probate —*Cœterorum.*

I, C. D., of , barrister-at-law, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , whereby he named E. F. executor in respect of his leasehold property situated in the city of Bristol, and his son, me this deponent, executor in respect of the rest of his estate.

That in the month of , 19 , probate of the said will, limited so far only as respected the said leasehold property, was granted in the Principal Probate Registry to the said E. F.

That I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said A. B.; that I am the executor therein named as to the rest of his estate; and that I will administer according to law all the rest of the estate which by law devolves to and vests in the personal representative of the said deceased, and that I will exhibit a true and perfect inventory of the rest of the said estate and render a just and true account thereof whenever required by law so to do; and that the rest of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information, and belief.

Sworn, etc. (Signed) C. D.

FORM NO. 159.

Oath—Cessate Probate—Sole Executor having attained the Age of 21 (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Cessate probate—Sole executor having attained the age of twenty-one.

I, C. D., of , surveyor, make oath and say that A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , and thereof appointed his son, me the said C. D., sole executor, I being then a minor of the age of years only.

That on the day of , 19 , letters of administration (with the said will annexed) of the estate of the said deceased were granted by this Division at the Principal Registry thereof to , the lawful uncle and one of the next of kin, and the curator or guardian, duly elected, of the said minor for his use and benefit, and until he should attain the age of twenty-one years.

That since the premises, to wit, on the day of , 19 , I, the said C. D. attained the age of twenty-one years and that I am a son of the said deceased.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

That I believe the paper writing hereunto annexed and marked by me to contain the true last will and testament of the said deceased.

That I will well and faithfully administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof, whenever required by law so to do; and that the gross value of the said estate of the said deceased left unadministered amounts to £ and no more, to the best of my knowledge, information, and belief.

Sworn, etc. (Signed) C. D.

FORM No. 160.

Oath—Cessate Probate—Executor—Where Attorney Originally Proved (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of Y. Z., deceased.

Oath—Cessate probate—Executor—Where attorney originally proved.

I, X. Z., of , grocer, make oath and say, that the said Y. Z., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament.

That I am the son of the said deceased, and the sole executor named in the said will.

That on the day of , 19 , letters of administration with the said will annexed of the estate of the said deceased were by authority of this Division granted at the Principal Probate Registry to W. V. as the lawful attorney and for the use and benefit of me, this deponent, and until I should apply for and obtain probate of the said will.

And I further make oath and say that I believe the paper writing hereto annexed and marked by me to contain a true copy of the last will and testament of the said deceased; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the unadministered estate amounts in value to the sum of £ and no more, to the best of my knowledge, information, and belief.

Sworn, etc. (Signed) X. Z.

FORM No. 161.

Oath—Cessate Probate—Substituted Executor (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Cessate probate—Substituted executor.

I, C. D. of , farmer, make oath and say as follows:—

That A. B. of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 .

That on the day of , 19 , probate of the said will was granted at the Principal Probate Registry to E. F., widow, the relict of the said A. B., the executrix for life named in the said will. That the said E. F. died on the day of , 19 .

That I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of the said A. B.; that I am the brother of the said A. B. and the executor substituted in the said will; that I will administer according to law all the estate which devolves to and vests in the personal representative of the said A. B.; that I will exhibit a true and perfect inventory of the said estate and render a just and true account thereof whenever required by

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

law so to do; and that the whole of the unadministered estate of the said A. B. amounts in value to the sum of £ and no more, to the best of my knowledge, information, and belief.

Sworn, etc. (Signed) C. D.

FORM No. 162.

Oath—Administration (with Will)—Attorney of Executor (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration (with will)—Attorney of executor.

I, C. D. of , chemist, make oath and say that A. B. of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , and thereof appointed his son E. F. sole executor, who now resides at . And I further make oath and say that I am the lawful attorney of the said E. F.

And I further make oath and say that I believe the paper writing hereto annexed, and marked by me to contain the true and original last will and testament of the said deceased, and that I will well and faithfully administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased for the use and benefit of the said E. F., and until he shall duly apply for and obtain probate of the said will to be granted to him. That I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 163.

Oath—Administration (with Will)—Attorney of Executor to whom Power has been Reserved, the proving Executors having Died (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration (with will)—Attorney of executor to whom power has been reserved, the proving executors having died.

I, C. D., of , bailiff, make oath and say that A. B., of , deceased, died on the day of , 19 , at , having made and executed his last will and testament, bearing date the day of , and thereof appointed E. F., G. H., and I. J. executors; that in the month of , 19 , probate of the said will was granted by this Division at the Registry thereof to the said E. F. and G. H., power being reserved of making the like grant to the said I. J., the other executor named in the said will; that the said E. F. and G. H. for some time intermeddled in the estate of the said deceased and are both since dead, to wit, the said E. F. having died on the day of , 19 , and the said G. H. on the day of , 19 , leaving part of the said estate unadministered; that the said I. J. now resides at , and that I am the lawful attorney of the said I. J.; that I believe the paper writing hereto annexed, and marked by me, to contain the true [and original] last will and testament of the said deceased; that I will well and faithfully administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased for the use and benefit of the said I. J. and until he shall duly apply for and obtain probate of the said will to be granted to him; that I will exhibit a true and perfect inventory of the said estate and render a just and true account thereof whenever required by

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

law so to do; and that the gross value of the said estate of the said deceased left unadministered as aforesaid amounts to £ , and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 164.

Oath—Administration (with Will)—Residuary Legatee (no Executor Named in Will) (*a*).

Oath—Administration (with will)—Residuary legatee (no executor named in will).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say, that I believe the paper writing hereunto annexed, and marked by me, to contain the true and original last will and testament of A. B., of , formerly of , deceased; who died on the day of , 19 , at , and that the said deceased did not in his said will name any executor, and that I am the relict of the said deceased and the residuary legatee named in the said will; and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof, whenever required by law so to do; and that the gross value of the said estate amounts to £ and no more, to the best of knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 165.

Oath—Administration (with Will)—Residuary Legatee (the Executor having Renounced) (*a*).

Oath—Administration (with will)—Residuary legatee (the executor having renounced).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D. of , baker, make oath and say, that I believe the paper writing hereto annexed and marked by me to contain the true and original last will and testament of A. B., of , deceased, who died on the day of , 19 , at , and that E. F., the sole executor named in the said will, has duly renounced the probate and execution thereof; that I am the son of the said deceased and the residuary legatee named in the said will; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information, and belief.

Sworn, etc. (Signed) C. D.

FORM No. 166.

Oath—Administration (with Will)—Residuary Devisee, Executor having Died (*a*).

Oath—Administration (with will)—Residuary devisee, executor having died.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of A. B., of , deceased, who died on the

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

day of , 19 , at ; that E. F., the son of the deceased and sole executor named in the said will, survived the said deceased, and is since dead, without having taken upon him the probate and execution of the said will; that I am the grandson of the said deceased and one of the residuary devisees named in the said will; that I will administer according to law all the estate, etc. [*continue as in Form No.* 164].

FORM NO. 167.

Oath—Administration (with Will)—Heir-at-Law (there being Real Estate) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of K. L., deceased.

Oath—Administration (with will)—Heir-at-law (there being real estate).

I, O. M., of , upholsterer, make oath and say, that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of K. L. of deceased, who died on the day of 19 , at ; that N. P., the sole executor named in the said will, survived the said deceased and has since died intestate without having taken upon him the probate and execution of the said will; that the deceased did not by his said will dispose of his residuary estate; that I am the heir-at-law of the said deceased; that I will administer according to law all the estate, etc. [*continue as in Form No.* 164].

FORM NO. 168.

Oath—Administration (with Will)—Substituted Residuary Legatee (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration (with will)—Substituted residuary legatee.

I, C. D., of , spinster, make oath and say, that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of A. B. of , deceased, who died on the day of , 19 , at ; that E. F., widow, the relict of the deceased, the sole executrix and residuary legatee for life named in the said will, has duly renounced the probate and execution thereof; that I am the son, and one of the residuary legatees substituted in the said will; that I will administer according to law all the estate. etc. [*continue as in Form No.* 164].

FORM NO. 169.

Oath—Administration (with Will)—Legatee (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of S. T., deceased.

Oath—Administration (with will)—Legatee.

I, V. W., of , farmer, make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of S. T., of , deceased, who died on the day of , 19 , at , that X. Y., the nephew of the deceased and the sole executor and sole residue legatee and devisee named in the said will, has duly renounced probate and execution of the said will; that I am a legatee named in the said will; that I will administer according to law all the estate, etc. [*continue as in Form No.* 164].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM No. 170.

Oath—Administration (with Will)—Creditor (*a*).

[Use the above Form, No. 169, substituting the word "creditor" for the word "legatee."

But note.—It must either be sworn that the deceased was not possessed of real estate, or the heir-at-law must be cleared off.]

FORM No. 171.

Oath—Administration (with Will), Next of Kin (Executors and Residuary Legatees having Renounced) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B. deceased.

I, C. D. of , widow, make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of A. B., of , deceased, who died on the day of , 19 , at ; that E. F. and G. H., the executors and residuary legatees named in the said will, have duly renounced probate and execution thereof; that the deceased died a widower, without child or father; that I am the natural and lawful mother and only next of kin of the said deceased; that the deceased was not possessed of any real estate;* that I will administer according to law all the estate, etc. [*continue as in Form No.* 164].

Oath—Administration (with will), next of kin (executors and residuary legatees having renounced).

**If the deceased left real estate, the heir-at-law must be cleared off.*

FORM No. 172.

Oath—Administration (with Will)—Widow (there being no Executor or Residuary Legatee (or Devisee) in Will) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.
In the Estate of Y. Z., deceased.

I, W. X., of , widow, make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of Y. Z., deceased, who died on the day of , 19 , at ; that the said deceased did not in his said will name any executor or residuary legatee [or devisee]*; that I am the lawful widow and relict of the said Y. Z.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 164].

Oath—Administration (with will)—Widow (there being no executor or residuary legatee (or devisee) in will).

* *Or, and died not possessed of real estate.*

FORM No. 173.

Oath—Administration (with Will)—Next of Kin (there being no Executor or Residuary Legatee) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.
In the Estate of G. H., deceased.

I, J. K., of , butcher, make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of G. H., of , deceased, who died on the day of , 19 , at ; that the deceased died a widower without child or parent, and did not in his said will name any executor or dispose of his residuary estate; that I am the natural

Oath—Administration (with will)—Next of kin (there being no executor or residuary legatee).

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

and lawful brother and only next of kin of the said deceased; that I will administer according to law all the estate, etc. [*continue as in Form No.* 164].

FORM No. 174.

Oath—Administration (with Will)—Committee of Lunatic (Executor) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

Oath—Administration (with will)—Committee of lunatic (executor).

In the Estate of A. B., deceased.

I, C. D., of , estate agent, make oath and say that A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , whereof he appointed his son E. F. sole executor.

That on the day of , 19 , the said E. F. was, upon an inquisition directed by the judge in lunacy, found to be a lunatic or person of unsound mind, and incapable of managing his affairs, and by an order made in lunacy on the day of , 19 , I was appointed committee of the estate of the said lunatic.

That I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of the said deceased; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, for the use and benefit of the said E. F. and until he shall become of sound mind; that I will exhibit, etc. [*continue as in Form No.* 164].

FORM No. 175.

Oath—Administration (with Will)—under the 73rd Section of the Court of Probate Act, 1857 (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration (with will) under sect. 73 of the Court of Probate Act, 1857.

I, C. D., of , chemist, make oath and say that A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, whereof he appointed E. F. sole executor and sole residuary legatee, who is now a lunatic [*or* who is now resident out of the United Kingdom of Great Britain and Ireland, *or* as the case may be]; that I am a creditor of the said deceased; that on the day of , 19 , the Honourable Sir H. B. D., Knight, Judge of this Division, appointed me to be the administrator (with the said will) of the estate of the said A. B. under and by virtue of the 73rd section of the Court of Probate Act, 1857.

That I believe the paper writing hereto annexed, and marked by me, to contain the true and original last will and testament of the said A. B.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 164].

FORM No. 176.

Oath—Cessate Administration (with Will)—Residuary Legatee (or Devisee) having Attained his Majority (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Cessate administration (with will)—Residuary legatee (or devisee) having attained his majority.

I, C. D., of , booking office clerk, make oath and say as follows:—

That A. B., of , deceased died on the day of , 19 , at , having made and duly executed his last will and testament, whereof he appointed E. F. executor, and his son, me this deponent, residuary legatee [*or* devisee].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

That the said E. F. died in lifetime of the said A. B., to wit, on the day of , 19 ; that on the day of , 19 , letters of administration (with the said will annexed) of the estate of the said A. B. were parted at the Principal Probate Registry to G. H. my lawful grandfather and only next of kin, the guardian duly assigned to me the said C. D., then an infant, for my use and benefit and until I should attain the age of twenty-one years; that on the day of , 19 , I attained the age of twenty-one years by reason of which the said letters of administration, with the said will annexed, have ceased and expired; and I further make oath and say that I believe the paper writing hereto annexed, and marked by me, to contain the true last will and testament of the said A. B.; that I am the residuary legatee [*or* devisee] named in the said will; and I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said A. B.; that I will exhibit a true and perfect inventory of the said estate and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate now unadministered amounts to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 177.

Oath—Administration (with Will) *de bonis non* to Residuary Legatee and Devisee (*a*).

Oath—Administration (with will) *de bonis non* to residuary legatee and devisee.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath and say as follows:—

(1) That A. B., of , deceased, died on the day of , 19 , at , and having made and duly executed his last will and testament, and thereof appointed his son E. F. sole executor.

(2) That in the month of , 19 , the said E. F. duly proved the said will in this Division at the Registry thereof, and for some time intermeddled in the estate of the said testator and afterwards died, to wit, on the day of , 19 , intestate [*or* having duly made and executed his last will and testament bearing date the day of , 19 , but did not appoint any executor thereof] leaving part of the said estate of the said deceased unadministered.

(3) That I believe the paper writing hereto annexed, and marked by me, to contain the true [and original] last will and testament of the said testator; that I am the relict of the said testator and the residuary legatee and devisee named in the said will, and that I will well and faithfully administer according to law all the unadministered estate which by law devolves to and vests in the personal representative of the said deceased left unadministered as aforesaid; that I will exhibit a true and perfect inventory of the said estate so left unadministered as aforesaid, and render a just and true account thereof whenever required by law so to do, and that the gross value of the said estate of the said deceased left unadministered as aforesaid amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 178.

Oath—Administration (with Will) *de bonis non* to Representative of Sole Executor and Residuary Legatee and Devisee (*a*).

Oath—Administration (with will) *de*

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , auctioneer's clerk, make oath and say as follows:—

(1) That A. B., of , deceased, died on the day of , 19 ,

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS *continued.*

bonis non to representative of sole executor and residuary legatee and devisee.

at , having made and duly executed his last will and testament, and thereof appointed his daughter E. F. (spinster) sole executrix and solo residuary legatee and devisee.

(2) That in the month of , 19 , the said E. F. duly proved the said will in this Division at the Registry thereof, and for some time intermeddled in the estate of the said testator, and afterwards died, to wit, on the day of , 19 , intestate, leaving part thereof unadministered.

(3) That I am the administrator of the estate of the said E. F., deceased, letters of administration of her estate having been granted to me by this Division at the Registry thereof on the day of , 19 .

(4) That I believe the paper writing hereto annexed, and marked by me, to contain the true last will and testament of the said testator; that I will well and faithfully administer, etc. [*continue as in Form No.* 177].

FORM No. 178A.

Oath—Administration (with Will) *de bonis non* to Residuary Legatee on Death of Residuary Legatee for Life (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

Oath—Administration (with will) *de bonis non* to residuary legatee on death of residuary legatee for life.

In the Estate of A. B., deceased.

I, C. D., of , spinster, make oath and say as follows:—

(1) That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament and thereof appointed his wife E. F., widow, sole executrix and residuary legatee and devisee for life.

(2) That in the month of , 19 , the said E. F. duly proved the said will in this Division at the Registry thereof, and for some time intermeddled in the estate of the said testator and afterwards died, to wit, on the day of , 19 , intestate, leaving part thereof unadministered.

(3) That I am the lawful daughter of the said testator and one of the residuary legatees and devisees substituted in his said will.

(4) That I believe the paper writing, etc. [*continue as in Form No.* 177].

FORM No. 179.

Oath—Administration (with Will) *de bonis non*—Legatee (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration (with will) *de bonis non*—Legatee.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament whereof he appointed E. F. sole executor.

That on the day of , 19 , probate of the said will was granted at the Principal Probate Registry to the said E. F. That the said E. F. has since died, to wit, on the day of , intestate, leaving part of the estate of the said deceased unadministered.

That the said A. B. did by his said will appoint his son G. H. residuary legatee (and devisee*) who has renounced his right to letters of administration (with the said will annexed) of the estate of the said A. B. left unadministered as aforesaid.

That I believe the paper writing hereunto annexed, and marked by

* *Or, if the deceased left no real estate, it should be so sworn.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

me, to contain the true [and original] last will of the said deceased; that I am a legatee named in the said will; that I will administer according to law all the unadministered estate, etc. [*continue as in Form No.* 177].

FORM No. 180.

Oath—Administration (with Will) *de bonis non*—Creditor (*a*).

[The above form (No. 179) is to be used, substituting for the words "a legatee named in the said will" the words "a creditor of the said A. B."]

Oath—Administration (with will) *de bonis non*—Creditor.

FORM No. 181.

Oath—Administration (with Will) *de bonis non* to Legatee for Life on Renunciation of Representative of Residuary Legatee and Devisee (*a*).

Oath—Administration (with will) *de bonis non* to legatee for life on renunciation of representative of residuary legatee and devisee.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

I, C. D., of , builder, make oath and say as follows:—

(1) That A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, whereby he appointed his brother C. D. sole executor, who duly proved the said will in this Division at the Registry thereof, in the month of , 19 .

(2) That the said C. D. for some time intermeddled in the estate of the said testator, and is since dead, having died on the day of , intestate.

(3) That the said testator appointed G. H. his sole residuary legatee and devisee, who survived the said testator and died on the day of , 19 , intestate.

(4) That in the month of , 19 , letters of administration of the estate of the said G. H., deceased, were granted by this Division at the Registry thereof, to I. J. his lawful widow and relict, who has duly renounced letters of administration (with the said will annexed) of the estate of the said testator left unadministered as aforesaid.

(5) That I believe the paper writing hereto annexed, and marked by me, to contain the true last will and testament of the said A. B., deceased.

(6) That I am the lawful niece and a legatee for life named in the said will; that I will well and faithfully administer, etc. [*continue as in Form No.* 177].

FORM No. 182.

Oath—Administration (Husband) (*a*).

Oath—Administration (husband).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

I, C. D., of , stationer, make oath, and say that A. B., of , deceased, died on the day of , 19 , at , intestate, and that I am the lawful husband of the said deceased; and will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and will exhibit a true and perfect inventory of the said estate and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information, and belief.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM No. 183.

Oath—Administration (Husband's Representative) (*a*).

Oath—Administration (husband's representative).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of Y. Z., deceased.

I, W. X., of , hairdresser, make oath and say that Y. Z., of , deceased, died on the day of , 19 , at , intestate and not possessed of any real estate,* leaving V. Z., her lawful husband, who died without having taken upon him letters of administration of her estate, and that I am the sole executor of the will [*or* the administrator of the estate] of the said V. Z., deceased, probate of the said will [*or* letters of administration, etc.] having been granted to me by this Division (at the Registry) in the month of , 19 ; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) W. X.

* *If the deceased died possessed of real estate, the heir-at-law must be cleared off.*

FORM No. 184.

Oath—Administration—Widow (*a*).

Oath—Administration—Widow

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , widow, make oath, and say that A. B., of , deceased, died on the day of , 19 , at , intestate, and that I am the lawful widow and relict of the said deceased; and will administer, etc. [*complete as in Form No.* 182].

FORM No. 185.

Oath—Administration—Child (Husband having Renounced) (*a*).

Oath—Administration—Child (husband having renounced).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of Y. Z., deceased.

I, W. X., of , engineer, make oath and say that Y. Z., of , deceased, died on the day of , 19 , at , intestate, and not possessed of any real estate,* leaving V. Z., her lawful husband, her surviving, who has duly renounced letters of administration of her estate, and that I am the natural and lawful son and one of the next of kin of the said deceased; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) W. X.

* *If the deceased died possessed of real estate, the heir-at-law must be cleared off.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM No. 186.

Oath—Administration—Child or Heir-at-Law (Widow having Renounced) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , spinster, make oath and say, that A. B., of , deceased, died on the day of , 19 , at , intestate, leaving E. B. his lawful widow and relict who has duly renounced letters of administration of his estate, and that I am the natural and lawful daughter and one of the next of kin (*or* heiress-at-law) of the said deceased; that I will administer according to law, etc. [*continue as in Form No.* 182].

Oath—Administration—Child or heir-at-law (widow having renounced).

FORM No. 187.

Oath—Administration—Child or Heir-at-Law (Widow having Died) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , chemist, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, leaving E. B. his lawful widow and relict, who is since dead, without having taken upon herself letters of administration of his estate, and that I am the natural and lawful son and only next of kin [*or* heir-at-law] of the said deceased; that I will administer according to law, etc. [*continue as in Form No.* 182].

Oath—Administration—Child or heir-at-law (widow having died).

FORM No. 188.

Oath—Administration—Child or Heir-at-Law (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a widow (*or* widower), and that I am the natural and lawful son and one of the next of kin [*or* heir-at-law] of the said deceased; that I will administer according to law, etc. [*continue as in Form No.* 182].

Oath—Administration—Child or heir-at-law.

FORM No. 189.

Oath—Administration—Child of Divorced Wife (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , bootmaker, make oath and say that A. B., of , deceased, formerly the wife of E. F., but whose marriage with the said E. F. was dissolved by the final decree pronounced in this Division on the day of , 19 , died on the day of , 19 , at , intestate, leaving me, her natural and lawful son and one of her next of kin, her surviving.

That I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

Oath—Administration—Child of divorced wife.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

Form No. 190.

Oath—Administration—Representative of Widow or Child (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Representative of widow or child.

I, C. D., of , civil servant, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, and not possessed of any real estate,* leaving E. B., his lawful widow and relict, and G. B., I. B., and K. B., his natural and lawful and only children and only next of kin, together the only persons entitled in distribution to his personal estate; that the said E. B., G. B., I. B. and K. B. have all since died without having taken upon themselves letters of administration of the estate of the said deceased; that I am one of the executors of the will of the said E. B. [*or* of G. B., or I. B., or K. B.], deceased (probate of the said will having been granted to me by this Division at the Registry thereof, in the month of , 19); that I will administer according to law, etc. [*continue as in Form No.* 182].

* *If the deceased left any real estate, the heir-at-law must be cleared off.*

Form No. 191.

Oath—Administration—Father (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Father.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor (or spinster), and that I am the natural and lawful father and next of kin of the said deceased; that I will administer according to law, etc. [*continue as in Form No.* 182].

Form No. 192.

Oath—Administration—Representative of Father (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Representative of father.

I, C. D., of , auctioneer, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, leaving E. B., his natural and lawful father and next of kin, him surviving, who is since dead, without having taken upon him letters of administration of his estate; that I am one of the executors of the will of the said E. B., deceased, probate of the said will having been granted to me by the Registry of the High Court of Justice in the month of , 19 ; that I will administer according to law, etc. [*continue as in Form No.* 182].

Form No. 193.

Oath—Administration—Son of Father (who has Renounced and Consented) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Son of father (who has renounced and consented).

I, C. D., of , gentleman, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor (or spinster), leaving him surviving E. F., his natural and lawful

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

father and next of kin, who has duly renounced letters of administration of his estate and consented to letters of administration being granted to me, the deponent, and that I am the natural and lawful son of the said E. F.; that I will administer according to law, etc. [*continue as in Form No.* 182.]

FORM NO. 194.

Oath—Administration—Mother (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Oath—Administration—Mother.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without a father, and that I am the natural and lawful mother and only next of kin of the said deceased; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

FORM NO. 195.

Oath—Administration—Brother—Mother having died without taking a Grant (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Oath—Administration—Brother—Mother having died without taking a grant.

I, C. D., of , banker, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a spinster, without a father, and not possessed of any real estate,* leaving E. F., widow, her natural and lawful mother and only next of kin her surviving; that the said E. F. has since died, to wit, on the day of , 19 , without having taken upon her letters of administration of the estate of the said A. B.; that I am the natural and lawful brother of the said A. B.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

* *If the deceased died possessed of real estate, the heir-at-law must be cleared off.*

FORM NO. 196.

Oath—Administration—Sister (on Mother Renouncing) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Oath—Administration—Sister (on mother renouncing).

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without father, and not possessed of any real estate,* leaving E. F., widow, his natural and lawful mother and only next of kin him surviving; that the said E. F. has duly renounced letters of administration of the estate of the said deceased; that I am the natural and lawful sister of the said deceased; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

* *If the deceased was possessed of real estate, the heir-at-law must be cleared off.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM No. 197.

Oath—Administration—Brother (Sister) (*a*).

Oath—Administration—Brother (sister).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of L. M., deceased.

I, N. O., of , upholsterer, make oath and say as follows:—

That L. M., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without parent; that I am the natural and lawful brother and only next of kin of the said L. M.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

FORM No. 198.

Oath—Administration—Representative of Sister (Brother) (*a*).

Oath—Administration—Representative of sister (brother).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of G. H., deceased.

I, J. K., of , carpenter, make oath and say as follows:—

That G. H., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without a parent and not possessed of real estate,* leaving L. M., widow, his natural and lawful sister and only next of kin, and the only person entitled in distribution to his personal estate him surviving; that the said L. M. has since died, without having taken upon herself letters of administration of the estate of the said G. H.; that I am the sole executor of the will of the said L. M., probate of the said will having been granted to me in this Division at the Registry thereof, on the day of , 19 ; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

* *If the deceased left real estate, the heir-at-law must be cleared off.*

FORM No. 199.

Oath—Administration—Niece (Entitled in Distribution)—Next of Kin having renounced (*a*).

Oath—Administration—Niece (entitled in distribution)—Next of kin having renounced.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , spinster, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without a parent and not possessed of real estate,* leaving E. F., widow, his natural and lawful sister and only next of kin him surviving; that the said E. F. has duly renounced letters of administration of the estate of the said A. B.; that I am the lawful niece and one of the persons entitled in distribution to the personal estate of the said A. B., being the natural and lawful daughter of G. H., the natural and lawful brother of the said A. B., who died in his lifetime; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

* *If the deceased was possessed of real estate, the heir-at-law must be cleared off.*

FORM No. 200.

Oath—Administration—Nephew (Entitled in Distribution)—Next of Kin being Dead (*a*).

Oath—Administration—Nephew (entitled in distribution)—Next of kin being dead.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , farmer, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 ,

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

at , intestate, a widower, without child or parent and not possessed of real estate,* leaving E. F., widow, his natural and lawful sister and only next of kin him surviving; that the said E. F. has since died without having taken upon herself letters of administration of the estate of the said A. B.; that I am the lawful nephew and one of the persons entitled in distribution to the personal estate of the said A. B., being the natural and lawful son of I. J., the natural and lawful brother of the said A. B., who predeceased him; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

* *If the deceased left real estate, the heir-at-law must be cleared off.*

FORM No. 201.

Oath—Administration—Uncle (Aunt, Nephew, Niece) as Next of Kin (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Uncle (aunt, nephew, niece) as next of kin.

I, C. D., of , coachbuilder, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a widower without child or parent, brother or sister, and that I am the lawful uncle [*or* aunt, *or* nephew, *or* niece] and one of the next of kin of the said A. B.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

FORM No. 202.

Oath—Administration—Representative of Uncle (Aunt, Nephew, Niece) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of G. H., deceased.

I, J. K., of , builder, make oath and say as follows:—

Oath—Administration—Representative of uncle (aunt, nephew, niece).

That G. H., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without parent, brother or sister, and not possessed of real estate,* leaving L. M. his lawful uncle [*or* aunt, *or* nephew, *or* niece] and only next of kin him surviving; that the said L. M. has since died without having taken upon him letters of administration of the estate of the said G. H.; that I am the administrator of the estate of the said L. M., letters of administration having been granted to me at the Principal Probate Registry in the month of , 19 ; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

* *If the deceased left real estate, the heir-at-law must be cleared off.*

FORM No. 203.

Oath—Administration—Cousin German (Next of Kin) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Cousin-german (next of kin).

I, C. D., of , spinster, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, without child, or parent, brother or sister, uncle or aunt, nephew or niece; that I am the lawful cousin german and one of the next of kin of the said A. B.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

Form No. 204.

Oath—Administration—Representative of Cousin German (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Representative of cousin german.

I, C. D., of , gardener, make oath and say as follows :—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without parent, brother or sister, uncle or aunt, nephew or niece, and not possessed of real estate,* leaving E. F., spinster, his lawful cousin german and only next of kin him surviving, who has since died, without having taken upon herself letters of administration of the estate of the said A. B. ; that I am the sole executor of the will of the said E. F., and that probate of the said will was granted to me at the Principal Probate Registry on the day of , 19 ; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

* *If the deceased died leaving real estate, the heir-at-law must be cleared off.*

Form No. 205.

Oath—Administration—Second Cousin (Next of Kin) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Second cousin (next of kin).

I, C. D., of , widow, make oath and say as follows :—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without parent, brother or sister, uncle or aunt, nephew or niece, cousin german, or cousin german once removed ; that I am the lawful second cousin and one of the next of kin of the said A. B. ; that I will administer according to law all the estate, etc. [*continue as in Form No.* .182].

Form No. 206.

Oath—Administration—Creditor (Next of Kin having Renounced) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Creditor (next of kin having renounced).

I, C. D., of , chemist, make oath and say as follows :—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, and not possessed of real estate,* leaving E. F., his natural and lawful father and next of kin, him surviving, who has duly renounced letters of administration of the estate of the said A. B. ; that I am a creditor of the said A. B. ; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

* *If the deceased left real estate, the heir-at-law must be cleared off.*

Form No. 207.

Oath—Administration—Attorney of Husband (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Attorney of husband.

I, C. D., of , tinker, make oath and say as follows :—

That A. B., of , deceased, died on the day of , 19 , at , intestate, leaving E. F., her lawful husband, her surviving, who

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

now resides in ; that I am the lawful attorney of the said E. F.; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said A. B. for the use and benefit of the said E. F., and until he shall duly apply for and obtain letters of administration of the said estate to be granted to him; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 208.

Oath—Administration—Attorney of Widow (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , solicitor, make oath and say as follows:—

Oath—Administration—Attorney of widow.

That A. B., of , deceased, died on the day of , 19 , at , intestate, leaving E. F., his lawful widow and relict, who now resides in ; that I am the lawfully appointed attorney of the said E. F.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 207].

FORM No. 209.

Oath—Administration—Attorney of Intestate's Child (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Attorney of intestate's child.

I, C. D., of , upholsterer, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, leaving E. F. his natural, lawful, and only son and only next of kin, who now resides at ; that I am the lawful attorney of the said E. F., and that I will faithfully administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased for the use and benefit of the said E. F., and until he shall duly apply for and obtain letters of administration of the said estate of the said deceased to be granted to him; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 210.

Oath—Administration—Attorney of Father (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , estate agent, make oath and say as follows:—

Oath—Administration—Attorney of father.

That A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, leaving E. F. his natural and lawful father and next of kin him surviving; that the said E. F. now resides in , and that I am his lawfully appointed attorney; that I will administer according to law all the estate, etc. [*continue as in Form No.* 207].

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

FORM NO. 211.

Oath—Administration—Attorney of Mother (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Attorney of mother.

I, C. D., of , coachbuilder, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without father, leaving E. F., widow, his natural and lawful mother and only next of kin him surviving; that the said E. F. now resides in , and that I am her lawfully appointed attorney; that I will administer according to law all the estate, etc. [*continue as in Form No.* 207].

FORM NO. 212.

Oath—Administration—Guardian of Minors and Infants (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Guardian of minors and infants.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the day of , 19 , at , a widower, and intestate and not possessed of real estate,* leaving E. F., spinster, and G. H., his natural and lawful and only children and only next of kin, who are now in their minority and infancy respectively, to wit, the said E. F. being a minor of the age of ten years and upwards, and the said G. H. being an infant of the age of five years only. That there is no testamentary or other lawfully appointed guardian of the said minor and infant; that I am the lawful aunt and only [*or* one of the] next of kin of the said minor and infant; and that the said minor has, by an instrument in writing bearing date the day of , 19 , elected or chosen me to be her curatrix or guardian for the purpose of taking out letters of administration of the estate of the said intestate, to be granted to me for the use and benefit of the said minor and infant, and until one of them shall attain the age of twenty-one years; that I will faithfully administer according to law all the estate which by law devolves to and vests in the personal representatives of the said deceased for the use and benefit of the said minor and infant, and until one of them shall attain the age of twenty-one years; that I will exhibit a true and perfect inventory of the said estate and render a true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

* *If the deceased left any real estate, the heir-at-law must be cleared off.*

FORM NO. 213.

Oath—Administration—Guardian of Infant (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Guardian of infant.

I, C. D., of , boat-builder, make oath and say as follows:—

1. That A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, leaving E. F., spinster, his natural and lawful and only child and only next of kin and heiress-at-law, who

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

is now in her infancy, to wit, of the age of three years only, and under the age of seven years.

2. That there is no testamentary or lawfully appointed guardian of the said infant.

3. That I am the lawful grandfather and only next of kin of the said infant, and that I have been duly assigned her curator or guardian for the purpose of taking letters of administration of the estate of the said deceased for the use and benefit of the said infant and until she shall attain the age of twenty-one years.

4. That I will faithfully administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, for the use and benefit of the said E. F. until she shall attain the age of twenty-one years; that I will exhibit, etc. [*continue as in Form No.* 212].

FORM No. 214.

Oath—Administration—Testamentary Guardian for the Use of Minors (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Testamentary guardian for the use of minors.

I, C. D., of , draper, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a widow, and not possessed of any real estate,* leaving E. B., spinster, G. B. and I. B. her natural and lawful and only children and only next of kin her surviving, who are all now in their minority, to wit, the said E. B. of the age of years and upwards, the said G. B. of the age of years and upwards, and the said I. B. of the age of years and upwards, but severally under the age of twenty-one years.

And I further make oath and say that K. B., late of , deceased, the natural and lawful father of the said minors, by his will, dated the day of , 19 , and proved in the month of , 19 , in the Principal Probate Registry, appointed me, this deponent, to be guardian of his said children.

And I further make oath and say that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the deceased, for the use and benefit of the said E. B., G. B., and I. B. until one of them shall attain the age of twenty-one years; that I will exhibit a true and perfect inventory, etc. [*continue as in Form No.* 212].

* *If the deceased left real estate, the heir-at-law must be cleared off.*

FORM No. 215.

Oath—Administration—Guardian Appointed by Chancery Division for the Use of Minors (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Guardian appointed by Chancery Division for the use of minors.

I, C. D., of , bailiff, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a widow, and not possessed of real estate,* leaving E. F. and G. H. her natural and lawful and only children and only next of kin her surviving, who are both now minors of the ages of and respectively. That there is no testamentary guardian of the said minors; that I have been duly appointed guardian of the estate of the said minors under and by

* *If the deceased left real estate, the heir-at-law must be cleared off.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

virtue of an order of the Chancery Division of the High Court of Justice, made on the day of , 19 , during their minority and until further order of the said Court.

And I further make oath and say that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, for the use and benefit of the said minors until one of them shall attain the age of twenty-one years or until further order of the said Court of Chancery as aforesaid; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

Form No. 216.

Oath—Administration—Mother of Minors—Statutory Guardian—Guardianship of Infants Act, 1886 (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Mother of minors—Statutory guardian—Guardianship of Infants Act, 1886.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, without child, not possessed of real estate, leaving E. F., spinster, and G. H. his lawful grandchildren and only next of kin him surviving; that the said E. F. and G. H. are now in their minority, to wit, the said E. F. being a minor of the age of years only, and the said G. H. being a minor of the age of years only; that there is no testamentary or other lawfully appointed guardian of the said minors; that I am the natural and lawful mother and lawful guardian of the said E. F. and G. H.; that I will faithfully administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased for the use and benefit of the said minors and until one of them shall attain the age of twenty-one years; that I will exhibit a true and perfect inventory of the said estate, and render a true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased amounts in value to £ and no more, to the best of my knowledge, information and belief.

Sworn. etc. (Signed) C. D.

Form No. 217.

Oath—Administration—Committee of Lunatic (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Committee of lunatic.

I, C. D., of , architect, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, without parent and not possessed of real estate,* leaving E. F. his natural and lawful brother and only next of kin him surviving; that the said E. F. is a lunatic so found by inquisition, and that by an order made in lunacy on the day of , 19 , I was appointed committee of the estate of the said E. F.; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said A. B. for the use and benefit of the said E. F. during his lunacy; that I will exhibit a true and perfect inventory of the said estate, and render

* *If the deceased left real estate, the heir-at-law must be cleared off.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

Form No. 218.

Oath—Administration—Person Appointed under Lunacy Acts (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of G. H., deceased.

Oath—Administration—Person appointed under Lunacy Acts.

I, J. K., of , greengrocer, make oath and say that G. H., of , deceased, died on the day of , 19 , at , intestate, a bachelor, leaving L. M. his natural and lawful father and next of kin him surviving.

That the said L. M. is now a lunatic, and that I am the person entrusted by an order made in Lunacy, and dated the day of , 19 , with the application of the estate to which the said L. M. is or may be entitled.

That I will administer according to law all the estate, etc. [*continue as in Form No.* 217].

Form No. 219.

Oath—Administration—Next of Kin of Lunatic (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Next of kin of lunatic.

I, C. D., of , joiner, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, and not possessed of any real estate,* leaving E. F. his natural and lawful son and only next of kin him surviving, who is now a lunatic; that no committee has been appointed of the estate of the said E. F., nor has any order been made in Lunacy intrusting the application of his estate to any person; that I am the natural and lawful son and one of the next of kin of the said E. F.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 217].

* *If the deceased left real estate, the heir-at-law must be cleared off.*

Form No. 220.

Oath—Administration—Former Grant of Administration Revoked by Consent (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Former grant of administration revoked by consent.

I, C. D., of , grocer, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, without child or parent.

That notwithstanding the premises, letters of administration of the estate of the said deceased were, on the day of , 19 , granted at the Principal Probate Registry of the High Court of Justice to E. F., the lawful uncle of the said deceased, on the suggestion that the said

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

deceased died intestate, a widower, without child or parent, brother or sister, and that the said E. F. was the only next of kin of the said deceased.

That the said letters of administration have been since voluntarily brought in by or on behalf of the said E. F., and have been duly revoked and declared null and void.

That I am the natural and lawful brother and only next of kin of the said deceased; I will administer according to law, etc. [*continue as in Form No.* 182].

FORM No. 221.

Oath—Administration—Death Presumed (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—Death presumed.

I, C. D., of , greengrocer, make oath and say as follows:—

That A. B., of , deceased, died on or since the day of , 19 , intestate, a widower, but I am unable to depose as to the place of his death.

That on the day of , 19 , by an order on motion made in this Division it was ordered that upon an application being made for letters of administration of the estate of the said A. B., his death might be sworn to have occurred on or since the said day of , 19 .

That I am the natural and lawful son and one of the next of kin of the said A. B.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 182].

FORM No. 222.

Oath—Administration—*Ad Colligenda* (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration—*Ad colligenda.*

I, C. D., of , merchant, make oath and say as follows:—

That A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, and not possessed of real estate,*, leaving, as I believe, three natural and lawful children and only next of kin whose names and addresses are unknown to me; that I am a creditor of the said deceased; that by an order on motion, dated the day of , 19 , it was ordered that letters of administration of the estate of the said A. B. be granted to me limited for the purpose only of collecting and getting in and receiving the personal estate and doing such acts as may be or become necessary for the preservation of the same during the absence of the person or persons entitled by law to the said estate, and until they or one of them apply for and obtain letters of administration of the said estate, but no further or otherwise; that I will faithfully administer the said estate of the said A. B., limited only as aforesaid; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do, and that the personal estate of the said deceased amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

* *If the deceased left real estate, the heir-at-law must be cleared off.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

Form No. 223.

Oath—Administration *pendente lite* (*a*).

Oath—Administration *pendente lite.*

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

I, C. D., of , chartered accountant, make oath and say as follows :—

That A. B., of , deceased, died on the day of , 19 , at ; that there is now depending in this Division an action entitled E. and another against G. and others touching the validity of the will of the said A. B. ; that the Honourable Sir H. B. D., Knight, a Judge of the aforesaid Division, did on the day of , 19 , order that letters of administration of the personal estate of the said deceased be granted to me the said C. D. pending the said action ; that I will faithfully administer according to law the said personal estate of the said A. B., pending the said action, save distributing the residue thereof, under the control and direction of this Court ; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do ; and that the whole of the personal estate of the said A. B. amounts to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

Form No. 224.

Oath—Cessate Administration—Minor Having Attained his Majority (*a*).

Oath—Cessate administration —Minor having attained his majority.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say that A. B., of , deceased, died on the day of , 19 , at , a widower, and intestate ; that in the month of , 19 , letters of administration of the estate of the said intestate were granted by this Division at the Registry thereof, to the lawful [*relationship*] and one of the next of kin and the curator or guardian lawfully elected of me the deponent (then a minor) the natural and lawful and only child and only next of kin of the said intestate, for my use and benefit, and until I should attain the age of twenty-one years.

And I further make oath and say, that since the premises, to wit, on the day of , 19 , I, this deponent, attained the age of twenty-one years, whereby the said letters of administration have ceased and expired.

And I further make oath and say that I am the natural and lawful son and only next of kin of the said intestate ; that I will faithfully administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased ; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do ; and that the gross value of the said estate of the said deceased left unadministered amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

Form No. 225.

Oath—Cessate Administration—Attorney (Administrator) of Applicant having Died (*a*).

Oath—Cessate administration—Attorney (administrator) of applicant having died.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , stationer, make oath and say that A. B., of , deceased, died on the day of , intestate, a bachelor, leaving me his natural and lawful father and next of kin him surviving; that at the date of the death of the said A. B. I was residing in ; that in the month of , 19 , letters of administration of the estate of the said A. B. were granted to E. F., my lawfully appointed attorney, for my use and benefit and until I should duly apply for and obtain letters of administration of the said estate; that the said E. F. died on the day of , 19 , by reason of which the said letters of administration have ceased and expired; that I am the lawful father of the said A. B.; that I will administer according to law all the estate, etc. [*continue as in Form No.* 224].

Form No. 226.

Oath—Administration *de bonis non*—Intestate's Child (*a*).

Oath—Administration *de bonis non*—Intestate's child.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

I, C. D., of , baker, make oath and say:—

1. That A. B., of , deceased, died on the day of , 19 , at , intestate; that in the month of , 19 , letters of administration of the estate of the said deceased were by the authority of this Division at the Registry thereof, granted to E. F., his lawful widow and relict, who for some time intermeddled in the said estate, and afterwards died, to wit, on the day of , 19 , leaving part thereof unadministered.

2. That I am the natural and lawful son and one of the next of kin of the said deceased; that I will faithfully administer according to law all the unadministered estate which by law devolves to and vests in the personal representative of the said deceased, left unadministered as aforesaid; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the gross value of the said estate of the said deceased, left unadministered as aforesaid, amounts to £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

Form No. 227.

Oath—Administration *de bonis non*—Representative of Only Child (*a*).

Oath—Administration *de bonis non*—Representative of only child.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of E. F., deceased.

I, G. H., of , baker, make oath and say that E. F., of , deceased, died on the day of , 19 , at , a widower, and intestate, and not possessed of real estate*; that in the month of , 19 , letters of administration of the estate of the said E. F. were granted at the Principal Probate Registry to I. J., spinster, the natural and lawful daughter and only next of kin, and the sole person entitled to the personal estate of the said E. F.; that the said I. J. died on the day of , 19 , leaving part of the said estate unadministered;

* *If the deceased left real estate, the heir-at-law must be cleared off.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

that I am the administrator of the estate of the said I. J. under a grant of letters of administration made to me at the said Registry on the day of , 19 ; that I will administer according to law all the unadministered estate, etc. [*continue as in Form No.* 226].

FORM No. 228.

Oath—Administration *de bonis non*—Representative of Husband (*a*).

Oath—Administration *de bonis non*—Representative of husband.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

I, C. D., of , upholsterer, make oath and say as follows:—

1. That A. B. (wife of E. F.), deceased, died on the day of , 19 , at , intestate, leaving the said E. F. her lawful husband her surviving.

2. That in the month of , 19 , letters of administration of the estate of the said deceased were granted by this Division at the Registry thereof to the said E. F., who for some time intermeddled in the said estate of the said deceased and afterwards died, to wit, on the day of , leaving part thereof unadministered.

3. That the said deceased did not die possessed of any real estate.*

4. That I am the executor of the will [*or* administrator of the estate] of the said E. F., deceased, probate of his will [*or* letters of administration of his estate] having been granted to me by this Division at the Registry thereof on the day of , 19 .

5. That I will faithfully administer according to law, etc. [*continue as in Form No.* 226].

* *If the deceased left real estate, the heir-at-law* must *be cleared off.*

FORM No. 229.

Oath—Administration *de bonis non*—Father's Representative (*a*).

Oath—Administration *de bonis non*—Father's representative.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of G. H., deceased.

I, I. J., widow, make oath and say as follows:—

That G. H., of , deceased, died on the day of , 19 , at , intestate, a bachelor, leaving K. L. his natural and lawful father and next of kin him surviving; that in the month of , 19 , letters of administration of the estate of the said G. H. were granted in this Division at the Registry thereof to the said K. L., who died on the day of , 19 , leaving part of the said estate unadministered; that I am the administratrix of the estate of the said K. L. under a grant of letters of administration made to me at the said Registry on the day of , 19 ; that I will administer according to law all the unadministered estate, etc. [*continue as in Form No.* 226].

FORM No. 230.

Oath—Administration *de bonis non*—Brother (or Sister) (*a*).

Oath—Administration *de bonis non*—Brother (or sister).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

I, C. D., of , dairyman, make oath and say as follows:—

That A. B., of , deceased, died on the day of , at ,

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

intestate, a bachelor, without a father, and not possessed of real estate,* leaving E. F. his natural and lawful mother and only next of kin him surviving; that in the month of , 19 , letters of administration of the estate of the said A. B. were granted in this Division at the Registry thereof to the said E. F., who died on the day of , 19 , leaving part of the said estate unadministered; that I am the natural and lawful brother of the said A. B.; that I will administer according to law all the unadministered estate, etc. [*continue as in Form No.* 226].

* *If the deceased died leaving real estate, the heir-at-law must be cleared off.*

FORM No. 231.

Oath—Administration *de bonis non*—Sister as one other of Next of Kin (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration *de bonis non*—Sister as one other of next of kin.

I, C. D., of , widow, make oath and say that A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor without a parent; that in the month of , 19 , letters of administration of the estate of the said deceased were granted in this Division at the Registry thereof to E. F., his natural and lawful brother and one of his next of kin; that the said E. F. died on the day of , 19 , leaving part of the said estate unadministered; that I am the natural and lawful sister and one other of the next of kin of the said deceased; that I will administer according to law all the unadministered estate, etc. [*continue as in Form No.* 226].

FORM No. 232.

Oath—Administration *de bonis non*—Nephew (entitled in Distribution) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of G. H., deceased.

Oath—Administration *de bonis non*—Nephew (entitled in distribution).

I, J. K., of , merchant, make oath and say as follows:—

That G. H., of , deceased, died on the day of , 19 , at , intestate, a widower, without child or parent, and not possessed of real estate,* leaving L. M., his natural and lawful brother and only next of kin him surviving; that in the month of , 19 , letters of administration of the estate of the said G. H. were granted in this Division at the Registry thereof to the said L. M.; that the said L. M. died on the day of , 19 , leaving part of the said estate unadministered; that I am the lawful nephew and one of the persons entitled in distribution to the personal estate of the said deceased, being the natural and lawful son of N. O., the natural and lawful sister of the said G. H., who died in his lifetime, to wit, on the day of , 19 ; that I will administer according to law all the unadministered estate, etc. [*continue as in Form No.* 226.]

* *If the deceased left real estate, the heir-at-law must be cleared off.*

FORM No. 233.

Oath Administration *de bonis non* on Death of Lunatic Next of Kin for whose use original Grant was made (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Oath—Administration *de bonis non* on death of lunatic next of kin for whose

I, C. D., of , professional golf player, make oath and say that A. B., of , deceased, died on the day of , 19 , at ,

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

a spinster, without a parent and intestate and not possessed of real estate,* leaving E. F. her natural and lawful brother and only next of kin; who was then and until the time of his death continued to be a lunatic or person of unsound mind; that in the month of , 19 , letters of administration of the estate of the said deceased were granted to me by this Division at the Registry thereof as the lawful cousin-german and one of the next of kin of the said E. F., the lunatic aforesaid, for his use and benefit during his lunacy; that the said E. F. died on the day of , 19 , and that part of the said estate of the said A. B., deceased, remains unadministered; that I am the administrator of the estate of the said E. F., deceased, letters of administration of his estate having been granted to me by this Division at the Registry thereof on the day of , 19 ; that I will faithfully administer, etc. [*continue as in Form No.* 226].

use original grant was made.

* *If the deceased left real estate, the heir-at-law should be cleared off.*

FORM No. 234.

Oath—Probate or Administration where the Domicile is to be noted (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

[*Follow the oath for executor* (*No.* 151) *or for an administrator* (*No.* 182) *until arriving at the words "whenever required by law so to do" then follows*—] that the said deceased died domiciled in England and that the gross value of the said estate of the said deceased amounts to £ and no more, to the best of my knowledge, information, and belief.

Oath—Probate or administration where the domicile is to be noted.

Sworn, etc. (Signed)

FORM No. 235.

Oath—Application to Re-seal Colonial Grant (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Goods of A. B., deceased.

I, C. D. [*or* E. F.], of , make oath and say:—

1. That a grant of probate of the will [*or* letters of administration of the personal estate] of A. B., late of , deceased, was granted to me [*or* C. D.] by the Court at on the day of .

Oath—Application to re-seal colonial grant.

2. That the said deceased was at the time of his death domiciled at , [*the following words to be struck out if inapplicable*] within the jurisdiction of the said Court.

3. That the notice hereunto annexed was inserted in the "Times" newspaper on the day of .

4. That I am the attorney lawfully appointed of C. D. under his hand and seal, and am duly authorised to apply to this Court for the sealing of the said grant. [*This paragraph to be struck out if inapplicable.*]

5. That the value of the personal estate in England amounts in value to the sum of and no more, to the best of my knowledge, information, and belief.

Sworn, etc.

[NOTE.—*See additional Rules and Orders; Non-contentious Business (dated 7th November,* 1892); *Colonial Probates Act,* 1892.]

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS.

FORM NO. 236.

Order on Motion—Grant to Nominee of the Crown (*a*).

Order on motion—Grant to nominee of the Crown.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Goods of A. B., deceased.

On reading the statement filed on behalf of his Majesty's Proctor, and on hearing counsel thereon, it is ordered that letters of administration of the personal estate of A. B., deceased, as having died a bachelor, a bastard and intestate, be granted to the Solicitor for the affairs of his Majesty's Treasury, and his successors in the said Office, for the use of his Majesty, on his exhibiting a declaration instead of an inventory of the said personal estate.

(Signed) W. Y.,
Registrar.

FORM NO. 237.

Order on Motion—Grant to the Solicitor to the Duchy of Lancaster (*a*).

Order on motion—Grant to the Solicitor to the Duchy of Lancaster.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Goods of A. B., deceased.

On reading the Chancellor's warrant and statement filed on behalf of Proctor for the Duchy of Lancaster and on hearing counsel thereon, it is ordered that letters of administration of the personal estate of A. B., deceased, as having died a bachelor, a bastard and intestate, be granted to , the Solicitor for the affairs of the Duchy of Lancaster and his successors in the said Office, for the use of his Majesty, in right of his said Duchy on his exhibiting a declaration instead of an inventory of the said personal estate.

(Signed) W. Y.,
Registrar.

FORM NO. 238.

Order on Motion—Grant to Solicitor of Treasury after Citation (*a*).

Order on motion—Grant to Solicitor of Treasury after citation.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Goods of A. B., deceased.

On reading the statement filed on behalf of the Solicitor for the affairs of his Majesty's Treasury and the affidavits of , and on hearing counsel thereon in default of the appearance of the parties cited, it is ordered that letters of administration of the personal estate of A. B., deceased, be granted to the Solicitor for the affairs of his Majesty's

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

Treasury, and his successors in the said Office, for the use of his Majesty, on his exhibiting a declaration instead of an inventory of the said personal estate.

(Signed) W. Y.,
Registrar.

FORM No. 239.

Order on Motion—Grant of Probate (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)
Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.
On the day of , 19 .
In the Estate of A. B., deceased.

Order on motion—Grant of probate.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that probate of the last will and testament, with codicil thereto bearing date respectively , of A. B., deceased, be granted to the said , the executor named in the said will.

(Signed) W. Y.,
Registrar.

FORM No. 240.

Order on Motion—Grant of Administration (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)
Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.
On the day of , 19 .
In the Estate of A. B., deceased.

Order on motion—Grant of administration.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the estate of A. B., deceased, be granted to the said C. D., the lawful of the said A. B., deceased.

(Signed) W. Y.,
Registrar.

FORM No. 241.

Order on Motion—Probate—Presumed Death (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)
Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.
On the day of , 19 .
In the Estate of A. B., deceased.

Order on motion—Probate—Presumed death.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that upon an application for probate of the will of A. B., to be granted to the executor therein named the death may be sworn to have occurred on or since the day of .

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 242.

Order on Motion—Administration—Presumed Death (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion—Administration—Presumed death.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, it is ordered that upon an application for letters of administration of the estate of A. B., intestate, to be granted to the person entitled by law to the same, death may be sworn to have occurred on or since the day of , such person exhibiting a declaration on oath of the particulars and value of the said estate, and his or her sureties justifying.

(Signed) W. Y.,
Registrar.

FORM No. 243.

Order on Motion—Grant in Default of Appearance to Citation (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion—Grant in default of appearance to citation.

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, in default of the appearance of the person cited, it is ordered that letters of administration of the estate of A. B., deceased, be granted to the said C. D., a creditor of the said deceased (*or as the case may be*).

(Signed) W. Y.,
Registrar.

FORM No. 244.

Order on Motion—Grant of Probate—Copy (or Draft) Will (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion—Grant of probate—Copy (or draft) will.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that probate of the last will and testament, with codicil thereto bearing date respectively , of A. B., deceased (as contained in a copy thereof exhibited to the said affidavit of), be granted to , the executor named in the said will. Limited until the original will or a more authentic copy thereof shall be brought into the Registry.

(Signed) C. D.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 245.

Order on Motion—Refusal of Application for Probate of Draft Will (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion—Refusal of application for probate of draft will.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that the application for probate of the last will and testament of A. B., deceased, as contained in the draft thereof, be rejected.

(Signed) W. Y.,
Registrar.

FORM No. 246.

Order on Motion for the Examination of an Attesting Witness before the Court (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion for the examination of an attesting witness before the Court.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that C. D., of , and E. F., of , unless within seven days they do make the required affidavits as to the execution of the will of this deceased, do attend at the sitting of the Court on such day as shall be set out in the notice to be served upon them, for the purpose of being examined as to the execution of the said will.

And it is further ordered that the costs of this application be, in any event, paid by the said C. D. and E. F.

(Signed) G. H.,
Registrar.

FORM No. 247.

Order on Motion to Discharge Prisoner (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

C. D. against E. F.

Order on motion to discharge prisoner.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that G. H., now in the custody of the Governor of his Majesty's prison at , be forthwith released from such custody, he having purged his contempt.

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

Form No. 248.

Order on Motion—To Discharge Prisoner (Alternative Form) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

C. D. against E. F.

Order on motion to discharge prisoner (alternative form).

Upon hearing counsel for the defendant E. F., who alleged that the said E. F. is a prisoner in his Majesty's prison at , in the custody of the sheriff of , under an attachment issued against him pursuant to the order dated for his contempt in not [*set out default*], and that the said E. F. hath since [*state the compliance*], and upon hearing counsel for the plaintiff and upon reading the affidavits of , it is ordered that the said E. F. be discharged out of the custody of the said sheriff as to his said contempt; and it is further ordered that the said E. F. do pay to the plaintiff his costs of this application.

(Signed) W. Y.,
Registrar.

Form No. 249.

Order on Motion—Appointment of an Administrator and Receiver Pending Suit (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

C. D. against E. F.

Order on motion—Appointment of an administrator and receiver pending suit.

On reading the statement filed on behalf of the , and the affidavits of , and on hearing counsel on behalf of , it is ordered that G. H., of , [*or* such person or persons as shall be agreed upon between the parties, or, in default of agreement, as shall be nominated by one of the registrars], be appointed the administrator, pending this action, of the personal estate of A. B., the deceased in this action, on exhibiting a declaration on oath of the particulars and value of the said personal estate and his sureties justifying.

And that the said G. H. [*or* such person] be also appointed to be the receiver, pending this action, of the rents and profits of the real estate of the said deceased, on his entering into a bond with two sufficient sureties, in a penal sum to be fixed by one of the registrars, for the faithful performance of the duties committed to him.

(Signed) W. Y.,
Registrar.

Form No. 250.

Order on Motion to an Executor who has intermeddled with an Estate, and who has been Cited but has not Appeared, to take a Grant of Probate (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion to an executor who has intermeddled with an estate,

On reading the statement filed on behalf of C. D., and the affidavits of , and on hearing counsel thereon, in default of the appearance of

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

E. F., the person cited, it is ordered that the said E. F. do within fourteen days from the service of this order upon him take probate as executor of the will bearing date , and now in the Principal Probate Registry of this Division, of A. B., deceased, and it is further ordered that the said E. F. do pay the taxed costs of the said C. D. of this application.

and who has been cited but has not appeared, to take a grant of probate.

(Signed) W. Y.,
Registrar.

FORM No. 251.

Order on Motion—Limited Grant of Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the unadministered personal estate of A. B., deceased, be granted to C. D., one of the persons beneficially interested in the sum of £ India $3\frac{1}{2}$ per cent. stock standing in the name of the said deceased, limited to his interest in the aforesaid sum.

Order on motion—Limited grant of administration.

(Signed) W. Y.,
Registrar.

FORM No. 252.

Order on Motion—Grant Limited to Proceedings in Chancery (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

against

In the Estate of A. B., deceased.

On reading the statement filed on behalf of , and the affidavits of and hearing counsel on behalf of , the plaintiff thereon in default of the appearance of , the parties cited, it is ordered that letters of administration of the (personal) estate of A. B., deceased, be granted to , limited for the purpose only of his becoming and being made a party to a certain cause or suit now depending, or about to be instituted, in the Chancery Division of this Court, between plaintiffs and defendants, and to supply, substantiate, and confirm the proceedings already had, or which may be hereafter had, in the said cause or suit, or in any other matter, cause, or suit which may be commenced in the same or any other division of the Court between the aforesaid or any other parties, touching the matters which are the subjects of the said cause or suit, and until a final order or decree shall be made therein, and the same carried into execution, and the execution thereof fully completed "on giving the usual security" [*or as ordered*].

Order on motion—Grant limited to proceedings in Chancery.

(Signed) C. D.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM NO. 253.

Order on Motion—Grant of Administration *ad colligenda* (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion—Grant of administration *ad colligenda.*

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the (personal) estate of A. B., deceased, be granted to C. D., limited for the purpose only of collecting and getting in and receiving the personal estate, and doing such acts as may be necessary for the preservation of the same during the absence of the person or persons entitled by law to the said estate, and until they or one of them obtain letters of administration of the same, but no further or otherwise.

Declaration to be filed and sureties to justify.

(Signed) W. Y.,
Registrar.

FORM NO. 254.

Order on Motion—Revocation of Grant of Letters of Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion—Revocation of grant of letters of administration.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that the letters of administration of the estate of , deceased, granted on the day of , 19 , at , on the suggestion that the said deceased had died intestate, be revoked.

(Signed) W. Y.,
Registrar.

FORM NO. 255.

Order on Motion—Grant of Administration under the 73rd section of the Court of Probate Act, 1857 (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

Order on motion—Grant of administration under sect. 73 of the Court of Probate Act, 1857.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the personal estate of , deceased, be granted to C. D., a creditor of the said deceased, under the 73rd section of the Court of Probate Act, 1857.

(Signed) E. F.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 256.

Order on Motion—Grant of Administration under the 73rd section of the Court of Probate Act, 1857. Bond without Sureties (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the estate of , deceased, be granted to under the 73rd section of the Court of Probate Act, 1857, and that a bond without sureties be accepted.

Order on motion—Grant of administration under sect. 73 of the Court of Probate Act, 1857—Bond without sureties.

(Signed) W. Y.,
Registrar.

FORM No. 257.

Order on Motion—Grant of Limited Administration under the 73rd section of the Court of Probate Act, 1857 (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the estate of , deceased.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the estate of , deceased, be granted to under the 73rd section limited to the interest of the said deceased, in shares in the Co. Ltd., and to the dividends accrued, and to become, due thereon.

Order on motion—Grant of limited administration under sect. 73 of the Court of Probate Act, 1857.

(Signed) W. Y.,
Registrar.

FORM No. 258.

Order on Motion—Grant of Administration, "for Use and Benefit," under the 73rd section of the Court of Probate Act, 1857 (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.

On the day of , 19 .

In the Estate of A. B., deceased.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the estate of , deceased, be granted to under the 73rd section of the Court of Probate Act, 1857, for the use and benefit of , the lawful brother and only next of kin of the said deceased, until the said shall become of sound mind.

Order on motion—Grant of administration, "for the use and benefit," under sect. 73 of the Court of Probate Act, 1857.

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

Form No. 259.

Order on Motion—Grant *ad colligenda* under the 73rd section of the Court of Probate Act, 1857 (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.
On the day of , 19 .
In the Estate of A. B., deceased.

Order on motion—Grant *ad colligenda*, under sect. 73 of the Court of Probate Act, 1857.

On reading the statement filed on behalf of , and the affidavits of , and on hearing counsel thereon, it is ordered that letters of administration of the estate of A. B., deceased, be granted under the 73rd section of the Court of Probate Act, 1857, to the said , limited to the collection of the said estate, the payment of debts, and the sale of the business of a , carried on by the said deceased, limited until the person entitled to a permanent and general grant of letters of administration shall apply for and obtain the same.

Declaration to be filed and sureties to justify.

(Signed) W. Y.,
Registrar.

Form No. 260.

Order for the Hearing of a Probate $\frac{\text{action}}{\text{cause}}$ as a Short Cause (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
Before the Right Honourable Sir Samuel Thomas Evans, Knight, the President, sitting at the Royal Courts of Justice, Strand, in the County of Middlesex.
On the day of , 19 .
In the Estate of A. B., deceased.
C. D. against E. F.

Order for the hearing of a probate $\frac{\text{action}}{\text{cause}}$ as a short cause.

On hearing counsel on behalf of the , it is ordered that this $\frac{\text{action}}{\text{cause}}$ be placed in the list for hearing on Monday next, the day of , 19 .

(Signed) W. Y.,
Registrar.

Form No. 261.

Order for Joint Grant to Widow and Next of Kin (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

Order for joint grant to widow and next of kin.

On reading the affidavit of C. D., widow, the relict of A. B., of , deceased, wherein it appeared that she was consenting and desirous that E. F., the natural and lawful son of herself and the said A. B., should be joined with her in the letter of administration of the estate of the said A. B., and also the consent thereto, dated the day of , 19 , signed by G. H. and I. J., who with the said E. F. are the natural and lawful and only children and only next of kin of the said A. B., the said G. H. being also his heir-at-law, the undersigned registrar ordered that letters of administration of the said estate be granted to the said C. D. and the said E. F. jointly.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

Form No. 262.

Order assigning a Guardian to Infants (*a*).

Order assigning a guardian to infants.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn the day of , whereby it appeared that A. B., of died at on the , intestate, a widower, and not possessed of any real estate,* leaving him surviving E. F. and G. H., his natural, lawful and only children and next of kin, and that the said E. F. and G. H. are now infants under the age of seven years, and therefore by law incapable of acting in their own name, or of electing a guardian to act on their part and behalf, and that there is no testamentary or other lawful guardian of the said infants, and that the said C. D., is the lawful grandfather and only next of kin of the said infants, and is ready and willing to accept the guardianship of the said infants for the purpose of taking letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, for the use and benefit of the said infants until one of them shall attain the age of twenty-one years ; the undersigned Registrar of the Principal Probate Registry assigned the said C. D. guardian to the said infants for the purpose aforesaid.

Dated the day of , 19 .

(Signed) I. J.,
Registrar.

* *In cases where there is real estate the heir-at-law must be cleared off.*

Form No. 263.

Order assigning Guardians (Next of Kin and Stranger) to Infants (*a*).

Order assigning guardians (next of kin and stranger) to infants.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn the day of , whereby it appeared that A. B., of , deceased, died on the day of , 19 , at , intestate, a widower,* leaving him surviving E. F. and G. H., his natural and lawful and only children, and only next of kin, the said E. F. being also his heir-at-law, who are now infants under the age of seven years, and therefore by law incapable of acting in their own name, or of electing a guardian to act on their part and behalf, and that there is no testamentary or other lawful guardian of the said infants, and that the said C. D., is the lawful grandfather and only next of kin of the said infants and is ready and willing to accept the guardianship of the said infants for the purpose of taking letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased, for the use and benefit of the said infants until they shall attain the age of twenty-one years, and that the said C. D. is upwards of years of age and being very infirm and feeble is consenting and desirous that I. J., of , be joined with him in the letters of administration of the said estate, the undersigned Registrar of the Principal Probate Registry assigned the said C. D. and I. J. guardians to the said infants for the purpose aforesaid.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

* *Or if the deceased was not possessed of real estate it should be so stated.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 264.

Order assigning a Guardian to Infants for the Purpose of Renouncing (*a*).

Order assigning a guardian to infants for the purpose of renouncing.

In the High Court of Justice. Probate, Divorce, and Admiralty Division, (Probate.)

In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn the day , 19 , whereby it appeared that A. B., of , died on the day of , 19 , at , intestate, a widower leaving him surviving, E. F., spinster, and G. H., his natural and lawful and only children and only next of kin, the said G. H. being also his heir-at-law, who are now infants under the age of seven years, and therefore by law incapable of acting in their own name, or of electing a guardian to act on their part and behalf, and that there is no testamentary or other lawful guardian of the said infants, and that the said C. D. is the lawful uncle and one of the next of kin of the said infants and is ready and willing to accept the guardianship of the said infants for the purpose of renouncing for them and on their part and behalf the letters of administration of the estate of the said deceased, the undersigned Registrar of the Principal Probate Registry assigned the said C. D. guardian to the said infants for the purpose aforesaid.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

FORM No. 265.

Order assigning Guardian to Infant cited (*a*).

Order assigning guardian to infant cited.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

C. D. against E. F.

On reading the affidavit of G. H., whereby it appears that a citation has issued under seal of this Division bearing date the day of , 19 , at the instance of C. D., alleging himself to be a creditor of A. B., deceased, citing E. F., the residuary legatee named in the will and testament of the said A. B., bearing date the day of , 19 , to accept or refuse letters of administration with the said will annexed, of the estate of the said A. B., or show cause why the said letters of administration, with the said will annexed, of the said estate should not be granted to the said G. H. as a creditor of the said deceased ; and it further appearing that the said E. F. is now an infant of the age of years only, and that G. H. is the lawful uncle and one of the next of kin of the said infant and is ready and willing to accept the guardianship of the said infant for the purpose of appearing to the said citation, and accepting the said letters of administration, with the said will annexed, of the said estate as his guardian, to be granted to him for the use and benefit of the said infant until he shall attain the age of twenty-one years, the undersigned registrar assigned the said G. H. guardian to the said infant for the purpose aforesaid.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

FORM No. 266.

Order for Grant to Party cited (*a*).

Order for grant to party cited.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. *v.* E. F.

X. Y. and Co., the solicitors of the defendant in this cause, exhibited affidavit of sworn on the day of , 19 , whereby it appeared that the

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

said defendant by a citation issued on the day of , 19 , had been duly cited to accept or refuse letters of administration of the estate of A. B. late of , the deceased in this cause, and that the said defendant had entered an appearance to the said citation, and that notice of the entry of such appearance was on the day of , 19 , duly served on the solicitor of the plaintiff , and that no summons has been served or other proceeding taken in this cause on behalf of the plaintiff since the service of the said notice. And the said , the solicitor of the defendant , alleged that the said defendant is willing to take upon himself the said letters of administration, whereupon the undersigned registrar on application ordered that the said letters of administration should issue under seal to the said defendant if entitled thereto notwithstanding the caveat entered in the goods of the said deceased by or on behalf of the plaintiff on taking out the said citation.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

FORM NO. 267.

Order for Discontinuance of Proceedings and Grant (*a*).

Order for discontinuance of proceedings and grant.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

A. against B.

Upon hearing the and by consent, I do order that the contentious proceedings in this $\frac{\text{matter}}{\text{action}}$, arising from caveat No. , entered on the day of , 19 (and also from writ of summons issued on the day of 19), be discontinued, and that Probate of the will [*or letters of administration of the estate*] of C. D., late of , the deceased herein, be granted to G. H. and I. J. (the executors therein named), the plaintiffs in this $\frac{\text{matter}}{\text{action}}$ if entitled thereto.

Dated the day of , 19 .

(Signed) E. F.,
Registrar.

FORM NO. 268.

Registrar's Order presuming Death—Probate (*a*).

Registrar's order presuming death—Probate.

In the Estate of A. B., deceased.

On reading the affidavits of E. F., sworn the , and of C. D., sworn the , I do order that upon an application for probate of the will of A. B., to be granted to the executor therein named, the death may be sworn to have occurred on or since the day of [or in or since the year].

(Signed) G. H.,
Registrar.

FORM NO. 269.

Registrar's Order presuming Death—Administration (*a*).

Registrar's order presuming death—Administration.

In the Estate of A. B., deceased.

On reading the affidavits of C. D., sworn the , and of E. F., sworn the , I do order that upon an application for letters of administration of the estate of A. B., intestate, to be granted to the person entitled by law to the same, death may be sworn to have occurred on or since the day of [or in or since the year], such person exhibiting a declaration on oath of the particulars and value of the said estate, and his or her sureties justifying.

(Signed) G. H.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM NO. 270.

Order for Grant to Person Entrusted by the Court of the Deceased's Domicile (*a*).

Order for grant to person entrusted by the Court of the deceased's domicile.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn on the day of , the letters of administration granted by the Supreme Court of , dated [*and the power of attorney dated*], I do order that letters of administration of the estate of A. B., of No. 22, Rue de Rivoli, Paris, in the Republic of France, deceased, who died on the day of , intestate, domiciled at Paris aforesaid, be granted to the said C. D. [*the lawful attorney, and for the use and benefit of E. F. (who now resides in France)*], the person entrusted with the administration of the estate of the deceased by the Court having jurisdiction as the place of domicile of the said deceased at the time of his death.

Dated the day of , 19 .

(Signed) G. H.,
Registrar.

FORM NO. 271.

Order for Grant to Person Entitled thereto by the Law of the Deceased's Domicile (*a*).

Order for grant to person entitled thereto by the law of the deceased's domicile.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn the day of , and the affidavit of E. F., sworn the day of * [*and the power of attorney dated the day of*], I do order that letters of administration of the estate of A. B., of No. 50, Unter den Linden, Berlin, in the Empire of Germany, deceased, who died on the day of , intestate, domiciled at Berlin aforesaid, be granted to the said C. D. [*the lawful attorney, and for the use and benefit of G. H., who now resides in Germany*], the person entitled thereto by the law of the place of domicile of the said deceased at the time of his death.

Dated the day of , 19 .

(Signed) I. J.,
Registrar.

* *The affidavit sworn by a competent person as to the law of the domicile of the deceased.*

FORM NO. 272.

Registrar's Order for Grant of Probate of Draft (or Copy) Will (*a*).

Registrar's order for grant of probate of draft (or copy) will.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

On reading the affidavits of C. D., sworn the day of , and of E. F., sworn the day of , I do order that probate of the last will and testament of A. B., deceased, bearing date the day of , as contained in a completed draft thereof (*or* in a copy thereof) be granted to G. H., the sole executor named therein until the original will or a more authentic copy thereof be brought into the Principal Probate Registry, I. J., the heir at law, and K. L. and M. N., the natural and lawful children and only next-of-kin, and the only persons entitled in distribution to the personal estate of the said deceased had he died intestate having duly consented thereto.

Dated the day of , 19 .

(Signed) O. P.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 273.

Order revoking Grant of Probate (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Order revoking grant of probate.

On reading the affidavit of C. D., sworn on the day of , 19 , whereby it appeared that on the day of , 19 , probate of the will (and codicil) of A. B. of , deceased, bearing date the , 19 , was granted by this Court at the Principal Probate Registry thereof, to C. D. and E. F., the executors therein named, and that it has since been discovered that the said deceased made and duly executed a later will bearing date the day of , 19 , whereof he appointed G. H. the sole executor; and the said probate having been voluntarily brought into and left in the said Probate Registry, the undersigned Registrar of the Principal Probate Registry on the application of the said , revoked the said grant made to the said as aforesaid, and declared the same to be null and void to all intents and purposes in law whatsoever.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 274.

Order revoking Grant of Letters of Administration (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Order revoking grant of letters of administration.

On reading the affidavit of C. D., sworn on the day of , , whereby it appeared that on the day of , 19 , a grant of letters of administration of the estate of A. B., of , deceased, was, on the suggestion that the said deceased died intestate a widower without child or parent, brother or sister, made by this Court at the Principal Probate Registry thereof to E. F., the lawful uncle of the said deceased, and that it has since been discovered that the said deceased made and duly executed his will and testament bearing date the day of , 19 , whereof he appointed G. H. and I. J. the executors [*or as the case may be*], and the said letters of administration having been voluntarily brought into and left in the said probate registry the undersigned Registrar of the Principal Probate Registry on the application of the said , revoked the said letters of administration made to the said E. F. as aforesaid and declared the same to be null and void to all intents and purposes in law whatsoever.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 275.

Order for Filing Renunciation (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Order for filing renunciation.

On reading an instrument of renunciation under the hand of C. D., and referring to the probate of the will [and codicil] of A. B., deceased, whereby it appeared that on the day of , 19 , the said probate was granted by this Court at the Principal Probate Registry to G. H., one of the executors, the usual power being reserved of making the like grant to the said C. D., the other executor, and that the said C. D. had in and by the said instrument under his hand renounced the probate and execution of the said will and codicil, the

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

undersigned Registrar of the Principal Probate Registry ordered that the said instrument of renunciation be filed in the said registry, and that the renunciation be noted on the record of the said probate.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 276.

Order for Renunciation and Will to be Filed (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Order for renunciation and will to be filed.

C. D., of , the solicitor of E. F., exhibited an instrument in writing under the hand of the said E. F., bearing date , and alleged that A. B., late of , died on the day of , 19 , having made and duly executed his last will and testament, bearing date the day of , , and thereof appointed the said E. F. executor, who in and by the said instrument under his hand renounced the probate and execution thereof, and he brought in the said will annexed to the said instrument of renunciation.

Whereupon the undersigned registrar, on the application of the said C. D., ordered that the said instrument of renunciation be filed and that the said original will be deposited in the principal registry for safe custody.

Dated the day of , 19 .

(Signed) G. H.,
Registrar.

FORM No. 277.

Order for Alteration of Grant (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Order for alteration of grant.

On reading the affidavit of C. D., sworn on the day of , 19 , and referring to the grant of probate of the will [*or letters of administration* (*with will*) *of the estate*] of A. B., deceased, made by this Court at the [*Principal*] Probate Registry thereof on the day of , 19 , whereby it appears that in the said grant the death of the said deceased is stated to have occurred on the day of , 19 , whereas it in fact occurred on the day of , 19 [*or as the case may be*], the undersigned Registrar of the Principal Probate Registry ordered that the said grant be altered by striking out and substituting therefor in the line thereof.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 278.

Order for Notation of Domicile (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Order for notation of domicile.

On reading the affidavit (with schedule annexed) sworn on the day of , 19 , of , the executor [*or the administrator*] named in the grant of probate of the will [ ] of [*or letters of administration* (*with will*) *of the estate*] of A. B., deceased, made by this Court at the Principal Probate Registry thereof on the day of , 19 , whereby it appeared that the said deceased died on the day of , 19 , and was at the time of his death domiciled in England, and that all the estate which by law devolves to and vests in the personal representative of the said deceased within the United

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

Kingdom, and in respect of which the said grant was made was of the value of £ , and that a part of the said estate of the value of £ (particulars of which are set forth in the said schedule), was in Scotland the undersigned Registrar of the Principal Probate Registry, on the application of the said executor [*or* administrator] ordered the said grant to be noted that "the deceased died domiciled in England."

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 279.

Order for Notation when Executor to whom Power has been reserved has been Cited and has failed to Appear (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(.)

In the Estate of A. B., deceased.

Order for notation when executor to whom power has been reserved has been cited and has failed to appear.

On reading the affidavit of service of citation (with citation annexed) on C. D. sworn and of no appearance of the said C. D. sworn , whereby it appeared that in default of appearance by the said C. D. her rights as executrix under the will of A. B., deceased (probate whereof was granted at the Principal Probate Registry of our High Court of Justice to E. F. and G. H., on the day of , 19), would wholly cease, and that representation to the said deceased devolved as if the said C. D. had not been appointed an executrix, I do order that it be noted on the record that the said C. D. has been duly cited and has not appeared.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

[NOTE.—*When the executor was served personally this order is made by the registrar; when the service was by advertisement, an order of the Court on motion must be obtained.*]

FORM No. 280.

Order for Impounding Grant (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)

In the Estate of A. B., deceased.

Order for impounding grant.

On reading the affidavit of C. D., sworn on the day of , 19 , and the joint affidavit of E. F. and G. H., sworn on the day of , 19 , whereby it appeared that on the day of , a grant of probate of the will [*or letters of administration* (*with will*) *of the estate*] of A. B., of , deceased, was made by this Court at the [*Principal*] Probate Registry thereof to I. J., and that since taking upon himself the said probate [*or letters of administration* (*with will*)] he has become a person of unsound mind and incompetent to manage himself or his affairs and that no Committee in Lunacy of his estate has been appointed [*or by Order in Lunacy dated the day of the said C. D. was appointed committee of his estate*] it is ordered by the undersigned Registrar of the Principal Probate Registry that letters of administration (with the said will) of the estate of the said deceased be forthwith granted to the said C. D., for the use and benefit of the said I. J., during his lunacy and until he shall become of sound mind, and that the said probate [*or letters of administration* (*with will*) *dated the day of*] be first brought into the said Principal Probate Registry and during such lunacy be impounded.

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 281.

Order for Re-delivery of Impounded Grant (*a*).

Order for re-delivery of impounded grant.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

On reading the affidavit of C. D., sworn on the day of , 19 , and the affidavit of E. F., sworn on the day of , 19 , [(*or*) *On reading the Order in Lunacy dated the day of* 19 ,] whereby it appeared that the grant of probate of the will [(*or*) *letters of administration (with will) of the Estate*] of A. B., deceased, granted by this Court on the day of , 19 , at the [*Principal*] Probate Registry thereof to the executor [(*or*) *administrator*] was [(*or*) *were*] in consequence of the said having become (since having taken upon himself the said probate [*or letters of administration (with will)*]) a person of unsound mind and incompetent to manage himself or his affairs, impounded pursuant to an order of one of the Registrars of the Principal Probate Registry dated the day of , 19 , and that the letters of administration with the said will of the estate of the said deceased were on the day of , 19 , granted at the said registry to the said for the use and benefit of the said during his lunacy and until he should become of sound mind ; and that the said died on the day of , 19 , and that probate of his will was [(*or*) *that letters of administration of his estate were*] granted at the said Principal Registry on the day of , 19 , to the said [(*or*) *that the said has now upon due examination been found to be of sound mind and capable of managing himself and his affairs,*] it is ordered by the undersigned Registrar of the Principal Probate Registry that the said grant heretofore impounded as aforesaid be delivered out to the said .

Dated the day of , 19 .

(Signed) A. Z.,
Registrar.

FORM No. 282.

Order on Summons for Directions (*a*).

Order on summons for directions.

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B. deceased.

C. against D.

Upon hearing the solicitors for the plaintiff and defendant I do order

1. Indorsement on writ to stand for statement of claim.
Statement of claim to be delivered in days from to-day.

Statement of defence to be delivered in days from to-day.
delivery of statement of claim.

Pleadings to be delivered with particulars, if necessary.

2. Affidavits of scripts of all parties to be filed within days from to-day.

3. After delivery of statement of defence, affidavit of documents to be filed by either party within days from service of notice : receipt : inspection within days from filing affidavit.

4. Place of trial . Mode of trial.

5. Liberty to apply.

Dated the day of 19 .

(Signed) E. F.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM NO. 283.

Order for Service out of Jurisdiction (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the matter of an intended action

Between A. B., plaintiff,
and
C. D., defendant.

Upon reading the affidavit of E. F. sworn on the day of 19 .

Order for service out of jurisdiction.

I do order that the intended plaintiff be at liberty to issue a writ of summons against the intended defendant C. D., of .

And I further order that the said intended plaintiff be at liberty to serve the said writ* on the said intended defendant , at , or elsewhere in the , and that the time for appearance to the said writ* by the said intended defendant be within after the service of the said writ.

Dated the day of , 19 .

(Signed)
(Signature of judge making the order.)

* *If the said intended defendant is a foreigner, insert "notice of" before the word "writ."*

FORM NO. 284.

Order for Substituted Service. (O. 10.) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Upon hearing and upon reading the affidavit of , filed the day of , 19 , and

Order for substituted service. (O. 10.)

It is ordered that service of a copy of this order, and of a copy of the writ of summons in this action, by sending the same by a prepaid post letter, addressed to the defendant at , [*or such other substituted service as may be ordered*] shall be good and sufficient service of the writ.

Dated the day of , 19 .

FORM NO. 285.

Order to Bespeak Request for Substituted Service Abroad. (O. 11, r. 8.) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. C., deceased.

C. D. against E. F.

Upon reading the [certificate, declaration, *or, as the case may be describing the same*]

Order to bespeak request for substituted service abroad. (O. 11, r. 8.)

It is ordered that the plaintiff be at liberty to bespeak a request for substituted service of notice of the writ of summons herein on the defendant at , or elsewhere in the [*name of country*] and that the said defendant have days after such substituted service within which to enter appearance.

Dated this day of , 19 .

FORM NO. 286.

Order for Renewal of Writ. (O. 8, r. 1.) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Upon hearing and upon reading the affidavit of , filed the day of , 19 .

Order for renewal of writ. (O. 8, r. 1.)

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

It is ordered that the writ in this action be renewed for six months from the date of its renewal, pursuant to the Rules of the Supreme Court, Order VIII., Rule 1.

Dated the day of , 19 .

FORM No. 287.

Order for Affidavit as to Documents. (O. 31, r. 12.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Order for affidavit as to documents. (O. 31, r. 12.)

Upon hearing

It is ordered that the do, within days from the date of this order, answer on affidavit stating what documents are or have been in possession or power relating to the matters in question in this action, and that the costs of this application be .

Dated the day of , 19 .

FORM No. 288.

Order for Discovery and Inspection of Documents (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Order for discovery and inspection of documents

Upon hearing the solicitors for the

I do order, that the do within days after service of this Order make and file a full and sufficient affidavit stating whether he has or has had in his possession or power any and (if any) what document relating to the matters in question in this action and accounting for the same. And that he do within days after the filing of such affidavit produce to the said , his solicitor or agent, such of the said documents as by such affidavit shall appear to be in his possession, custody or power, except such of the same (if any) as he may by his said affidavit object to produce. And that the said , his solicitor or agent may be at liberty to inspect and peruse the documents so produced and take copies thereof and abstracts and extracts therefrom, as he shall be advised at his expense.

Dated this day of , 19 .

(Signed) G. H.,
Registrar.

FORM No. 289.

Order to Produce Documents for Inspection. (O. 31, r. 14.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Order to produce documents for inspection. (O. 31, r. 14.)

Upon hearing and upon reading the affidavit of , filed the day of , 19 , and

It is ordered that the do, at all seasonable times, on reasonable notice, produce at [*insert place of inspection*], situate at , the following documents, namely , and that the be at liberty to inspect and peruse the documents so produced, and to take copies and abstracts thereof of and extracts therefrom at his expense. In the meantime it is ordered that all further proceedings be stayed, and that the costs of this application be .

Dated the day of, 19 .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM NO. 290.

Order for Delivery of Interrogatories. (O. 31, r. 1.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Order for delivery of interrogatories. (O. 31, r. 1.)

Upon hearing and upon reading the affidavit of , filed the day of , 19 , and

It is ordered that the be at liberty to deliver to the interrogatories in writing, and that the said do answer the interrogatories as prescribed by Order XXXI., Rules 8 and 26 of the Rules of the Supreme Court, and that the costs of this application be .

Dated the day of , 19 .

FORM NO. 291.

Order for *Vivâ voce* Examination of Witness within the Jurisdiction (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F. and Another.

Order for *vivâ voce* examination of witness within the jurisdiction.

On reading the affidavit of G. H., sworn the day of 19 , and of sworn the day of . And on hearing the solicitor for the and by consent I do order that witness on behalf of the said and now within the jurisdiction of this Court, may be examined *vivâ voce* before I. J., of , barrister-at-law, as examiner at such time and place as the said examiner shall think fit and cause to be notified to the parties four days at least before the time so appointed by him ; and that the shall be at liberty to cross-examine the said witness , and that the said witness may be further examined before the said examiner, if he shall think fit ; And I further order that it shall and may be lawful for the said examiner, and he is hereby required to make, if need be, a special report touching the said examination hereby directed, and that the said examination and other proceedings had before him shall be returned to the Probate Registry of this Court, at Somerset House, Strand, certified under his hand and seal on or before the day of 19 . And I further order that either party may be at liberty to take office copies of the said examination, and that the same may be read in evidence at the trial of this cause, saving all just exceptions.

Dated the day of 19 .

(Signed) K. L.,
Registrar.

FORM NO. 292.

Order on Summons for Commission for Examination of Witnesses (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Order on summons for commission for examination of witnesses.

On hearing the solicitors for the , I do order that a commission do issue under seal of this Court for the examination of G. H. and others, witnesses on behalf of the , such commission to be addressed to I. J., of , and to be returned into the Principal Probate Registry, with the depositions of the witnesses taken thereunder, forthwith ; and I do further order that either party may be at liberty to take office copies of the said examination, and that the same may be read in evidence at the trial of this cause, saving all just exceptions.

Dated the day of 19 .

(Signed) K. L.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 293.

Order for Appointment of Special Examiner to take Evidence Abroad (*a*).

Order for appointment of special examiner to take evidence abroad.

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Upon hearing the solicitors on both sides, and upon reading the affidavit of ,

It is ordered that G. H., of , barrister-at-law, be appointed as special examiner for the purpose of taking the examination, cross-examination, and re-examination, *vivâ voce*, on oath or affirmation, of witnesses on the part of the at aforesaid. The solicitors to give to the solicitors days' notice in writing of the date on which they propose to send out this order to for execution, and that days after the service of such notice the solicitors for the plaintiffs and defendants respectively do exchange the names of their agents at , to whom notice relating to the examination of the said witnesses may be sent. And that days (exclusive of Sunday) prior to the examination of any witness hereunder notice of such examination shall be given by the agent of the party on whose behalf such witness is to be examined to the agent of the other party (unless such notice be dispensed with). And that the depositions when so taken, together with any documents referred to therein, or certified copies of such documents, or of extracts therefrom, be transmitted by the examiner, under seal, to the Senior Registrar of the Principal Probate Registry, Somerset House, London, on or before the day of next or such further or other day as may be ordered, there to be filed in the proper office. And that either party be at liberty to read and give such depositions in evidence on the trial of this action, saving all just exceptions. And that the trial of this action be stayed until the filing of such depositions. And that the costs of and incident to this application and such examination be costs in the action.

Dated the day of 19 .

(Signed) I. J.,
Registrar.

FORM No. 294.

Order under the Bankers' Books Evidence Act (42 & 43 Vict. c. 12, s. 7) (*a*).

Order under the Bankers' Books Evidence Act (42 & 43 Vict. c. 12, s. 7.)

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Upon hearing the solicitor of the and upon reading the affidavit of , sworn the day of 19 , I do order that the said be at liberty to inspect and take copies of all entries in the books of the Bank, situate at , in the name of the above-named deceased from the beginning of the year , to the .

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

FORM No. 295.

Order for Interim Injunction (Jud. Act, 1873, s. 25, sub-s. 8; O. 50, r. 6) (*a*).

Order for interim injunction (Jud. Act. 1873, s. 25, sub-s. 8; O. 50, r. 6).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Upon hearing for the plaintiff and upon reading the affidavit of , filed the day of , 19 , and the plaintiff by his said undertaking to abide by any order the Court or a judge may make as to damages in

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

case the Court or a judge should hereafter be of opinion that the defendant shall have sustained any by reason of this order which the plaintiff ought to pay. It is ordered and directed that the defendant his agents and servants and every of them be restrained and an injunction is hereby granted restraining them and every of them from until after the trial of this action or until further order.

Dated the day of , 19 .

FORM No. 296.

Order for Subpœna to bring in a Script (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Order for subpœna to bring in a script.

On reading the affidavit of C. D., sworn on the day of 19 , and filed in the Principal Probate Registry of this Court, whereby it appeared that a certain paper writing, being or purporting to be testamentary, to wit, the last will and testament of A. B., of , deceased bearing date the day of , is now in the possession, within the power, or under the control of E. F., of , and G. H., of , or one of them, it is ordered by the undersigned registrar that a subpœna do issue under seal requiring the said E. F. and G. H., within eight days after service thereof, to produce and bring into, and leave in the Principal Registry of this Division (or in a district registry) the said paper writing, under pain of the law, and the contempt thereof.

Dated the day of 19 .

(Signed) I. J.,
Registrar.

FORM No. 297.

Order to bring up Witness in Criminal Custody (16 & 17 Vict. c. 30, s. 9) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F. and others.

Order to bring up witness in criminal custody (16 & 17 Vict. c. 30, s. 9).

Upon reading the affidavit of , I do order that the keeper of His Majesty's prison at shall have before on the day of 19, at of the clock in the noon, the body of , a prisoner in his custody (as it is said), then and there to testify the truth and give evidence in this cause on behalf of , and so from day to day until the said shall have given evidence as aforesaid, and when shall have given evidence that be taken back without delay to the said , and there detained until be discharged by due course of law.

Dated the day of 19 .

FORM No. 298.

Order for Security for Costs (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Order for security for costs.

Upon hearing the solicitors on both sides, and reading the affidavits of .

It is ordered that the plaintiff give security for the defendant's costs in this action to the satisfaction of the registrar, and that in the meantime all further proceedings be stayed.

And that the costs of such application be .

Dated the day of 19 .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM NO. 299.

Order for Payment of Costs (*a*).

Order for payment of costs.

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

A. B. against C. D.

I do order that [C. D.] the [*defendant*] do, within seven days from the service of this order, pay to Messrs. E. and F., of the solicitors of the [*plaintiff*] the sum of £ , being the amount of the [*plaintiff's*] costs, as taxed and certified by one of the registrars of this Division.

Dated this day of 19 .

FORM NO. 300.

Garnishee Order—*Nisi* (Attaching Debt). (O. 45, r. 1.) (*a*).

Garnishee order —*nisi* (attaching debt). (O. 45, r. 1.)

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Between judgment creditor,
and
judgment debtor,
, garnishee.

Upon hearing , and upon reading the affidavit of filed the day of , 19 , and .

It is ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor be attached to satisfy the amount due from the said judgment debtor to the above-named judgment creditor under an order dated the day of 19 , for the sum of £ on which order the sum of £ remains due and unpaid.

And it is further ordered that the said garnishee attend one of the Registrars of the Principal Probate Registry, Somerset House, Strand, London, on day, the day of 19 , at o'clock in the noon, on an application by the said judgment creditor that the said garnishee pay the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the amount due under the said order.

Dated the day of 19 .

(Signed) W. Y.,
Registrar.

FORM NO. 301.

Garnishee Order Absolute. (O. 45, r. 3.) (*a*).

Garnishee order absolute. (O. 45, r. 3.)

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Between judgment creditor,
and
judgment debtor,
, garnishee.

Upon hearing the solicitors for the judgment creditor and the garnishee, and upon reading the affidavit of , filed the day of , 19 , and whereby it was ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor should be attached, to satisfy the amount due from the said judgment debtor to the above-named judgment creditor, under an order dated the , 19 , for the sum of £ , on which order the sum of £ remained due and unpaid.

It is ordered that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor (or so much thereof as may be sufficient to satisfy the judgment debt), and that in default thereof execution may issue for the same.

Dated the day of , 19 .

(Signed) W. Y.,
Registrar.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

FORM No. 302.

Order Charging Stock—*Nisi.* (O. 46, r. 1.) (*a*).

Order charging stock—*nisi.* (O. 46, r. 1.)

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Upon hearing the solicitor for the plaintiff and upon reading the affidavit of filed herein, whereby it appears that by an order made on the day of 19 , it was ordered that E. F., the defendant, do pay to the said plaintiff, the sum of £ , and that the said defendant is still indebted to the said plaintiff to the amount of £ , and that there is standing in .

It is ordered that unless sufficient cause be shown to the contrary before one of the Registrars at the Principal Probate Registry of the High Court of Justice, at Somerset House, Strand, London, on the day of , 19 , at of the o'clock in the noon, the defendant's interest in the so standing as aforesaid shall, and that it in the meantime do, stand charged with the payment of the above-mentioned amount due under the said order, together with the costs of this application.

Dated the day of 19 .

(Signed) G. H.,
Registrar.

FORM No. 303.

Order Charging Stock—Absolute. (O. 46, r. 1.) (*a*).

Order charging stock—absolute (O. 46, r. 1.)

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Upon hearing the solicitors for the plaintiff, for the defendant, and for the , and upon reading the affidavit of filed, and the order *nisi* made herein, dated the day of 19 , reciting the affidavits of , whereby it appeared that by an order made on the day of , 19 , it was ordered that E. F., the defendant, do pay to the said plaintiff the sum of £ , and that the said defendant is still indebted to the said plaintiff to the amount of £ , and that there is standing in .

It is ordered that the defendant's interest in the so standing as aforesaid, stand charged with the payment of the above-mentioned amount due under the said order.

Dated the day of 19 .

(Signed) G. H.,
Registrar.

FORM No. 304.

Summons for Appointment of Receiver and Interim Injunction. (O. 50, r. 15A.) (*a*).

Summons for appointment of receiver and interim injunction. (O. 50, r. 15A.)

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Upon reading the affidavit of .

Let the attend one of the Registrars at the Principal Probate Registry, Somerset House, Strand, London, on day, the day of , 19 , at o'clock in the noon, on the hearing of an application on the part of the for the appointment of as receiver in this action, on all usual terms, to receive the rents, profits and moneys receivable in respect of the interest in the following property,

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

namely: in satisfaction of the sum of £ due under the in this dated the .

And the by his solicitor hereby undertaking to abide by any order the Court or a judge may make as to damages in case the Court or a judge should hereafter be of opinion that the shall have sustained any by reason of this order which the ought to pay, it is ordered and directed that the said , his agents and servants, and every of them, be restrained, and an injunction is hereby granted restraining them, and every of them, until after the hearing of the above application, from selling, charging, or otherwise dealing with the said property.

Dated the day of 19 .

(Signed) G. H.,
Registrar.

This summons issued by
To

Solicitors for the .

Form No. 305.

Order Appointing Receiver. (O. 50, r. 15a.) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Order appointing receiver. (O. 50, r. 15a.)

Upon hearing for the and upon reading the affidavit of .

It is ordered that be appointed receiver upon first giving security by bond to the satisfaction of one of the Registrars of the Principal Probate Registry of the High Court of Justice, to receive the rents, profits and monies receivable in respect of the following property (to wit) .

But this appointment is to be without prejudice to the rights of any prior incumbrancers upon the said premises, who may think proper to take possession of or receive the same by virtue of their respective securities, or, if any prior incumbrancer is in possession, then without prejudice to such possession.

And that the tenants of the said premises do attorn and pay their rents in arrear and growing rents to such receiver. And that such receiver have liberty, if he shall think proper (but not otherwise), out of the rents, profits, and monies to be received by him, to keep down the interest upon the prior incumbrances, according to their priorities, and be allowed such payments (if any) in passing his accounts; and that such receiver shall, at such time or times as may be ordered by one of the said registrars, file and pass his accounts, and shall from time to time, as may be hereafter ordered by the registrar, , pay the balance or balances appearing due on the accounts, or such part thereof as shall be certified as proper to be so paid, in or towards satisfaction of what shall for the time being be due in respect of the order or decree made on the day of , for the sum of £ , and £ for costs, making together the sum of £ . And that the costs of this order, and of carrying the same into effect, and of obtaining the discharge of the receiver, shall be primarily payable out of the sums received by the receiver; but if there shall be no sums received, or the amount shall be insufficient, then upon the certificate of one of the said registrars being given stating the amount of the deficiency, the amount of the deficiency so certified shall be paid by the judgment debtor to the judgment creditor.

It is further ordered that the balance (if any) remaining in the hands of the receiver, after making the several payments aforesaid, shall forthwith be paid by the receiver into Court to the credit of this suit, subject to further order.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

ORDERS—*continued.*

And any of the parties are to be at liberty to apply to one of the registrars in chambers as there may be occasion.

Dated the day of 19 .

(Signed) G. H.,
Registrar.

PAYMENTS.

FORM No. 306.

Payment into Court (Authority for) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

I. *Request for authority for Lodgment.*

In the Estate of A. B., deceased.

C. D. against E. F.

To the Registrar.

I request authority for the lodgment of at the Bank of England; such lodgment being for as directed by order dated* .

Payment into court (authority for).

(Signature) G. H.,
Solicitor for the .

* *Strike out these words if the lodgment is for security for costs of discovery or interrogatories.*

II. *Authority for Lodgment.*

To the Agent of the Bank of England (Law Courts Branch).

Please receive the above-stated sum, and place it to the account of the Paymaster-General for the time being for and on behalf of the Supreme Court of Judicature.

(Signature) I. J.,
Registrar.

(Date) , 19 .

III. *Bank Certificate of Receipt.*

To the Assistant Paymaster-General,
Bank of England , 19 .

The above-stated sum has been this day received.

(Signature) K. L.

[NOTE.—*If the lodgment is for security for costs of* discovery *or* interrogatories, *this form must be impressed with a 1/- stamp before the money is lodged.*]

FORM No. 307.

Payment out of Court (Authority for) (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.

In the Estate of A. B., deceased.

C. D. against E. F.

Date , 19 .

The Paymaster-General is hereby directed to make the payments specified below out of the money standing in his books to the credit of the above cause or matter.

Payment out of court (authority for).

(*a*) These forms are specimens only, and must be altered to suit individual cases.

PAYMENTS—*continued.*

Name of person to whom, and also of the person (if any) upon whose authority, payment is to be made.		When lodged.	Amount to be paid.
Person to be paid (Christian name to precede surname).	Person (if any) to give authority for payment.		
G. H., of Solicitor for			

Total amount in words .

I. J.,
Registrar.

PLEADINGS.

Form No. 308.

Statement of Claim. (O. 19, r. 5.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.) 1910. L. No. 156.
In the Estate of E. L., deceased.
Writ issued on the day of , 19 .
Between F. L., plaintiff,
and
M. C., A. C. and B. C., defendants.

Statement of Claim.

Statement of claim. (O. 19, r. 5.)

The plaintiff is one of the executors named in the true last will of E. L., deceased, who died on the day of , 19 , her said will bearing date the day of , 19 .

The plaintiff claims :—

(1) Probate of the said will in solemn form of law.

(2) Such further relief as may be just.

(Signed) X. Y.

Delivered the day of , 19 , by & Co., of , plaintiff's solicitor.

Form No. 309.

Statement of Defence and Counterclaim. (O. 19, r. 5.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.) 1910. L. No. 156.
In the Estate of E. L., deceased.
Between F. L., plaintiff,
and
M. C., A. C. and B. C., defendants.
Defence and counterclaim of the defendant M. C.

Defence.

Statement of defence and counter-claim. (O. 19, r. 5.)

1. This defendant admits that the plaintiff is one of the executors of the will of E. L., deceased, as in the statement of claim mentioned.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

PLEADINGS—*continued.*

2. The said will appointed this defendant jointly with the plaintiff executors thereof.

3. The said E. L. made a codicil to her said will dated the day of , 19 .

Counterclaim.

4. By way of counterclaim this defendant repeats the allegations in his defence and claims :—

(1) That the Court will grant probate of the said will and codicil in solemn form of law.

(2) Such further and other relief as the nature of the case may require.

(Signed) B. H.

Delivered the day of , 19 , by R. M. & Co., of , solicitors for the defendant M. C.

FORM NO. 310.

Reply and Defence to Counterclaim. (O. 19, r. 5.) (*a*).

Reply and defence to counterclaim. (O. 19, r. 5.)

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.) 1910. L. No. 156.
In the Estate of E. L., deceased.
Between F. L., plaintiff,
and
M. C., A. C. and B. C., defendants.

Reply and defence to counterclaim to the defence and counterclaim of the defendant M. C.

The plaintiff says that :—

1. The said alleged codicil dated was not duly executed according to the provisions of the statute 1 Vict. cap. 26.

The substance of the case under this paragraph is that this defendant is put to the proof of the due execution of the said codicil.

2. The said deceased at the time of the execution of the said alleged codicil did not know and approve of the contents thereof.

3. The said deceased at the time the said alleged codicil purports to have been executed was not of sound mind, memory, and understanding.

4. The making and execution of the said alleged codicil was obtained by the undue influence of the defendant M. C.

The substance of the case under paragraphs 2, 3, and 4 is as follows :— . . . . . .

And by way of defence to counterclaim the plaintiff further says :—

5. That as to the said codicil he repeats paragraphs 1, 2, 3, and 4 of the reply herein.

And the plaintiff claims :

(1) That the Court will be pleased to pronounce against the validity of the said alleged codicil ;

(2) As before.

(Signed) X. Y.

Delivered the day of , 19 , by & Co., plaintiff's solicitors.

POWERS OF ATTORNEY.

FORM NO. 311.

Power of Attorney to take Administration (*a*).

Power of attorney to take administration.

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of , deceased.

WHEREAS , late of , deceased, died on the day of , 19 , at , intestate, and that I am his lawful widow and relict. And whereas I the said am now residing at .

Now, I the said , of , do hereby nominate and appoint my lawful attorney for me and on my behalf to apply to the Probate Division

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

POWERS OF ATTORNEY—*continued.*

of his Majesty's High Court of Justice in England and obtain letters of administration of all the estate which by law devolves to and vests in the personal representative of the said deceased to be granted to him for my use and benefit and until I shall duly apply for and obtain letters of administration of the said estate of the said deceased to be granted to me, and I hereby promise to ratify, allow, and confirm whatsoever my said attorney shall lawfully do or cause to be lawfully done in the premises by virtue of these presents. In witness whereof I have hereunto set my hand and seal at this day of , 19 .

Signed, sealed and delivered by the said in the presence of

(Signed)

FORM No. 312.

Power of Attorney to take Letters of Administration (with Will) given by Executors (*a*).

Power of attorney to take letters of administration (with will) given by executors.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

WHEREAS A. B., of , died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , and thereof appointed C. D. and E. F. executors.

Now we, the said C. D. and E. F., at present residing at , do hereby nominate, constitute, and appoint G. H., of , to be our lawful attorney for the purpose of obtaining letters of administration (with the said will annexed) of all and singular the estate of the said A. B., deceased, to be granted to him for our use and benefit, and until we shall duly apply for and obtain probate of the said will to be granted to us; and we hereby promise to ratify and confirm whatever our said attorney shall lawfully do or cause to be done in the premises.

In witness whereof we have hereunto set our hands and seals this day of , 19 .

Signed, Sealed, and Delivered by the said C. D. and E. F. in the presence of

(Signed) C. D.

(Signed) E. F.

FORM No. 313.

Power of Attorney to take Administration (Will) given by Residuary Legatee (*a*).

Power of attorney to take administration (will) given by residuary legatee.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

WHEREAS A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament bearing date the day of , 19 , and did not name any executor therein but did name C. D. residuary legatee.

Now I, the said C. D., at present residing at , do hereby nominate, constitute, and appoint E. F., of , my lawful attorney for the purpose of obtaining letters of administration (with the said will annexed) of the estate of the said A. B., deceased, to be granted to him by the High Court of Justice for my use and benefit, and until I shall duly apply for and obtain letters of administration (with the said will annexed) of the said estate to be granted to me, and I hereby promise to ratify and

(*a*) These forms are specimens only, and must be altered to suit individual cases.

POWER OF ATTORNEY—*continued.*

confirm whatever my said attorney shall lawfully do or cause to be done in the premises.

In witness whereof I have hereunto set my hand and seal this day of , in the year of our Lord, 19 .

Signed, sealed, and delivered by the said C. D., in the presence of } (Signed) C. D.

PRÆCIPES.

FORM No. 314.

Præcipe for Citation (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

Citation for C. D. against E. F. in a matter of calling upon E. F., G. F., and H. F., to accept or refuse letters of administration of the estate of A. B., late of , in the county of , who died on the day of , 19 , at .

Præcipe for citation.

(Signed) M., N. & Co.,
Solicitors for C. D.
Address (for service), .

Dated this day of , 19 .

FORM No. 315.

Præcipe for Setting down Action for Trial (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

hereby enters this action for trial by a judge of the Probate Division of this Court [*or*] of the issues of fact arising from the pleadings in this action by a judge of the Probate Division of this Court and a jury.

Præcipe for setting down action for trial.

Dated the day of , 19 .

(Signed) ,
Address .
Solicitor for .

FORM No. 316.

Præcipe for Subpœna *ad Testificandum* (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Subpœna for to testify between plaintiff and defendant on the part of the .

Præcipe for subpœna *ad testificandum.*

Dated the day of , 19 .

FORM No. 317.

Præcipe for Subpœna to bring in a Script (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Subpœna for G. H. to bring into and leave in the Principal Probate Registry [*here accurately describe the script*] the day of , 19 .

Præcipe for subpœna to bring in a script.

(Signed) C. D.,
Plaintiff's [*or* defendant's] solicitor.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

PRÆCIPES—*continued.*

FORM No. 318.

Præcipe for Subpœna to a Witness to be Examined touching a Testamentary Paper of which he is supposed to have Knowledge (*a*).

Præcipe for subpœna to a witness to be examined touching a testamentary paper of which he is supposed to have knowledge.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

In the Estate of A. B., deceased.

Subpœna for C. D. to testify respecting a paper writing or script being or purporting to be testamentary, to wit, [*describe the document*] of which he is supposed to have knowledge, on the part of , this day of , 19 .

(Signed) E. F.,
Plaintiff's [*or* defendant's] solicitor.

RENUNCIATIONS.

FORM No. 319.

Renunciation of Probate (*a*).

Renunciation of probate.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament , bearing date the day of , 19 , and thereof appointed me, the undersigned C. D., sole executor. Now I, the said C. D., do hereby declare that I have not intermeddled in the estate of the said deceased and will not hereafter intermeddle therein with intent to defraud creditors, and I hereby renounce all my right and title to the probate and execution of the said will.

Signed by the said C. D. this day of , 19 , in the presence of } (Signed) C. D.
Signature of witness
Address .

FORM No. 320.

Renunciation of Letters of Administration (*a*).

Renunciation of letters of administration.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

WHEREAS A. B., of , in the county of , deceased, died on the day of , 19 , at , intestate, a widower; and whereas I, C. D., am his natural and lawful son and only next of kin. Now I, the said C. D., do hereby renounce all my right and title to letters of administration of the estate of the said deceased.

Signed by the said C. D. this day of 19 , in the presence of } (Signed) C. D.
Signature of witness
Address .

FORM No. 321.

Renunciation of Letters of Administration (with Will) (*a*).

Renunciation of letters of administration with will).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament,

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

RENUNCIATIONS—*continued.*

bearing date the day of , and did not therein name any executor, but therein appointed me, the undersigned C. D., residuary legatee. Now I, the said C. D., do hereby renounce all my right and title to letters of administration (with the said will annexed), of the estate of the said deceased.

Signed by the said C. D.
this day of 19 ,
in the presence of
(Signed) C. D.

Signature of witness
Address .

FORM No. 322.

Renunciation of Guardianship of a Minor (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Renunciation of guardianship of a minor.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , and therein appointed C. D. sole executor and residuary legatee and devisee ; and whereas the said C. D. is now a minor of the age of years.

And whereas I, the undersigned E. F., am the natural and lawful grandfather and only next of kin of the said C. D.

Now I, the said E. F., do hereby renounce all my right and title in and to the guardianship of the said minor.

Signed by the said E. F.
this day of 19 ,
in the presence of
(Signed) E. F.

Signature of witness
Address .

FORM No. 323.

Renunciation of Guardianship of an Infant (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Renunciation of guardianship of an infant.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, and not possessed of any real estate, leaving him surviving C. B. his natural and lawful and only son and only next of kin, who is now an infant of the age of years only ; and whereas I, the undersigned D. E., am the lawful uncle and only next of kin of the said C. B.

Now I, the said D. E., do hereby renounce all my right and title in and to the guardianship of the said infant.

Signed by the said D. E.
this day of 19 ,
in the presence of
(Signed) D. E.

Signature of witness
Address .

FORM No. 324.

Renunciation of Letters of Administration by Guardian of Minor and Infant (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
In the Estate of A. B., deceased.

Renunciation of letters of administration by guardian of minor and infant.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, leaving C. B. and D. B. his natural, lawful, and only children, only next of kin, and the only persons entitled in

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

RENUNCIATIONS—*continued.*

distribution to his personal estate, the said C. B. being also his heir-at-law. And whereas the said C. B. is now in his minority, to wit, of the age of years and upwards, but under the age of twenty-one years, and the said D. B. is now in his infancy, to wit, of the age of years only. And whereas the said C. B., the minor aforesaid, has in and by an instrument under his hand expressly elected me, the undersigned E. F., his lawful and only next of kin, to be his guardian for the purpose of renouncing in his name and on his part letters of administration of the estate of the said deceased. And whereas I have been duly assigned the guardian of the said D. B.

Now I, the said E. F., do hereby as guardian of the said minor and infant, renounce all their right, title, and interest in and to letters of administration of the said estate.

Signed by the said E. F.
this day of
19 , in the presence
of K. L.

(Signed) E. F.

FORM No. 325.

Renunciation of Letters of Administration by Guardian of Infant (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.

In the Estate of A. B., deceased.

Renunciation of letters of administration by guardian of infant.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , intestate, a widower, leaving C. D. and E. F. his natural and lawful and only children and only next of kin, the said C. D. being also his heir-at-law; and whereas the said C. D. and E. F. are now in their infancy, being both under the age of seven years; and whereas by order dated the day of , G. H., one of the Registrars of the Principal Probate Registry of this Division, assigned I. J., the lawful uncle and only next of kin of the said infants, guardian to the said infants for the purpose of renouncing on their part and behalf the letters of administration of the estate of the said deceased.

Now I, the said I. J., do hereby as guardian of the said infants, renounce all their right, title, and interest in and to letters of administration of the said estate.

Signed by the said G. H., this
day of 19
in the presence of

(Signed) I. J.

FORM No. 326.

Renunciation and Consent of Father (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)

In the Estate of A. B., deceased.

Renunciation and consent of father.

WHEREAS A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, leaving me, the undersigned C. D., of , his natural and lawful father and next of kin.

Now I, the said C. D., do hereby renounce all my right and title in and to the letters of administration of the estate of the said deceased, and I do also hereby consent that letters of administration of the said estate may be granted to E. F., my natural and lawful son.

Signed by the said C. D., this
day of 19
in the presence of

(Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

RENUNCIATIONS—*continued.*

FORM No. 327.

Retractation of Renunciation (*a*).

Retractation of renunciation.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The Principal Probate Registry.
In the Estate of A. B., deceased.

WHEREAS A. B., of , in the county of , deceased, died on the day of , 19 , at , having made and duly executed his last will and testament, bearing date the day of , 19 , and thereof appointed C. D. executor and me the undersigned E. F. residuary legatee; and whereas the said C. D. duly renounced the probate and execution of the said will, and I the said E. F. also duly renounced letters of administration with the said will annexed of the estate of the said deceased; and whereas letters of administration, with the said will annexed, of the said estate were on the day of granted by authority of this Division to G. H., a creditor of the said deceased; and whereas the said G. H. died on the day of , 19 , leaving part of the said estate unadministered.

Now I, the said E. F., do hereby declare that I retract the renunciation of the letters of administration with the said will annexed of the said estate, so as aforesaid by me heretofore made.

Signed by the said E. F., this
day of 19
in the presence of
(Signed) E. F.

REPLY. *See* "PLEADINGS."

REQUESTS.

FORM No. 328.

Letter forwarding Request for Service Abroad. (O. 11, r. 8.) (*a*).

Letter forwarding request for service abroad. (O. 11, r. 8.)

The President of the Division of the High Court of Justice presents his compliments to his Majesty's Principal Secretary of State for Foreign Affairs, and begs to enclose a notice of a writ of summons issued in an action of *versus* pursuant to order, out of the High Court of Justice in England for transmission to the Ministry of Foreign Affairs in [*name of country*] with the request that the same may be served personally upon [*name of defendant to be served*] against whom proceedings have been taken in the English Court, and with the further request that such evidence of the service of the same upon the said defendant may be officially certified to the English Court, or declared upon oath, or otherwise, in such manner as is consistent with the usage or practice of the Courts of the [*name of country*] in proving service of legal process.

The President begs further to request that in the event of efforts to effect personal service of the said notice of writ proving ineffectual the Government or Court of the said country be requested to certify the same to the English Court.

[R. S. C. (July) 1903, Sched.]

FORM No. 329.

Request for Service Abroad. (O. 11, r. 8.) (*a*).

Request for service abroad. (O. 11, r. 8.)

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

I [*or* we] hereby request that a notice of writ of summons in this action be transmitted through the proper channel to [*name of country*]

(*a*) These forms are specimens only, and must be altered to suit individual cases.

REQUESTS—*continued.*

for service [*or* substituted service] on the defendant [*naming him*] at [*address of defendant*] or elsewhere in [*name of country*].

And I [*or* we] hereby personally undertake to be responsible for all expenses incurred by his Majesty's Principal Secretary of State for Foreign Affairs in respect of the service hereby requested, and on receiving due notification of the amount of such expenses I [*or* we] undertake to pay the same to the Chief Clerk at the Foreign Office, and to produce the receipt for such payment to the proper officer of the High Court.

Dated, etc. (Signature of solicitor.)

FORM NO. 330.

Letter forwarding Request for Substituted Service. (O. 11, r. 8.) (*a*).

Letter forwarding request for substituted service. (O. 11, r. 8.)

The President of the Division of the High Court of Justice presents his compliments to his Majesty's Principal Secretary of State for Foreign Affairs, and begs to enclose a notice of a writ of summons in the case of *versus* in which the plaintiff has obtained an order of the English High Court (which is also enclosed) giving leave to bespeak a request that the said notice of writ may be served by substituted service on the defendant at in the [*name of country*].

The President requests that the said notice of writ and order may be forwarded to the proper authority in [*name of country*] with the request that the same may be transmitted by post addressed to the defendant at [the last known place of abode *or* the place of business] of the said defendant, or there delivered in such manner as may be consistent with the usage or practice of the Courts of [*name of country*] for service of legal process where personal service cannot be effected; and with the further request that the same may be officially certified to the English Court, or declared upon oath, or otherwise, in such manner as is consistent with the practice of the Courts of the [*name of country*] in proving service of legal process.

STATEMENT OF CLAIM. *See* "PLEADINGS."

SUBPŒNAS.

FORM NO. 331.

Subpœna *ad Testificandum* (General Form). (O. 37, r. 27.) (*a*).

19 . [*Here put the letter and number.*]
In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
Between plaintiff,
and
defendant.

Subpœna *ad testificandum* (general form). (O. 37, r. 27.)

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to [*the names of three witnesses may be inserted*] greeting:

We command you to attend before at on day the day of , 19 , at the hour of in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the plaintiff [*or* defendant].

Witness, etc.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

SUBPŒNAS—*continued.*

FORM NO. 332.

Subpœna *duces tecum.* (O. 37, r. 27.) (*a*).

Subpœna *duces tecum.* (O. 37, r. 27.)

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
C. D. against E. F.

GEORGE V., by the grace of God, etc., to [*the names of three witnesses may be inserted*] greeting :

We command you to attend before at , on day the day of , 19 , at the hour of in the noon, and so from day to day until the above cause is tried, to give evidence on behalf of the , and also to bring with you and produce at the time and place aforesaid [*specify documents to be produced*].

Witness, etc.

FORM NO. 333.

Subpœna to bring in a Script. (O. 20, r. 2 (n.).) (*a*).

Subpœna to bring in a script. (O. 20, r. 2 (n.).)

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith :

To of .

WHEREAS it appears by an affidavit of sworn the day of , and filed in the Principal Probate Registry of the Probate, Divorce and Admiralty Division of our High Court of Justice, that a certain original paper or script, being or purporting to be testamentary, to wit [*here describe the paper*], bearing date the day of , 19 , is now in your possession, within your power, or under your control :

Now this is to command you, that within eight days after service hereof on you, inclusive of the day of such service, you do bring into and leave in the Principal Probate Registry aforesaid the said original paper or script now in the possession, within the power, and under the control of you the said : And this you shall in no wise omit under pain of the law and contempt thereof.

Witness, the Right Honourable , at our High Court of Justice, the day of , 19 , in the year of our reign.

(Signed) E. F.
Registrar.

Subpœna to bring in a script [*name and address of solicitor*], solicitor.

N.B.—*The Principal Probate Registry of the Probate, Divorce and Admiralty Division of the High Court of Justice is at Somerset House, Strand, in the county of Middlesex.*

FORM NO. 334.

Subpœna to Bring in a Script Decreed by the Court (*a*).

Subpœna to bring in a script decreed by the Court.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.

GEORGE V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith :

To of .

WHEREAS there is now proceeding in our Court of Probate a certain business of proving in solemn form of law the last will and testament of

(*a*) These forms are specimens only, and must be altered to suit individual cases.

SUBPŒNAS—*continued.*

A. B. , late of , deceased, who died on or about , at , the said will bearing date the day of , 19 , promoted by C. D., the sole executor [*or as the case may be*] therein named, against E. F. the natural and lawful brother and one of the next of kin of the said deceased [*or as the case may be*]: And whereas the right honourable the judge of our said Court did, by his order made in the said cause, and bearing date , order and direct that a subpœna do issue, under seal of our said Court, to the purport and effect hereinafter mentioned.

Now this is to command you, that, within eight days after service on you, inclusive of the day of such service, you do bring into and leave in the Principal Registry of our said Court, a certain original paper writing or script purporting to be testamentary, to wit [*here describe the script accurately*], if the same be now in your possession or under your control: or in case the said paper writing or script be not in your possession, or under your control, that you, within eight days after the service hereof on you, inclusive of the day of such service, do file in the Principal Registry of our said Court an affidavit to that effect, and therein set forth what knowledge you have of and respecting the said paper writing or script. And this you shall in nowise omit, under the penalty of 100*l.*

Witness [*insert the name of the judge*], at the Court of Probate, the day of , 19 , in the year of our reign.

(Signed) E. F.,
Registrar.

[*Name of the practitioner and address.*]

INDORSEMENT TO BE MADE AFTER SERVICE.

This subpœna was served by I. J. on the within-named of , at , on the day of , 19 .

(Signed) I. J.

FORM No. 335.

Subpœna to a Witness to be Examined Touching a Testamentary Paper (*a*).

Subpœna to a witness to be examined touching a testamentary paper.

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

GEORGE V., by the grace of God, etc.

To , greeting:

We command you to attend at the sittings of the Probate, Divorce and Admiralty Division of our High Court of Justice at the Royal Courts of Justice, Strand, in our county of Middlesex, on the day of , 19 , by half-past ten of the clock in the forenoon of the same day, and so from day to day whenever the said Division of our said Court is sitting, until the action or proceeding is heard, to testify the truth according to your knowledge [*or,* to answer certain interrogatories to be administered to you], in a certain action now in the said Division of our said Court, depending between plaintiff, and defendant, touching a certain paper writing or script, being or purporting to be testamentary, to wit [*here describe the script, giving the date as accurately as possible*], of which said paper writing or script reasonable grounds have been furnished to our said Court for believing you have knowledge. And this you or any of you shall by no means omit, under the penalty of each of you of one hundred pounds.

Witness, the Right Honourable , at our High Court of Justice, the day of , 19 , in the year of our reign.

Subpœna issued by of , solicitor for the .

N.B.—*Notice will be given to you of the day on which your attendance will be required.*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

SUMMONSES.

FORM No. 336.

Summons for Directions. (R. S. C., O. 30.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
19 , , No. .
In the Estate of A. B., deceased.
Between plaintiff,
and
defendant.

Summons for directions. (R. S. C., O. 30.)

Let all parties concerned attend one of the registrars, at the Principal Probate Registry of the High Court of Justice, at Somerset House, Strand, in the county of Middlesex, on day, the day of , 19 , at o'clock in the noon, on the hearing of an application on the part of the to show cause why an order for directions should not be made in this action as follows :—

Affidavit of scripts.—

Pleadings.—Endorsement on writ to stand for statement of claim. Statement of claim containing full particulars in days. Statement of defence containing full particulars in days. Reply (if necessary) in days.

Admissions.—

Discovery.—That after defence delivered the plaintiff and defendant do respectively within ten days after service of copy receipt for deposit in Court file an affidavit of documents.

Interrogatories.—For leave to interrogate the . Answers to be filed within ten days.

Inspection of documents.—

Inspection of real or personal property.—

Commissions.—

Examination of witnesses.—

Place of trial.—

Mode of trial.—

Any other interlocutory matter or thing.—

Liberty to apply .

And that the costs of this application be costs in the cause.

Dated the day of 19 .

This summons was taken out by , of , solicitor for .
To .

FORM No. 337.

Registrar's Summons (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
In the Estate of A. B., deceased.
E. F. against C. D.

Registrar's summons.

Let the attend one of the Registrars at the Principal Probate Registry of the High Court of Justice, at Somerset House, Strand, in the county of Middlesex, on next, the day of , 19 , at of the clock, to show cause why .

Dated the day of 19 .

This summons issued by , solicitor for the .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

SUMMONSES—*continued.*

FORM No. 338.

Judge's Summons (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Judge's summons.

Let the attend one of the Judges of this Division at his Chambers at the Royal Courts of Justice, on next, the day of , 19 , at of the clock, to show cause why the .

Dated the day of 19 .

This summons issued by , solicitor for the .

FORM No. 339.

Notice under Summons for Directions (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Notice under summons for directions.

TAKE notice that the above-named plaintiff intends to apply to one of the Registrars at the Principal Probate Registry of the High Court of Justice at Somerset House, Strand, in the county of Middlesex, on the day of , 19 , at 12 o'clock noon, for further directions in this action as to .

Dated .

G. H. & Co.,
Solicitors for the plaintiff.

To Messrs. I. J. & Co., defendant's solicitors.

FORM No. 340.

Summons to discontinue Contentious Proceedings (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division. (Probate.)

In the Estate of A. B., deceased.

C. D. against E. F.

Summons to discontinue contentious proceedings.

Let the defendant attend one of the registrars at the Principal Probate Registry of the High Court of Justice, at Somerset House, Strand, in the county of Middlesex, on [Tuesday], the day of , 19 , at [12] of the clock, to show cause why the contentious proceedings in this action [*or* matter, *if before writ of summons*] arising from Caveat No. , entered on the day of , 19 , and also from writ of summons issued on the day of , 19 , should not be discontinued and why [probate of the will dated the day of , 19 ,] of A. B., of , in the county of , the deceased therein, should not be granted to [*C. D., the sole executor named in the said will*], the [*plaintiff*] in this action [*or matter*] if entitled thereto.

Dated day of , 19 .

Summonses issued by X. Y.,
Solicitor for the plaintiff.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

WARNING.

Form No. 341.

Warning to Caveat (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The Principal Probate Registry.

Dated the day of , 19 .
To A. B., of , [*or* C. D., of , solicitor].

Warning to caveat.

You are hereby warned, within six days (exclusive of Sunday) after the service of this warning upon you, inclusive of the day of such service, to cause an appearance to be entered for you in the said Principal Probate Registry to the caveat entered by you in the estate of E. F., of , deceased, who died at , on or about the day of , 19 , and to set forth your [*or* your client's] interest.

And take notice that in default of your so doing, the said Court will proceed to do all such acts, matters, and things as shall be needful and necessary to be done in and about the premises.

Issued at the instance of G. H. [add the interest of G. H. in the matter, and give an address for service of notices within three miles.]

(Signed) I. J.,
Registrar.

WRITS.

Form No. 342.

Writ of Summons (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
19 . [*Here put the letter and number.*]
In the Estate of X. Y., deceased.
Between A. B., plaintiff,
and
C. D., defendant.

Writ of summons.

George V., by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith:

To C. D., of , in the county of .

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of A. B.; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, , Lord High Chancellor of Great Britain at the High Court of Justice in London, the day of , 19 , and in the year of our reign.

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within twelve calendar months from date thereof, or, if renewed within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant [*or* defendants] may appear hereto by entering an appearance [*or* appearances] either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

Indorsement.

The plaintiff claims, etc. (*see Form* 343, *and post,* pp. 1159—1162).

Certificate.

A sufficient affidavit in verification of the indorsement on this writ to

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

WRITS—*continued.*

authorise the sealing thereof has been produced to me this day of , 19 .

(Signed) V. W.,
Registrar.

This writ was issued by the said plaintiff, who resides at , *or*, this writ was issued by E. F., of , whose address for service is , solicitor for the said plaintiff, who resides at , *or*, this writ was issued by G. H., of , whose address for service is , agent for , of , solicitor for the said plaintiff, who resides at .

Indorsement to be made on the writ after service thereof.

This writ was served by me at on the defendant on the day of , 19 .
Indorsed the day of , 19 .
(Signed)
(Address)

FORM NO. 343.

Indorsements on Writ (Specimens of) (*a*).

1.

(Executors against widow.)

Indorsements on writ (specimens of).

The plaintiffs claim to be the executors of the last will and testament bearing date , of A. B., late of , deceased, who died , and to have the said will established.

This writ is issued against you the said C. D. as the widow of the said deceased, and interested in the event of an intestacy.

2.

(Husband against executors of alleged will.)

The plaintiff is the lawful husband of C. D., late of , deceased, who died on the , intestate, and claims letters of administration of the estate of the said deceased to be granted to him, and to have an alleged will of the said deceased bearing date , pronounced against.

This writ is issued against you the said E. F. and G. H. as the executors of the said alleged will.

Etc., etc.

FORM NO. 344.

Writ for Service out of the Jurisdiction, or where Notice in lieu of Service is to be given out of the Jurisdiction. (O. 2, r. 5.) (*a*).

[*Title, etc., as in No.* 342.]

Writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction. (O. 2, r. 5.)

GEORGE V., by the grace of God, etc. [*as in Form No.* 342].

To C. D., of .

We command you, C. D., That within [*here insert the number of days directed by the Court or judge ordering the service or notice*] after the service of this writ [*or notice of this writ, as the case may be*] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of our High Court of Justice in an action at the suit of A. B.; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, etc. [*as in Form No.* 342].

Indorsement to be made on the writ before the issue thereof.

The plaintiff claims, etc.

This writ [*or* notice of writ] is issued against you as .

N.B.—*This writ is to be served within twelve calendar months from*

(*a*) These forms are specimens only, and must be altered to suit individual cases.

WRITS—*continued.*

the date thereof, or if renewed within six calendar months from the last renewal, including the day of such date, and not afterwards. Appearance to be entered at the Central Office, Royal Courts of Justice, London.

This writ was issued by , of , whose address for service is , solicitor for the plaintiff, who resides at .

The writ [*or* notice of this writ] was served by me at , on the defendant , on the day of , 19 .

Indorsed the day of .

(Signed)
(Address)

N.B.—This writ is to be used where the defendant or all the defendants or one or more defendant or defendants is or are out of the jurisdiction. When the defendant to be served in not a British subject, and is not in British dominions, notice of the writ, and not the writ itself, is to be served upon him.

FORM NO. 345.

Notice of Writ in lieu of Service to be given out of the Jurisdiction. (O. 2, r. 5.) (*a*).

[*Title, etc., as in No.* 342.]

To G. H., of

TAKE notice, that A. B., of , has commenced an action against you, G. H., in the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice in England, by writ of that court, dated the day of , A.D. 19 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing, the said A. B. may proceed therein, and judgment may be given in your absence.

Notice of writ in lieu of service to be given out of the jurisdiction. (O. 2, r. 5.)

You may appear to the said writ by entering an appearance personally or by your solicitor at the Central Office, Royal Courts of Justice, London.

(Signed) A. B. of etc.
or X. Y., of etc.
Solicitor for A. B.

N.B.—This notice is to be used where the person to be served is not a British subject, and is not in British dominions.

FORM NO. 346.

Writ of Attachment. (O. 44.) (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
In the Estate of A. B., deceased.
C. D. against E. F.

GEORGE V., by the grace of God, etc. [*as in Form No.* 342].

To the sheriff of , greeting :

Writ of attachment (O. 44.)

We command you to attach C. D. so as to have him before us in the Probate Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, etc.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

WRITS—*continued.*

Notice to Sheriff.—*This writ, if issued for default in payment of money, is subject to the following limitation :—*

If under section 4 *of the Debtors Act,* 1869, *it does not authorise imprisonment for any longer period than* one year.

Indorsement.—*This writ was issued by, etc., solicitors for the who resides at , and was issued pursuant to order dated the day of* , 19 , *for such default as is therein mentioned* [*being a default in payment of money under section* 4 *of the Debtors Act,* 1869] or [*not being a default in payment of money*].

[*Note.*—The above "Notice to the sheriff" (which forms a footnote to the official forms now in use) and the "Indorsement" form no part of the Appendix to the Rules, but were added to the above form under O. 61, r. 33. Two copies of this writ must be made : one to be issued, and one to be filed on issuing.]

PART II.—FORMS IN USE IN THE DISTRICT PROBATE REGISTRIES.

[NOTE.—A selection only of the forms in use in the District Probate Registries are here given. For others reference may be had to the preceding forms, but in making use of the Oaths, etc., already given a statement must be added that "the deceased had, at the time of his death, a fixed place of abode at , within the district of " (the district of the Registry where application is made).]

BONDS.

Form No. 347.

Bond—Administration (*a*).

Bond—Administration.

Know all men by these presents, that we, A. B., of , schoolmaster, C. D., of , greengrocer, and E. F., of , haberdasher, are jointly and severally bound unto the Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of his Majesty's High Court of Justice, in the sum of pounds, of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals.

Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the natural and lawful father of G. H., deceased, who died on the day of , 19 , and the intended administrator of all the estate which by law devolves to and vests in the personal representative of the said deceased do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the said estate which has or shall come to his hands, possession, or knowledge, or into the hands and possession of any other person for him, and the same so made do exhibit, or cause to be exhibited, into the District Probate Registry of his Majesty's High Court of Justice at , whenever required by law so to do, and the said estate, do well and truly administer according to law : And further do make, or cause to be made, a just and true account of his said administration, whenever required by law so to do. And if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors or

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(*a*) These forms are specimens only, and must be altered to suit individual cases.

BONDS—*continued.*

other persons therein named do exhibit the same into the said Division of the said Court, making request to have it allowed and approved accordingly, if the said intended administrator being thereunto required, do render and deliver the letters of administration (approbation of such testament being first had and made) into the said Court, then this obligation to be void and of none effect, or else to remain in full force and virtue.

(Signed) A. B.

Signed, sealed, and delivered by the within-named A. B., C. D., and E. F., in the presence of

C. D.

E. F.

A commissioner for oaths.

FORM No. 348.

Bond—Administration (with Will) (*a*).

Bond—Administration (with will).

KNOW all men by these presents, that we, A. B., of , widow, C. D., of , baker, and E. F., of , butcher, are jointly and severally bound unto the Right Honourable Sir Samuel Thomas Evans, Knight, the President of the Probate, Divorce, and Admiralty Division of His Majesty's High Court of Justice, in the sum of pounds, of good and lawful money of Great Britain, to be paid to the said Sir Samuel Thomas Evans, or to the President of the said Division for the time being, for which payment well and truly to be made we bind ourselves and each of us, for the whole, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals.

Dated the day of , 19 .

The condition of this obligation is such, that if the above-named A. B., the residuary legatee [*or as the case may be*] of G. H., deceased, who died on the day of , 19 , and the intended administratrix (with the will) of all the estate which by law devolves to and vests in the personal representative of the said deceased do, when lawfully called on in that behalf, make, or cause to be made, a true and perfect inventory of the said estate which has or shall come to her hands, possession, or knowledge, and the same so made do exhibit, or cause to be exhibited, into the District Probate Registry of the High Court of Justice at , whenever required by law so to do. And the said estate , do well and truly administer according to law. And further do make, or cause to be made, a just and true account of her administration when she shall be thereunto lawfully required, then this obligation to be void and of none effect or else to remain in full force and virtue.

(Signed) A. B.

Signed, sealed, and delivered by the within-named A. B., C. D., and E. F., in the presence of

C. D.

E. F.

A commissioner for oaths.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

CAVEAT.

Form No. 349.

Caveat (*a*).

Caveat.

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The District Probate Registry at .

Let nothing be done in the estate of A. B., of , deceased, who died on the day of , 19 , at , and had at the time of his death a fixed place of abode at aforesaid, within the district of , unknown to , of , having interest.

Dated this day of , 19 .

(Signed)

EXEMPLIFICATIONS.

Form No. 350.

Exemplification of Probate or of Letters of Administration with Will annexed (*a*).

Exemplification of probate or of letters of administration with will annexed.

Sworn under £

Extracted by

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The District Probate Registry at .

Be it known, that upon search being made in the District Registry attached to her Majesty's Court of Probate at , it appears that on the day of , in the year of our Lord, 19 , the last will and testament with codicils of A. B., late of , deceased, who died at on or about , 19 , and had, at the time of his death, a fixed place of abode at , within the district of , was proved by C. D., the executor named therein [*or* letters of administration with the last will and testament and codicils annexed of the personal estate and effects of A. B., late of, etc., were granted to C. D., as the], and which probate [*or* letters of administration] now remain of record in the said District Registry. The true tenor of the said will (and codicils) is in the words following, to wit:

[*Here follow the will, codicils, and such affidavits as are registered.*]

In faith and testimony whereof these letters testimonial are issued.

Given at as to the time of the aforesaid search, and the sealing of these presents, this day of , in the year of our Lord, 19 .

(Signed) E. F.,
District Registrar.

(L.S.)

Form No. 351.

Exemplification of Administration (*a*).

Exemplification of administration.

Sworn under £

Extracted by

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The District Probate Registry at .

Be it known, that upon search being made in the District Registry attached to her Majesty's Court of Probate at , it appears that on the day of , in the year of our Lord, 19 , letters of administration of all and singular the personal estate and effects of A. B., late of , who died at on or about , and had, at the time of his death, a fixed place of abode at , within the district of , were granted to C. D., the [*or* one of the] of the said deceased, and which letters of administration now remain of record in the said District Registry. The true tenor of the said letters of administration is in the words following, to wit:

[*Here the letters of administration are to be recited verbatim.*]

In faith and testimony whereof these letters testimonial are issued.

Given at as to the time of the aforesaid search, and the sealing of these presents, this day of , in the year of our Lord, 19 .

(Signed) E. F.,
District Registrar.

(L.S.)

(*a*) These forms are specimens only, and must be altered to suit individual cases.

MINUTE.

FORM No. 352.

Minute on Filing Renunciation (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
District Registry at .
In the Estate of A. B., deceased.

C. D., of , the solicitor of E. F., exhibited an instrument of renunciation under the hand of the said E. F., and alleged that A. B., late of , died on , having in and by his last will and testament appointed the said E. F. and G. H. executors, and that in the month of , 19 , a probate of the said will was granted by authority of Court of at the District Probate Registry thereof at to the said G. H., one of the said executors, the usual power being reserved of making the like grant to the said E. F. And he further alleged that the said E. F. had in and by the said instrument under his hand renounced the probate and execution of the said will .

Minute on filing renunciation.

Whereupon on the application of the said C. D. the said instrument of renunciation was filed in the said District Probate Registry, and the renunciation noted on the record of the said probate.

Dated the day of , 19 .

NOTICES.

FORM No. 353.

Notice by District Registrar of Application for Grant of Probate (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
The District Registry at , day of , 19 .

NOTICE is hereby given, that application has been made to me for a grant of probate of the will bearing date the day of , 19 , of A. B., deceased, who died on the day of , 19 , at , having at the time of his death a fixed place of abode at aforesaid, within the district of , by C. D., of , and E. F., of , the executors named in the said will in the words following :—

Notice by district registrar of application for grant of probate.

(Signed) G. H.,
District Registrar.

To the Registrars of the Principal Registry.

FORM No. 354.

Notice by District Registrar of Application for Grant of Administration with Will (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
The District Registry at , day of , 19 .

NOTICE is hereby given, that application has been made to me for a grant of letters of administration with the will annexed, the said will bearing date the day of , of the estate of A. B., late of , deceased, who died on the day of , at , having at the time of his death a fixed place of abode at , within the district of , by C. D., of , the named in the said will , in the following words :—

Notice by district registrar of application for grant of administration with will.

(Signed) E. F.,
District Registrar.

To the Registrars of the Principal Registry.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

NOTICES—*continued.*

FORM No. 355.

Notice by District Registrar of Application for Grant of Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The District Probate Registry at .
day of , 19 .

Notice by district registrar of application for grant of administration.

NOTICE is hereby given that application has been made to me for a grant of letters of administration of the estate of A. B., of , deceased, who died on the day of , 19 , at , intestate, having at the time of his death a fixed place of abode at aforesaid, within the district of , by , of , the of the said intestate.

(Signed) X. Y.,
District Registrar.

To the Registrars of the Principal Registry.

FORM No. 356.

Notice of the Entry of a Caveat (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
(Probate.)
The District Registry at .
To the Registrars of the Principal Registry.

Notice of the entry of a caveat.

YOU are requested to take notice that a caveat has been entered in the District Probate Registry of his Majesty's High Court of Justice at of the following tenor:

"In his Majesty's High Court of Justice.
"The District Registry at .
"Let nothing be done in the goods of A. B., late of , deceased, who died on the day of , 19 , at , and had at the time of his death a fixed place of abode at aforesaid, within the district of , unknown to , having interest."

Dated the day of , 19 .
This day of , 19 .

(Signed) Y. Z.,
District Registrar.

FORM No. 357.

Notice by District Registrar to Irish Probate Registrar Accompanying English Grant for Re-sealing in Ireland (*a*).

In the High Court of Justice (Ireland). Probate, and Matrimonial Division.
Notice of Application

Notice by district registrar to Irish probate registrar accompanying English grant for re-sealing in Ireland.

APPLICATION is made to reseal the enclosed grant of , made in the estate of , late of , by , on behalf of .

Dated this day of , 19 .

(Signed)
District Registrar.

District Probate Registry .
(To be addressed to the Registrars, Principal Registry, Probate and Matrimonial Division, Four Courts, Dublin.)

OATHS.

FORM No. 358.

Oath—for Executors (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
(Probate.)
The District Probate Registry at .
In the Estate of A. B., deceased.

Oath—for executors.

We, C. D., of , baker, and E. F., of , upholsterer, make oath and say that believe the paper writing hereto annexed and

(*a*) These forms are specimens only, and must be altered to suit individual cases.

OATHS—*continued.*

marked by us to contain the true and original last will and testament of A. B., of , formerly of , deceased, who died on the day of , 19 , at , and that the said deceased had at the time of his death a fixed place of abode at , within the district of , and that we are the sons of the said deceased and the executors named in the said will; and that we will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; and that we will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do: and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of our knowledge, information, and belief.

Sworn, etc. (Signed) C. D.
E. F.

FORM No. 359.

Oath—for Administrators with the Will (*a*).

In the High Court of Justice. Probate, Divorce, and Admiralty Division.
The District Probate Registry at .
In the Estate of A. B., deceased.

Oath—for administrators with the will.

I, C. D., of , widow, make oath and say, that I believe the paper writing hereto annexed, and marked by me to contain the true and original last will and testament of A. B., of , formerly of , deceased, who died on the day of , 19 , at , that the said deceased at the time of his death had a fixed place of abode at , within the district of , and that the said deceased did not in the said will name any executor; that I am the relict of the said deceased and the residuary legatee named in the said will, and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do, and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information and belief.

Sworn, etc. (Signed) C. D.

FORM No. 360.

Oath—for Administrators (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The District Probate Registry at .
In the Estate of A. B., deceased.

Oath—for administrators.

I, C. D., of , confectioner, make oath, and say, that A. B., of , deceased, died on the day of , 19 , at , intestate, a bachelor, and that at the time of his death the said deceased had a fixed place of abode at , within the district of , and that I am the natural and lawful father and next of kin of the said deceased; that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased; that I will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of £ and no more, to the best of my knowledge, information, and belief.

Sworn, etc. (Signed) C. D.

(*a*) These forms are specimens only, and must be altered to suit individual cases.

RENUNCIATIONS.

Form No. 361.

Renunciation of Probate (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The District Probate Registry at .
In the Estate of A. B., deceased.

Renunciation of probate.

Whereas A. B., of , who at the time of his death had a fixed place of abode at , within the district of , died on the day of , 19 , at , having made and duly executed his last will and testament , bearing date the day of , 19 , and thereof appointed me, C. D., of , the sole executor.

Now I, the said C. D., do hereby declare that I have not intermeddled in the estate of the said deceased, and will not hereafter intermeddle therein with intent to defraud creditors, and I hereby renounce all my right and title to the probate and execution of the said will.

Signed by the said C. D., this
day of 19
in the presence of
(Signed) C. D.

Signature of witness .
Address .

Form No. 362.

Renunciation of Administration (*a*).

In the High Court of Justice. Probate, Divorce and Admiralty Division.
The District Probate Registry at .
In the Estate of A. B., deceased.

Renunciation of administration.

Whereas A. B. (spinster) of , who at the time of her death had a fixed place of abode at , within the district of , died on the day of , 19 , at , intestate, a spinster, leaving me, C. D., her natural and lawful father and next of kin.

Now I, the said C. D., do hereby renounce all my right and title to letters of administration of the estate of the said deceased.

Signed by the said C. D., this
day of 19 ,
in the presence of
(Signed) C. D.

Signature of witness .
Address .

(*a*) These forms are specimens only, and must be altered to suit individual cases.

APPENDIX VIII.

PRECEDENTS OF PLEADING.

CONTENTS.

	Precedent No.	Page.
INDORSEMENTS ON WRIT		
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INDORSEMENTS ON WRIT.

[*See App. VII., Forms* 342, 343.]

PRECEDENT NO. 1. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Executor (or Legatee) propounds Will. [*Reprinted from R. S. C.* 1883, *App. A., Pt. III., Sec. V., Form No.* 1.]

The plaintiff claims to be executor of the last will dated the day of of *C. W.*, late of , gentleman, deceased, who died on the day of , and to have the said will established.

This writ is issued against you as one of the next of kin of the said deceased [*or as the case may be*].

PRECEDENT NO. 2. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Surviving Executor propounds Will.

The plaintiff claims to be the surviving executor named in the will dated the 1st day of April, 1910, of E. A., late of Alpha, in the county of Beta, spinster, deceased, who died on the 20th day of April, 1910, and to have the said will established.

This writ is issued against you Herbert A. as the natural and lawful nephew and heir-at-law of the deceased, and because you have entered a caveat, and also against you, the said Herbert A., and against you, C. A. and P. A., as the natural and lawful nephews and only next of kin of the said deceased, and the only persons entitled in distribution to the personal estate and effects of the said deceased in the event of an intestacy.

PRECEDENT NO. 3. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Residuary Legatee propounds Lost Will, Undated.

The plaintiff claims as residuary legatee for life under the last will, undated, but executed in the month of December, 1904, of I. R., late of Alpha, in the county of Beta, retired innkeeper, who died on the 1st day of April, 1906, to have the contents of the said will as contained in the completed draft thereof, admitted to probate.

This writ is issued against you, C. D. and E. F., as executors of a will and codicil of the deceased dated respectively the 10th day of May, 1903, and the 15th day of June, 1903, and against you, P. W., as residuary legatee under the said will and codicil, and also as executor and universal legatee under the will dated the 12th day of June, 1906, of Sarah R., widow of the deceased, who died on the 8th day of July, 1906, and as such interested in the estate of the deceased in the event of an intestacy.

INDORSEMENTS ON WRIT—*continued.*

PRECEDENT NO. 4. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Executors propound Will but not Codicil.

The plaintiffs claim, as executors of the last will dated the 1st day of June, 1902, of Caroline P., late of Alpha, in the county of Beta, spinster, who died on the 4th day of August, 1906, to have the said will established.

This writ is issued against you, the above-named defendants, as beneficiaries under a pretended codicil of the said deceased dated the 7th day of May, 1905.

PRECEDENT NO. 5. INDORSEMENT ON WRIT.

Action for Probate in Solemn Form—Beneficiary propounds Will without Alterations.

The plaintiff claims to be a joint tenant of a third of the real and personal estate of Mary Ann Thompson, late of 15, Elmdale Road, Chiswick, in the county of London, spinster, deceased, who died on the 2nd day of May, 1909, under and by virtue of her will dated the 31st day of March, 1898, and to have the said will, without alteration, established.

This writ is issued against you S. J. as the universal legatee in trust named in the said will by an alteration thereof which is unexecuted; against you T. M. and H. F. as entitled to one fourth of the deceased's estate by virtue of the said alteration.

PRECEDENT NO. 6. INDORSEMENT ON WRIT.

Action for Revocation of Probate—Executor or Legatee of a Former Will, or a Next of Kin, etc., of the Deceased seeks to obtain Revocation of a Probate Granted in Common Form. [*Reprinted from R. S. C.* 1883, *App. A, Pt. III., Sec. V., Form* 2].

The plaintiff claims to be executor of the last will dated the day of , of *C. D.*, late of , deceased, who died on the day of ; and to have the probate of a pretended will of the said deceased, dated the day of , revoked.

This writ is issued against you as the executor of the said pretended will [*or as the case may be*].

PRECEDENT NO. 7. INDORSEMENT ON WRIT.

Action for Revocation of Probate—Legatee claims to have Will Established, omitting Certain Words.

The plaintiff claims as residuary legatee for life under the last will with two codicils thereto dated respectively the 16th day of June,

INDORSEMENTS ON WRIT—*continued.*

1891, the 12th day of November, 1891, and the 1st day of November, 1892, of R. W., late of Alpha, in the county of Beta, gentleman, deceased, who died on the 17th day of November, 1892, to have the probate in common form of the said will and codicils revoked, and the said will and codicils established, omitting therefrom certain words wrongfully included in the said probate.

This writ is issued against you, I. L., as having obtained probate in common form of the said will and codicils, and against you, C. L., as interested in the said will and codicils as originally admitted to probate.

PRECEDENT NO. 8. INDORSEMENT ON WRIT.

Action for Revocation of Probate—Next of Kin claims Revocation of Probate in Common Form.

The plaintiff claims to be the lawful brother and one of the next of kin of A. B., late of Alpha, in the county of Beta, spinster, deceased, who died on the 14th day of November, 1898, intestate, and to have as such a grant of administration to the estate of the said deceased and to have probate of a pretended will of the said deceased dated the 4th day of February, 1898, revoked, and the said will pronounced against.

This writ is issued against you, A. K. and W. L., as having obtained probate in common form of the said pretended will.

PRECEDENT NO. 9. INDORSEMENT ON WRIT.

Action for Revocation of Probate—Legatee under Will attacks Codicil.

The plaintiff claims revocation of the probate granted out of the principal probate registry of this Honourable Court on the 22nd May, 1909, to the defendants, of the will dated the 31st December, 1905, and a codicil dated the 13th November, 1908, and a pretended codicil dated the 30th November, 1908, of the above named Sarah Hannibal, late of 14, Palace Mansions, Chapel Hill, Hampstead, in the county of Middlesex, spinster, who died on the 7th December, 1908. The plaintiff claims as a legatee under the said will dated the 31st December, 1905, and is adversely affected by the said pretended codicil dated the 30th November, 1908.

This writ is issued against you as the executrix and executor to whom probate of the said will and of the said codicil dated the 13th November, 1908, and of the said pretended codicil dated the 30th November, 1908, was granted.

[For Statement of Claim see precedent No. 21.]

INDORSEMENTS ON WRIT—*continued.*

PRECEDENT NO. 10. INDORSEMENT ON WRIT.

Action for Revocation of Administration—Executor or Legatee of a Will when Letters of Administration have been granted as on Intestacy. [*Reprinted from R. S. C., App. A., Pt. III., Sec. V., Form* 3.]

The plaintiff claims to be executor of the last will of C. D., late of , deceased, who died on the day of , dated the , day of .

The plaintiff claims that the grant of letters of administration of the [personal (*a*)] estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

[(*a*) Omit if the deceased died on or since January, 1, 1898.]

PRECEDENT NO. 11. INDORSEMENT ON WRIT.

Action for Revocation of Administration — Executors of Will claim Revocation of Administration as on Intestacy.

The plaintiffs claim as the executors named in the will dated the 1st day of May, 1910, of I. D., late of Alpha, in the county of Beta, chemist, deceased, who died on the 8th day of July, 1910, to have the said will established and a grant of administration to the estate of the said deceased issued from the principal probate registry on the 7th day of September, 1910, revoked.

This writ is issued against you, W. T., as having obtained the said grant of administration.

PRECEDENT NO. 12. INDORSEMENT ON WRIT.

Interest Suit—By Person claiming a Grant of Administration as a Next of Kin of the Deceased, whose Interest as Next of Kin is disputed. [*Reprinted from R. S. C.*, 1883, *App. A., Pt. III., Sec. V., Form* 4.]

The plaintiff claims to be the brother and sole next of kin of C. D., of , deceased, who died on the day of , intestate, and to have as such a grant of administration to the [personal (*a*)] estate of the said intestate.

This writ is issued against you because you have entered a caveat and have alleged that you are the sole next of kin of the deceased [*or as the case may be*].

[(*a*) Omit if the deceased died on or since January 1, 1898.]

STATEMENTS OF CLAIM.

[*See App. VII., Form* 308.]

PRECEDENT NO. 13. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Will with Alterations.

Statement of Claim.

1. The plaintiff is the executor and residuary legatee named in the will of A. B., late of Alpha, in the county of Beta, widow, who died on the 1st day of July, 1910, the said will bearing date the 14th day of January, 1910.

2. The alterations appearing in the fifth line of the second page of the said will were written by the testatrix prior to the execution of the said will.

3. The alterations now appearing in the second line of the third page of the said will, whereby a legacy of £1,000 is given to the defendant, were written subsequent to the execution of the said will.

The plaintiff claims :—

(1) That the Court shall pronounce for the said will together with the alterations referred to in paragraph 2 hereof, but omitting therefrom the alterations referred to in paragraph 3 hereof.

(2) Such further or other order as may be just.

[Signature of counsel.]

PRECEDENT NO. 14. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Will and Incorporated Document.

Statement of Claim.

1. The plaintiff is the executor named in the will dated the 5th day of April, 1902, of P. W., late of Alpha, in the county of Beta, who died on the 5th day of March, 1909.

2. The said will, in the third, fourth, and fifth lines of the third page thereof, contains a reference to a document then in existence in the terms following, that is to say: "I direct my executor to distribute my plate, pictures, and my collection of engravings in accordance with the directions contained in the list signed by me on the 14th day of March, 1901, which is now shewn to me and which I annex to this my will."

The document referred to by the said words of reference and thereby incorporated in the said will is the paper writing marked E. F. annexed to the plaintiff's affidavit of scripts.

The plaintiff claims :—

(1) That the Court shall pronounce for the said will and the said paper writing as together constituting the true last will of the deceased.

(2) Such further or other order as may be just.

[Signature of counsel.]

STATEMENTS OF CLAIM—*continued.*

PRECEDENT No. 15. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Lost Will.

[See also *Sugden* v. *Lord St. Leonards*, 1 P.D. at p. 154, and for Defence see Precedent No. 28.]

Statement of Claim.

1. The plaintiff is the executor and beneficiary named in the true last will of G. B., late of Alpha, in the county of Beta, barrister-at-law, who died on the 10th day of February, 1909, the said will bearing date the 25th day of January, 1908.

2. The said will never was revoked or destroyed by the testator nor by any person in his presence and by his direction with the intention of revoking the same and the same was at the time of his death a valid and subsisting will, but the same cannot be found.

3. The contents of the said will were in substance and effect as follows : "This is the last will and testament of me, G. B., of Alpha, in the county of Beta. I leave all my property to my son John, and appoint him my sole executor" [*or*, 3. The contents of the said will are contained in a draft thereof marked A. B. annexed to the plaintiff's affidavit of scripts].

The plaintiff claims :—

(1) That the Court shall pronounce for the said will in solemn form of law.

(2) Probate of the said will as set forth in paragraph 3 of this statement of claim [*or*, as contained in the said draft] until the said original will be found.

(3) Such further or other order as may be just.

[Signature of counsel.]

PRECEDENT No. 15A. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Foreign Will.

Statement of Claim.

1. The plaintiff is the executor named in the will, dated the 1st day of June, 1910, of Antonio Clampetti, late of the Hotel Corso, Naples, in the kingdom of Italy, doctor of medicine, who died on the 15th day of December, 1910, an Italian subject, domiciled in Italy, the said will being duly executed in accordance with the law of Italy.

The plaintiff claims :—

(1) That the Court shall pronounce for the said will in solemn form of law.

(2) Such further or other order as may be just.

[Signature of counsel.]

STATEMENTS OF CLAIM—*continued.*

PRECEDENT NO. 15B. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executor propounds Will of British Subject.

Statement of Claim.

1. The plaintiff is the executor named in the will, dated the 1st day of April, 1906, of Amelia, Baroness von Liebestraum, late of Berlin, in the Empire of Germany, widow, who died there on the 15th day of May, 1909, a British subject, whose domicil of origin was English, the said will being duly executed in accordance with the statutes 1 Vict. c. 26 and 24 & 25 Vict. c. 114.

The plaintiff claims :—

(1) That the Court shall pronounce for the said will in solemn form of law.

(2) Such further or other order as may be just.

[Signature of counsel.]

[See Defence, Precedent No. 29 ; and see Precedent No. 37.]

PRECEDENT NO. 16. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executors propound partially revoked Will.

Statement of Claim.

1. The plaintiffs are two of the executors named in the will of N. F., late of Alpha, in the county of Beta, widow, who died on the 8th day of May, 1910, the said will bearing date the 1st day of June, 1909.

2. On the 4th day of January, 1910, the said deceased duly executed a codicil to her said will, and thereby revoked the bequests contained in the second and fourth clauses of her said will.

3. The said deceased subsequently revoked the said codicil.

The plaintiffs claim :—

(1) That the Court shall decree probate of so much of the said will as was not revoked by the said codicil.

(2) Such further or other order as may be just.

[Signature of counsel.]

Substance of the Case (*a*).

The plaintiffs will prove that the said codicil was, after its execution, in the possession of the deceased and was not forthcoming at her death, and they rely on the presumption of law that she destroyed the same *animo revocandi.*

(*a*) NOTE.—It is not essential to give the substance of the case in a statement of claim, other than a statement of claim for the revocation of a grant, but where issues of this description are raised it is advisable to let the defendants know the nature of the case they have to meet. The same observations are applicable to a reply.

STATEMENTS OF CLAIM—*continued.*

PRECEDENT NO. 17. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Executors propound Will and Codicil, claiming Omission of Mistaken Words of Reference in Codicil and a Declaration that Legacies are not cumulative.

Statement of Claim.

1. A. B., late of Alpha, in the county of Beta, widow, deceased, died on the 10th day of June, 1910, having made a will dated the 15th day of May, 1897, whereof she appointed the plaintiff sole executor.

2. On the 18th day of September, 1901, the deceased duly executed a will which revoked all former testamentary dispositions and appointed the plaintiff sole executor thereof.

3. By the said will dated 18th September, 1901, the deceased bequeathed certain legacies to the defendants.

4. The deceased subsequently, on the 21st day of November, 1907, executed a codicil which in error purported to be a codicil to her will of the 15th day of May, 1897.

5. By the said codicil dated 21st November, 1907, the deceased bequeathed certain legacies to the defendants.

The plaintiff claims :—

(1) Probate of the said will dated 18th September, 1901, together with the said codicil dated 21st November, 1907, omitting from the probate of the said codicil the words "fifteenth day of May, 1897."

(2) A declaration that the said codicil is a codicil to the will dated 18th September, 1901.

(3) A declaration that the legacies bequeathed to the defendants by the said codicil are in lieu of or in substitution for the legacies bequeathed to the defendants by the said will of 18th September, 1901.

(4) In the alternative, probate of such of the hereinbefore mentioned testamentary documents as the Court shall declare to constitute the will of the deceased.

[Signature of counsel.]

PRECEDENT NO. 18. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Universal Legatee propounds Will and claims Declaration that it exercised Power of Appointment.

Statement of Claim.

1. On the 25th day of March, 1906, P. W., late of Alpha, in the county of Beta, who died on the 3rd day of December, 1907, duly executed a will, and thereby exercised a power of appointment under the will dated the 5th day of September, 1895, of her father, P. L. M., in favour of her husband, the plaintiff, to the extent of

STATEMENTS OE CLAIM—*continued.*

£1,000 per annum during such portion of her said husband's life as he should remain her widower.

2. On the 30th day of June, 1907, the said P. W. duly executed her true last will, and thereby left everything she had power to will to the plaintiff.

3. The said P. W., by her said will dated the 30th day of June, 1907, duly exercised the aforesaid power of appointment, and revoked the said will dated the 25th day of March, 1906.

The plaintiff claims:—

(1) That the Court shall pronounce for the said will dated the 30th day of June, 1907, in solemn form of law.

(2) A declaration that the deceased, by her said will dated the 30th day of June, 1907, duly exercised the power of appointment given to her by the said will of her father, P. L. M., in favour of the plaintiff.

(3) In the alternative, that the Court shall pronounce for the said two wills dated respectively the 25th day of March, 1906, and the 30th day of June, 1907, in solemn form of law.

(4) Such further or other order as may be just.

[Signature of counsel.]

PRECEDENT NO. 19. STATEMENT OF CLAIM.

Action for Probate in Solemn Form—Residuary Legatees propound Will destroyed by Testatrix while of Unsound Mind.

Statement of Claim.

1. The plaintiffs are two of the residuary legatees named in the true last will of A. B., late of Alpha, in the county of Beta, widow, who died on the 4th day of May, 1906, the said will bearing date the 8th day of June, 1905.

2. The said will was never revoked by the deceased, but the same was destroyed by the deceased at a time when she was of unsound mind.

3. The contents of the said will are contained in a draft thereof, marked A. B., and annexed to the plaintiff's affidavit of scripts.

The plaintiffs claim:—

(1) That the Court shall pronounce for the said will in solemn form of law, and decree probate thereof as contained in the said draft.

(2) Such further or other order as may be just.

[Signature of counsel.]

PRECEDENT NO. 20. STATEMENT OF CLAIM.

Action for Revocation of Probate—Next of Kin attacks Will.

[For Defence see Precedent No. 31.]

Statement of Claim.

1. The plaintiff is the natural and lawful brother and sole next of kin of the above-named John B., late of Alpha, in the county of

STATEMENTS OF CLAIM—*continued.*

Beta, draper, who died on the 7th day of December, 1908, intestate, without wife, child, or parent.

2. On the 22nd day of May, 1909, probate of a pretended will of the said deceased, bearing date the 1st day of April, 1908, was granted to the defendants out of the principal probate registry as the executors named therein.

3. The said alleged will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

4. At the time when the said alleged will purports to have been executed the deceased was not of sound mind, memory, or understanding.

5. At the time when the said alleged will purports to have been executed the deceased did not know and approve of the contents thereof.

The plaintiff claims :—

(1) Revocation of the probate granted out of the principal registry of this Court to the defendants on the 22nd day of May, 1909.

(2) That the Court shall pronounce against the validity of the said will and declare the same null and void.

(3) A grant to him of letters of administration to the estate of the said deceased.

(4) Such other order as may be just.

[Signature of counsel.]

Substance of the Case.

Under paragraph 3 the plaintiff puts the defendants to proof that the requirements of the statute were duly complied with.

Under paragraphs 4 and 5 the plaintiff alleges, etc., etc. [as in a Defence, *q.v.*].

PRECEDENT No. 21. STATEMENT OF CLAIM.

Action for Revocation of Probate—Legatee under Will attacks Codicil.

Statement of Claim (*a*).

1. The above-named Sarah Hannibal, late of 14, Palace Mansions, Chapel Hill, Hampstead, in the county of Middlesex, spinster, died there on the 7th December, 1908, having made her last will and testament dated the 31st December, 1905, whereby she appointed the defendants executors and trustees thereof and named the plaintiff a legatee thereunder.

2. Probate of the said will dated the 31st December, 1905, together with two alleged codicils dated the 13th November, 1908, and the 30th November, 1908, respectively, was on the 22nd May,

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(*a*) For Writ of Summons see Precedent No. 9.

1909, granted to the defendants out of the principal probate registry.

3. The interest of the plaintiff under the said will dated the 31st December, 1905, is not affected by the provisions contained in the said alleged codicil dated the 13th November, 1908.

4. The said alleged codicil dated the 30th November, 1908, was not duly executed according to the provisions of the statute 1 Vict. c. 26.

5. The said Sarah Hannibal was not at the time when the said alleged codicil purports to have been executed of sound mind, memory, and understanding.

6. At the time of the execution of the said alleged codicil the said Sarah Hannibal did not know and approve of the contents thereof.

The plaintiff claims :—

(1) Revocation of the probate granted out of the Principal Probate Registry of this Honourable Court to the defendants on the 22nd May, 1909.

(2) That the Court shall pronounce against the said alleged codicil dated the 30th November, 1908.

(3) That the Court shall pronounce for the said will dated the 31st December, 1905.

(4) Such further or other relief as may be just.

[Signature of counsel.]

Substance of the Case.

Under paragraph 4 hereof the plaintiff puts the defendants to proof of the due execution of the said alleged codicil.

Under paragraph 5 hereof the plaintiff alleges, etc., etc. [as in a defence, *q.v.*].

Under paragraph 6 hereof the plaintiff alleges, etc., etc. [as in a defence, *q.v.*].

PRECEDENT NO. 22. STATEMENT OF CLAIM.

Action for Revocation of Administration—Residuary Legatee sets up Will.

Statement of Claim.

1. The plaintiff is the residuary legatee named in the true last will of the above-named Thomas C., late of Alpha, in the county of Beta, publican, deceased, who died on the 10th day of August, 1906, the said will bearing date the 5th day of May, 1905.

2. Letters of administration to the estate of the said deceased were on the 30th day of August, 1906, granted out of the principal probate registry to the defendant as the lawful brother and sole next of kin of the deceased.

The plaintiff claims :—

(1) Revocation of the said letters of administration.

STATEMENTS OF CLAIM—*continued.*

(2) That the Court shall pronounce for the said will, and decree probate thereof in solemn form of law.
(3) Such further order as may be just.

[Signature of counsel.]

PRECEDENT No. 23. STATEMENT OF CLAIM.

Interest Suit. [*Reprinted from R. S. C.* 1883, *App. C.*]

Statement of Claim.

The plaintiff is the cousin-german and one of the next of kin of M. N., late of No. 1, High Street, Putney, in the county of Surrey, grocer, who died on the day of , 19 , a widower, without child or parent, brother or sister, uncle or aunt, nephew or niece.

The plaintiff claims: A grant of letters of administration of the estate of the said deceased.

[Signature of counsel.]

NOTE.—If the plaintiff disputes the interest of the defendant, he must allege in his statement of claim that he denies the defendant's interest. R. S. C. Order XXI., r. 9.

DEFENCES AND COUNTERCLAIMS.

[*See App. VII., Form* 309.]

PRECEDENT No. 24. DEFENCE.

Action for Probate in Solemn Form—Defence: Undue Execution and Incapacity.

Statement of Defence.

The defendants say that:—

1. The said alleged will and codicil were not duly executed in accordance with the statute 1 Vict. c. 26.

2. At the time when the said alleged will and codicil respectively purport to have been executed the deceased was not of sound mind, memory, and understanding.

Substance of the Case.

Under paragraph 1 the defendants put the plaintiff to proof that the provisions of the statute 1 Vict. c. 26 were duly complied with.

Under paragraph 2 the defendants allege that at the time when the said will and codicil respectively purport to have been executed the deceased was suffering from spinal paralysis and senile dementia, was unable to talk coherently and was completely lost as to time, place and surroundings, and was quite incapable of managing his affairs or of understanding and appreciating the nature of a testamentary document, or the claims of his relatives on his testamentary dispositions, and was unable to form a rational opinion as to the extent of his property.

DEFENCES AND COUNTERCLAIMS—*continued.*

PRECEDENT NO. 25. DEFENCE.

Action for Probate in Solemn Form—Defence: Undue Execution, Want of Knowledge and Approval, Undue Influence.

Statement of Defence.

The defendant says that:

1. The said will was not duly executed in accordance with the statute 1 Vict. c. 26.

2. The deceased, at the time when the said will purports to have been executed, did not know and approve of the contents thereof.

3. The execution of the said will was procured by the undue influence of the plaintiffs Thomas C. and Sarah C.

Substance of the Case.

1. Under paragraph 1 of the defence the defendant puts the plaintiffs to the proof that the provisions of the statute were duly complied with.

2. Under paragraph 2 of the defence the defendant alleges that the deceased gave no instructions for the said will and the same was not read over or properly explained to her, nor did she read it herself, and she was unaware of the nature and effect thereof.

3. Under paragraph 3 of the defence the defendant alleges that the deceased was at the time the said will purports to have been executed 80 years of age, and very weak physically, being confined to her bed, that from the year 1905 the plaintiffs Thomas C. and Sarah C., with whom the deceased was living, assumed complete control over the deceased, and managed the whole of her affairs; that they denied the relatives of the deceased, including the defendant, access to her, and persistently exercised the said influence and control to such an extent that they finally coerced the deceased into executing the will propounded by the plaintiffs.

[Signature of counsel.]

PRECEDENT NO. 26. DEFENCE.

Action for Probate in Solemn Form—Defence: Undue Execution, Incapacity, Want of Knowledge and Approval.

Statement of Defence.

The defendant says that:

1. The alleged will of the deceased was not duly executed according to the provisions of the statute 1 Vict. c. 26.

2. The deceased at the time the said will purports to have been executed was not of sound mind, memory, and understanding.

3. The deceased at the time the said will purports to have been executed did not know and approve of the contents thereof.

Substance of the Case.

Under paragraph 1 of the defence the defendants allege that the said will was not signed at the foot or end thereof by the deceased

DEFENCES AND COUNTERCLAIMS—*continued.*

or by any other person in his presence and by his direction, and such signature (if any) was not made or acknowledged by the deceased in the presence of two witnesses present at the same time, and such witnesses (if any) did not attest and subscribe the said will in the presence of the deceased.

Under paragraphs 2 and 3 of the defence the defendants allege that the deceased gave no instructions for the said will, that it was not read over to him, nor did he read it himself, and that the deceased was so weak mentally and physically as the result of excessive drinking that he was unable to appreciate or understand the meaning and effect of the said will or its purport and contents.

[Signature of counsel.]

PRECEDENT NO. 27. DEFENCE AND COUNTERCLAIM.

Action for Probate in Solemn Form—Defence: Undue Execution, Incapacity, Want of Knowledge and Approval. Counterclaim: Defendant propounds earlier (lost) Will and, in the alternative, a still earlier Will.

Statement of Defence and Counterclaim.

The defendant says that:

1. The will propounded by the plaintiff was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

2. At the time when the said will purported to have been executed the deceased was not of sound mind, memory, and understanding.

3. The deceased at the time when the said will purports to have been executed did not know and approve of the contents thereof.

And by way of counterclaim the defendant says that:

4. The said deceased duly executed her true last will in the month of September, 1909, whereby she appointed the defendant her residuary legatee. The said will was never revoked by the deceased, but the said will cannot now be found.

5. The contents and provisions of the said will are the same as the will of the 23rd day of June, 1909, hereinafter referred to, save in so far as they were altered by the provisions of a letter written by the deceased to her solicitor in the month of September, 1909, the said will and letter being respectively scripts Nos. 11 and 13 referred to in the affidavit of scripts sworn by the plaintiff C. R. on the 15th August, 1910.

6. If for any reason the will of September, 1909, is not admissible to probate, a will duly executed by the deceased on the 23rd day of June, 1909, whereby she appointed the defendant her residuary legatee is admissible to probate.

The defendant claims:

(1) That the Court shall pronounce against the will propounded by the plaintiff.

(2) That the Court shall pronounce for the will of September, 1909, as contained in the documents referred to in paragraph 5 of this defence and counterclaim in solemn form of law.

DEFENCES AND COUNTERCLAIMS—*continued.*

In the alternative:—

(3) That the Court shall pronounce for the will of the 23rd June, 1909, in solemn form of law.

(4) Such further order as may be just.

[Signature of counsel.]

Substance of the Case.

1. Under paragraph 1 of the defence the defendant puts the plaintiff to proof that the provisions of the statute were complied with.

2. Under paragraph 2 of the defence the defendant alleges that from the beginning of the year 1910 until her death on the 19th day of March, 1910, the deceased was subject to paroxysms of rage and despair for no cause or for trivial causes, that she suffered from the delusion that her friends and relatives, including the defendant, were neglecting and ill-treating her, that during this period she was in great pain, and as a result her mind became completely unbalanced and unhinged, so that on the 19th day of March, 1910, she took her life while of unsound mind.

3. Under paragraph 3 of the defence the defendant alleges that at the time when the said will purports to have been executed the deceased was incapable of comprehending and appreciating its provisions and their effect for the causes set out in paragraph 2 of the defence.

PRECEDENT NO. 28. DEFENCE AND COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Lost Will —Defendant attacks Will and pleads Revocation.

Statement of defence and counterclaim of the above-named defendant A. J. W. by the Official Solicitor, her guardian *ad litem.*

This defendant by her guardian *ad litem* says that:

1. The said will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

In the alternative:

2. The said will was revoked by the deceased.

3. She does not admit that the contents of the said will are contained in the copy put forward by the plaintiffs.

And by way of counterclaim:

4. This defendant is the lawful niece and one of the next of kin of the deceased, who died on the 15th day of June, 1902, intestate, a bachelor without parent, brother or sister.

This defendant claims:—

(1) That the Court shall pronounce against the said will and declare the same null and void.

(2) Such further relief as may be just.

[Signature of counsel.]

DEFENCES AND COUNTERCLAIMS—*continued.*

Substance of the Case.

Under paragraphs 1 and 3 this defendant puts the plaintiffs to the proof that the said will was duly executed, and that its contents are contained in the copy put forward by them.

Under paragraph 2 this defendant alleges that the said will was last known to be in the possession of the deceased and was not found at his death, and this defendant relies on the presumption of law that the said will was destroyed by the deceased *animo revocandi.*

PRECEDENT NO. 29. DEFENCE.

Action for Probate in Solemn Form—Defence: Will not executed in accordance with the Law of the Domicil.

Statement of Defence (*a*).

The defendant says that:

1. At the time the said will purports to have been executed and at the time of her death the deceased was a German subject domiciled in the Empire of Germany.

2. That the said will was not duly executed in accordance with the law of Germany.

In the alternative:

3. The said will was not duly executed in accordance with the provisions of the statute 1 Vict. c. 26.

Substance of the Case.

1. Under paragraph 1 of the defence the defendant alleges that on the 1st day of April, 1882, the deceased married Fritz, Baron von Liebestraum, of Silesia in the Empire of Germany, who then was, and so remained until his death on the 11th December, 1892, a German subject. The said Fritz, Baron von Liebestraum, was at the time when the said will purports to have been executed and at the time of his death domiciled in Germany. The deceased retained her German domicil and nationality so acquired until her death.

2. Under paragraph 2 of the defence the defendant puts the plaintiff to proof that the said will was executed in accordance with the law of Germany.

3. Under paragraph 3 of the defence the defendant puts the plaintiff to proof that the said will was executed in accordance with the statute 1 Vict. c. 26.

[Signature of counsel.]

PRECEDENT NO. 30. DEFENCE AND COUNTERCLAIM.

Action for Probate in Solemn Form—Defence: Undue Execution; Not a Testamentary Document. Counterclaim: Propounds earlier Will.

Statement of defence and counterclaim of the defendant H. A.

This defendant says that:

1. The said paper writing bearing date the 9th day of November,

---

(*a*) See Precedent No. 15B.

DEFENCES AND COUNTERCLAIMS—*continued.*

1901, was not duly executed in accordance with the statute 1 Vict. c. 26.

2. That he denies that the said paper writing is in the nature of a testamentary disposition.

And by way of counterclaim :

3. This defendant is the executor named in the true last will of the deceased dated the 23rd day of October, 1898.

This defendant counterclaims :

(1) A declaration that the said paper writing dated the 9th day of November, 1901, is not in the nature of a testamentary disposition.

(2) Probate of the said will dated the 23rd day of October, 1898, in solemn form of law.

[Signature of counsel.]

Substance of the Case.

1. Under paragraph 1 of the defence this defendant puts the plaintiff to proof that the provisions of the statute were complied with.

2. Under paragraph 2 of the defence this defendant alleges that the said paper writing does not purport to be of a testamentary nature, nor did the deceased ever intend that it should be of a testamentary nature or should have any operation and effect [*or* was intended by the deceased to be a gift of the property named therein, to take effect during his lifetime and not after his death].

PRECEDENT NO. 31. DEFENCE AND COUNTERCLAIM.

Action for Revocation of Probate—Plaintiffs attack Will and claim Intestacy. Defence: Joinder of Issue. Counterclaim: Propounds Will.

[For Statement of Claim see Precedent No. 20.]

Defence and Counterclaim.

The defendant says that :

1. He denies that the deceased died intestate.

2. He denies each and every allegation contained in paragraphs 3, 4, and 5 of the statement of claim.

And by way of counterclaim :

3. The deceased executed his true last will dated the 1st day of April, 1908, whereby he appointed the defendant his executor.

The defendant claims :—

(1) That the Court shall pronounce for the said will in solemn form of law.

(2) Such further relief as may be just.

[Signature of counsel.]

Substance of the Case.

The substance of the defence is contained in the counterclaim.

DEFENCES AND COUNTERCLAIMS—*continued.*

PRECEDENT No. 32. DEFENCE AND COUNTERCLAIM.

Interest Suit—Defendant denies Plaintiff's Interest.

Defence and counterclaim of the defendant G. B.

This defendant says that:

1. He admits that the said deceased died intestate and a spinster without parents and possessed of real estate.

2. He denies that the plaintiff is the nephew and heir-at-law of the said deceased.

3. The plaintiff's father James was not the lawful son of the father of the said deceased.

And by way of counterclaim :—

4. This defendant is a nephew and the heir-at-law of the said deceased, this defendant's father William George B., who was the eldest son of the father of the said deceased, having died on the 15th day of April, 1902.

This defendant claims :—

(1) A declaration that this defendant is the heir-at-law of the deceased.

(2) Such further relief as may be just.

[Signature of counsel.]

Substance of the Case.

Under paragraphs 2 and 3 of the defence this defendant puts the plaintiff to proof that the plaintiff's father was born in lawful wedlock.

REPLIES AND DEFENCES TO COUNTERCLAIM.

[*See App. VII., Form* 310.]

PRECEDENT No. 33. REPLY AND DEFENCE TO COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Will—Defendants attack Will and counterclaim an Intestacy.

Reply and Defence to Counterclaim.

The plaintiffs say:

1. That they deny each and every allegation contained in the defence and join issue thereon.

And by way of defence to counterclaim:

2. The plaintiffs deny that the said deceased died intestate.

[Signature of counsel.]

Substance of the Case.

Under paragraph 2 of the defence to the counterclaim the plaintiffs repeat their claim as indorsed upon the writ of summons.

REPLIES AND DEFENCES TO COUNTERCLAIM—*continued.*

PRECEDENT NO. 34. REPLY AND DEFENCE TO COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Will—Defendants attack Will and claim Intestacy—Plaintiffs allege Existence of earlier destroyed Will—Dependent Relative Revocation.

Reply and Defence to Counterclaim.

The plaintiffs say that:—

1. They deny each and every allegation contained in paragraphs 1, 2, and 3 of the defence and join issue thereon.

And by way of defence to counterclaim the plaintiffs say that:

2. The deceased duly executed a will dated the 17th day of January, 1905, whereby he appointed the plaintiffs his executors.

3. The said will was revoked by the will propounded by the plaintiffs.

4. Upon the execution of the will propounded by the plaintiffs the said will of the 17th day of January, 1905, was destroyed by the deceased.

5. If for any reason the said will propounded by the plaintiffs is not entitled to probate, the said will of the 17th day of January, 1905, is entitled to probate.

6. The contents of the said will of the 17th day of January, 1905, are contained in a draft thereof marked "E." and annexed to the plaintiffs' affidavit of scripts.

[Signature of counsel.]

Substance of the Case.

Under paragraphs 2, 3, 4, and 5 the plaintiffs repeat their statement of claim as indorsed on the writ of summons, and allege that the destruction of the will of the 17th day of January, 1905, only operated to revoke the said will in the event of the will propounded by the plaintiffs being valid and effectual.

PRECEDENT NO. 35. REPLY AND DEFENCE TO COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Will—Defendants attack Will and propound earlier Will—Plaintiffs allege Revocation.

Reply and Defence to Counterclaim.

The plaintiffs say that:

1. They deny each and every allegation contained in paragraphs 1, 2, 3, and 4 of the defence and join issue thereon.

And by way of defence to counterclaim the plaintiffs say that:

2. The will of the 15th day of April, 1905, referred to in paragraph 5 of the defence and counterclaim, was revoked by the will propounded by the plaintiffs.

[Signature of counsel.]

REPLIES AND DEFENCES TO COUNTERCLAIM—*continued.*

Substance of the Case.

Under paragraph 2 the plaintiffs repeat their statement of claim as indorsed on the writ of summons.

PRECEDENT No. 36. REPLY AND DEFENCE TO COUNTERCLAIM.

Action for Probate in Solemn Form—Plaintiffs propound Will—Defendants attack Will and propound Earlier Will—Plaintiffs allege existence of Intermediate Will.

Reply and Defence to Counterclaim.

The plaintiffs say that:

1. They deny each and every allegation contained in paragraphs 1, 2, 3, and 4 of the defence and join issue thereon.

And by way of defence to counterclaim the plaintiffs say that:

2. The deceased duly executed a will dated the 29th day of May, 1907, whereby he revoked all former wills and appointed the plaintiffs A. and B. his executors.

3. The said will of the 29th day of May, 1907, was revoked by the will propounded by the plaintiffs.

4. If for any reason the said will propounded by the plaintiffs is not entitled to probate the said will of the 29th day of May, 1907, is entitled to probate.

[Signature of counsel.]

Substance of the Case.

Under paragraphs 2 and 4 the plaintiffs allege that the will of the 15th day of April, 1901, propounded by the defendants in paragraph 5 of the defence and counterclaim was revoked by the said will of the 29th day of May, 1907, which was duly executed, and entitled to probate until revoked by the deceased.

Under paragraph 3 the plaintiffs repeat their statement of claim as indorsed on the writ of summons.

PRECEDENT No. 37. REPLY.

Action for Probate in Solemn Form—Defence: Will not executed in accordance with Law of Domicil—Reply: Will valid as the Exercise of a Power of Appointment—Will admitted to Probate by Court of Testatrix's Domicil.

Reply (*a*).

The plaintiff says that:

1. He denies that the deceased was a German subject as alleged in paragraph 1 of the defence.

2. He denies each and every allegation contained in paragraph 3 of the defence.

(*a*) To Defence, Precedent No. 29.

REPLIES AND DEFENCES TO COUNTERCLAIM—*continued.*

3. The said deceased died on the 15th day of May, 1909, a British subject, having duly executed the said will in accordance with the statutes 1 Vict. c. 26 and 24 & 25 Vict. c. 114.

In the alternative :

4. The said will is a good and valid exercise of a power of appointment in accordance with the terms of the will of Thomas Henry Ealing, deceased, dated the 8th day of June, 1864, and the codicil thereto dated the 16th day of May, 1868.

And in the further alternative :

5. The said deceased died domiciled in Germany and the said will has been admitted to proof by a Court of competent jurisdiction in Germany, namely, the Royal Court of First Instance, Silesia, and a certificate of inheritance according to the tenor of the said will has been duly sealed by the said Court, and the said will is valid and duly executed according to German law.

[Signature of counsel.]

SPECIFIC INSTANCES OF DELUSION.

PRECEDENT NO. 38. SPECIFIC INSTANCES OF DELUSION.

To be delivered by the Defendant, where he pleads that the Testator was not of sound mind, before the case is set down for trial. [*Order XIX.*, *r.* 25A ; *ante, p.* 655.]

The following are the instances of specific delusions from which the defendant alleges that the deceased suffered :—

1. The deceased was under the delusion that attempts were being made to poison her, and that the defendant was a party to such attempts ;

2. That persons were constantly spying on her, and listening at her door ;

3. That the defendant was concerned in a plot to confine her in a madhouse.

INTERROGATORIES.

[*See App. VII., Form* 129.]

PRECEDENT NO. 39. INTERROGATORIES.

[NOTE.—These interrogatories are merely intended to suggest useful matter for interrogation.]

[Where the Defendant propounds a missing will (*a*).]

1. Did the deceased personally give any instructions for the said will, which is alleged to have been executed at some date subsequent to the 19th day of June, 1904? If so, to whom, when, where, and in whose presence were such instructions given? State shortly what the instructions were.

2. Were any notes or memoranda in writing made of such

(*a*) Many of these interrogatories may be rendered unnecessary by an examination of the defendant's affidavit of scripts.

INTERROGATORIES—*continued.*

instructions ? If so, by whom, when, where, and what has become of the same ?

3. Was any draft made of the said will ? If so, when, where, and what has become of the same ?

4. When, where, by whom, and from what draft or instructions was the said will written out ?

5. On what date was the said will executed ? Where was the said will executed, and who was present ?

6. Where was the said will kept, and into whose custody or care was it given after it was executed, and where, when, and by whom was it last seen ?

7. How, when, and where did the said will come to your hands $\frac{\text{and}}{\text{or}}$ possession $\frac{\text{and}}{\text{or}}$ knowledge ?

8. Have you ever seen the said will ? If so, where and upon what date or dates ?

9. Did the deceased ever refer either verbally or in writing to the said will ? State the occasions, if any, when he did so. If in writing, identify the document or documents and say where it is or where they are.

[Where the Plaintiff is charged with undue influence.]

1. Where, when, and under what circumstances do you allege that the plaintiff suppressed correspondence between the deceased and what members of his family ? Identify the documents you allege to have been suppressed.

2. When first, and over what period, did the plaintiff prevent members of the deceased's family from seeing the deceased ? Give the names of such persons and state as to each of them

(*a*) on what occasions during the said period he or she attempted to see the deceased ;

(*b*) on what occasions during the said period he or she saw the deceased ;

(*c*) on what occasions during the said period he or she was denied access to the deceased, by whom, and under what circumstances.

3. Where, when, and under what circumstances did the plaintiff threaten any and which members of the deceased's family with violence?

State whether such threats were verbal or in writing, if in writing identifying the documents, and if verbal stating the substance and character of each of such threats, and when, where, and to whom it was spoken. What was the nature of the violence threatened ?

[NOTE.—Where the plaintiffs were charged with undue influence, the defendants were allowed to administer the following interrogatory : "What sum or sums of money have you, and each of you, received from the deceased (*a*) by way of payment for services rendered, (*b*) by way of loan, (*c*) by way of gift."—*Young* v. *Holloway* (1887), 12 P. D.167 ; *vide ante*, p. 622.]

CASES ON MOTION.

[*See App. VII., Form* 139.]

PRECEDENT NO. 40. CASE ON MOTION.

Motion to presume Death and for Administration under Sec. 73.

Case on Motion (*a*).

1. Edward G., formerly of Alpha, in the county of Beta, was last seen or heard of on the 9th day of January, 1902, when he left his brother's house in an excited state, saying that he was going to Kennington Lane.

2. A sum lay to the credit of the said E. G. in the Court of Chancery, and the said E. G. would have been entitled to payment of the said sum, had he lived, on the 15th day of January, 1902. The said sum has never been claimed.

3. No letters have been received from the said E. G. since his disappearance.

4. Numerous inquiries were made and steps taken to ascertain the whereabouts of the said E. G. in the years 1902 and 1903, and advertisements were inserted in certain newspapers in the months of July and August, 1903, but without result.

5. It is believed that the said E. G. died on or since the 9th day of January, 1902, intestate, a bachelor, and uninsured.

6. The estate of the said E. G. consists solely of the sum now in the Court of Chancery and is of the present value of £300 or thereabouts.

7. The mother and sole next of kin of the said E. G. is a lunatic not so found by inquisition. The only other persons entitled in distribution to the personal estate of the said E. G. are his brothers G. G. and W. G. W. G. is the present applicant.

8. The above averments are proved by affidavits.

The Court will be moved by counsel on behalf of the said W. G. for leave to depose on oath that the said E. G. died on or since the 9th day of January, 1902, a bachelor and intestate, and for a grant to the said W. G. of letters of administration to the estate of the said E. G. under sec. 73 of the Court of Probate Act, without citing the mother and sole next of kin of the said E. G.

PRECEDENT NO. 41. CASE ON MOTION.

Motion to presume Death and to depose as to Survivorship.

Case on Motion (*b*).

1. W. T. B. and E. B. his wife were engaged as missionaries at Foo-Choo, North China, and had been so engaged since the month of February, 1902.

2. On or about the 10th day of June, 1905, a massacre of all foreigners in the city of Foo-Choo took place, and it is believed that the said W. T. B. and E. B. together with their three children

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(*a*) To be headed "In the High Court," etc. "In the Estate of E. G. presumed deceased."

(*b*) See *Benyon*, [1901] P. 141.

CASES ON MOTION—*continued.*

were murdered on or about that date, but there are no means of ascertaining which of them survived the other.

3. The estate of the said W. T. B. consists of, etc.

4. The estate of the said E. B. consists of, etc.

5. The sole next of kin of the said W. T. B. is his brother J. J. B.

6. The next of kin of the said E. B. are her sister A. B. D. and her brother S. J. M.

7. It is believed that the said W. T. B. and E. B. died intestate and uninsured.

8. The above averments are proved by affidavits.

The Court will be moved by counsel on behalf of the said J. J. B.

(1) For a grant of administration to the estate of the said W. T. B.

(2) For leave to depose on oath that the said W. T. B. and his wife and three children died on or since the 10th day of June, 1905, and that after making inquiries the said J. J. B. has no reason to believe that the wife and three children survived the said W. T. B.

The Court will be moved on behalf of the said A. B. D.

(1) For a grant of administration to the estate of the said E. B.

(2) For leave to depose on oath that the said E. B. and her said husband and children died on or since the 10th day of June, 1905, and that after making inquiries the said A. B. D. has no reason to believe that the husband and three children survived the said E. B.

PRECEDENT No. 42. CASE ON MOTION.

For Appointment of Administrator and Receiver *pendente lite.*

[To be headed in the Action.]

Case on Motion.

1. Joseph P., late of Alpha, in the county of Beta, stockbroker, died on the 1st day of April, 1910, leaving a will dated the 4th day of June, 1909, whereby he appointed the plaintiffs his executors.

2. The plaintiffs have issued a writ and delivered a statement of claim propounding as executors the said will in solemn form of law.

3. The defendants are the sons and daughters, next of kin of the deceased, who have entered a caveat and are opposing probate of the said will. The defendant H. W. P. is the eldest son and heir-at-law of the said deceased.

4. The deceased died possessed of personal estate of the estimated value of £15,000, and of real estate of the estimated value of about £50,000 (*a*).

5. It is necessary that an administrator of the personal estate and a receiver of the real estate *pendente lite* should be appointed (*a*).

(*a*) These averments are sufficient for the Case on Motion, but the affidavits in support should describe in detail the nature of the estate, and the reasons which render the appointment of an administrator and receiver requisite.

CASES ON MOTION—*continued.*

6. The plaintiffs suggest that C. D., of the firm of E. F., of Alpha, in the county of Beta, should be appointed as such administrator and receiver as aforesaid.

7. The above averments are proved by affidavits.

The Court will be moved by counsel on behalf of the above-named plaintiffs to appoint an administrator and receiver *pendente lite* of the personal and real estate of the said deceased.

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